REPUBLIC OF SOUTH AFRCA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR2870/10

In the matter between:

Z T MTEMBU **Applicant**

and

THE SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

I A SIRKHOT N O **Second Respondent**

THE MINISTER OF SAFETY AND SECURITY **Third Respondent**

SOUTH AFRICAN POLICE SERVICE **Fourth Respondent**

Heard: **11 February 2013**

Delivered: **11 June 2013**

Summary: *Review application. Law of evidence. Applicant failing to testify at*

arbitration. Now seeks to review the outcome of the arbitration. Version put to witnesses in cross examination at arbitration which required Applicant's evidence to sustain. Such versions not to be relied upon in argument to sustain Applicant's case and cannot be taken into account by the court. Failure to give evidence counted against Applicant in casu. Applicant entitled not to give evidence, notwithstanding version being put to witnesses, if issues not material or in dispute and case not made out against him.

Procedural Law. Charges formulated so as to make it appear that several charges formed "elements" of a single charge. Submitted on behalf of Applicant that if all the "elements" are not proven, charge is not proven. Charges drafted in this manner are not to be regarded in this way. This would constitute a highly artificial and undesirable approach. No reason not to make findings in respect of individual infractions.

JUDGMENT

SNIDER A J

[1] In this matter the Applicant seeks relief to the following effect:- that an award[1] ("the award") dated 29 September 2010 issued by the Second Respondent ("the Commissioner") under the auspices of the First Respondent under case number PSS 340 and 390 – 09/10 be reviewed and set aside. The Applicant also seeks costs of the application and further or alternative relief to the main relief sought.[2]

[2] In the papers before me, there is a condonation application brought by the Third and Fourth Respondents in respect of the late filing of their answering affidavit and there is also a point *in limine* relating to the late filing of the Applicant's supplementary founding affidavit which has been taken by the Third and Fourth Respondents. The parties agreed, prior to the hearing of

[1] A copy of the award appears in the Record bundle pages 495 to 507

this matter that neither of these interlocutory matters would be persisted with in argument and that only the merits of the application would be dealt with.

[3] In light of this and in light of me being satisfied that the matter ought to be determined on its merits, and that a consideration of those merits outweighs any lateness on the part of the parties in respect of the filing of the answering affidavit by the Third and Fourth Respondent, and the late filing of the Applicants supplement founding affidavit, I accordingly condone such lateness.

[4] Although the events surrounding this matter could not have taken much more than forty five minutes to an hour, it is nevertheless a factually dense matter. A number of witnesses, some eleven all in all, gave evidence at the arbitration of the matter.

[5] Very briefly, in summary, the facts of the matter are the following:–

5.1 On 12 April 2008,the Applicant attended at a small-holding situated at 164 Waagfontein, Rustenberg ("the premises");[3]

5.2 the premises which the Applicant attended comprised, *inter alia*, of a workshop where trucks, which transported ore from certain mines on a contract basis for a company, known, *inter alia,* as Banson or the Banson Tiro Group (Pty) Limited ("Banson") were serviced and / repaired. The evidence suggests that there was more than one corporate entity which used the name "Banson" in its name, but it was clear that the entities were closely connected and operated, for the purposes of this matter, essentially as one entity;

5.3 the Applicant, alternatively the Applicant's wife, was the owner of a

[2] Pages 1 and 2 of the Review Bundle
[3] Record 441

TATA truck with registration number WSD 419 GP;[4]

5.4 the Applicant's wife was the sole member of a close corporation – Bayapha Business Services CC;[5]

5.5 it appears, although there are discrepancies in the evidence in this regard, that the Applicant, who attended at the premises with certain other individuals, a mechanic, Alexior Muriungweni, his brother and the Applicant's son[6] went towards the truck and whilst at the truck were approached by one Tanya Rossouw ("Rossouw") who worked for the workshop business and was returning to the premises from a shopping trip;

5.6 the Applicant wanted to remove his truck alternatively have work done on it by his own mechanic;

5.7 Rossouw informed the Applicant that there were outstanding payments in respect of the truck and that it could not be released to the Applicant until such time as the payment had been made. The payments were in respect of work which had been done on the truck at the premises by the workshop;

5.8 according to the evidence of Rossouw the Applicant became agitated at not being entitled to remove his truck and attempted to get past her and, when doing so, pushed her out of the way;

5.9 as a result of this, the exchange between the Applicant and Rossouw became quite heated and a security guard, one Gert Tokkie Lekhalakala ("Lekhalakala") stood between the two and requested the Applicant to leave the premises;

5.10 at some time after this Rossouw released her dogs in an endeavour,

[4] Record pages 465 to 466
[5] Record page 446

I surmise, to ensure the Applicant's departure and that he would not return. This particular factual aspect, as will appear from what is set out below is not of any particular significance in the scheme of the matter;

5.11 the Applicant, who was carrying his service issue pistol with him then threatened to shoot the dogs if Rossouw did not call them back;

5.12 Rossouw duly called the dogs back; and

5.13 some relatively short time after that one Johannes Cornelius Engelbrecht, ("Engelbrecht") having been phoned by Rossouw arrived at the premises and become involved in an altercation with Applicant.

[6] The events which transpired after Engelbrecht and the Applicant become involved in the fracas which is repeatedly described in the transcript as "wrestling", apparently the Applicant's fire arm being the central subject of the wrestling, are similarly of no particular relevance to the determination of this matter as will become apparent from what is set out below.

[7] At the time of his dismissal the Applicant was a Captain in the employ of the Fourth Respondent ("the SAPS") with 20 years of service.

[8] The charges made against the Applicant were the following –

8.1 first charge:- in terms of Section 40 of the South African Police Service Act 1995 read with the South African Police Service Discipline Regulations 2006, you are hereby charged with misconduct in that you allegedly contravened Regulation 20(e) of the said regulations at or near small-holding 164 Waagfontein, Rustenberg, during Saturday 12 April 2008 at 15:20, in that you endangered the lives of others by disregarding safety rules or

[6] Record pages 307 to 308, evidence of Alexior Muriungweni

regulations in that you pointed a firearm at Tanya Rossouw, threatening to kill her;

8.2 second charge:- in terms of Section 40 of the South African Police Service Act 1995 read with the South African Police Service Discipline Regulations 2006, you are hereby charged with misconduct in that you allegedly contravened Regulation 20(q) of the said relations at or near small holding 164 Waagfontein, Rustenberg, during Saturday 12 April 2008 at 15:20 in that you contravened any prescribed code of conduct for the service or the public service which may be applicable to him. In that you did not uphold the constitution and the law, you did not act with integrity and utilise available resources responsibly, uphold and prevent the fundamental rights, act in a manner that is impartial, honest, respectful, transparent and accountable, and exercise the powers conferred upon you in a reasonable and controlled manner by pointing a firearm at and threatening to kill Tanya Rossouw and by assaulting Tanya Rossouw and Johannes Cornelius Engelbrecht;

8.3 third charge: in terms of Section 40 of the South African Police Service Act 1995 read with the South African Police Service Discipline Regulations 2006, you are hereby charged with misconduct in that you allegedly contravened Regulation 20(z) of the said regulations at or near small holding 164 Waagfontein, Rustenberg, during Saturday 12 April 2008 at 15:20 in that you committed a common law offence by pointing a firearm at Tanya Rossouw, assaulting and threatening to kill her and assaulting Johannes Cornelius Engelbrecht; and

8.4 fourth charge:- in terms of Section 40 of the South African Police Service Act 1995 read with the South African Police Service Discipline Regulations 2006, you are hereby charged with misconduct in that you allegedly contravened Regulation 20(m) of

> the said relations at or near small holding 164 Waagfontein, Rustenberg, during Saturday 12 April 2008 in that you without written approval of the employer performed work for compensation in a private capacity for another person or organisation either during or outside working hours in that you performed work for Banson, Tiro Group (Pty) Limited for an undisclosed period under a contractual agreement.

[9] The Applicant was subjected to an internal disciplinary proceeding which included an appeal. Pursuant to this process he was dismissed from the services of the SAPS and duly referred the matter to the First Respondent for conciliation and then arbitration. The arbitration was heard by the Commissioner and, as set out above, eleven witnesses were called, nine on behalf of the SAPS and two on behalf of the Applicant.

[10] The Applicant himself elected not to give evidence. I will deal with this election and its consequences more fully below.

[11] At the arbitration, the Applicant challenged only the substantive aspects of his dismissal, not the procedure which was followed by the SAPS in effecting the dismissal.

[12] In respect of the first charge, there was no evidence at the arbitration that the Applicant pointed a firearm at Rossouw, threatening to kill her. This was not the evidence of Rossouw. The Commissioner correctly made a finding in accordance with this evidence and accordingly could not have taken this aspect into account in coming to his final decision that the dismissal was substantively fair.[7]

[13] However, in relation to the allegations contained in charges two and three concerning an assault on Rossouw, there was evidence in this regard given by Rossouw, which was clearly taken into account by the Commissioner in

[7] Record page 504 third unnumbered paragraph

reaching his decision. The evidence given by Rossouw in this regard certainly demonstrates that an assault took place. Extracts of the evidence of Rossouw in this regard are worth considering:–

'I was standing on the side of the truck he was standing here and he wanted to come by and I was in the way so he pushed me out of the way.[8] [14] In argument by the Applicant's representatives and in the heads of argument submitted on behalf of the Applicant, emphasis was placed on Rossouw's attitude towards the assault and particularly that she did not regard it as being particularly serious. Whether this is the case is not the relevant concern. It is not the subjective perception of Rossouw that is in question, but rather whether or not, as an off duty policeman, the Applicant was within his rights to conduct himself as he did, or more cogently, did he perpetrate and assault as set out in the charges which were brought against him.

[15] As set out above, the Applicant failed to testify. Rossouw's evidence, at the very least, and notwithstanding subsequent evidence, and here I refer to the evidence of Lekhalakala, which was not put to Rossouw in cross-examination, and which contradicted her version, established a case on the basis of which the commissioner could reasonably come to the conclusion that an assault, however grievous or benign it may have been, had taken place.

[17] The Applicant sought to discredit the SAPS' case purely by cross-examining its witnesses and himself leading the evidence of two witnesses.

[18] Bearing in mind that the burden of proof on the SAPS was on a balance of probabilities and that in terms of the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[9] the test to be applied by me is whether the decision reached by the Commissioner is one that a reasonable commissioner could not have reached, the Applicant created certain difficulties for himself by electing to take the view that the SAPS had

[8] Record page 31 line 24 ff

not proved its case. I do not share the Applicant's view that the SAPS did not prove its case on a balance of probabilities to sustain the Applicant's dismissal.

[19] I have already alluded to one of these difficulties in relation to the assault on Rossouw in respect of which I am of the view that the Commissioner's decisions falls squarely on the right side of the test set out in *Sidumo (supra).*

[20] The Applicant relied solely on the evidence of the two witnesses called by him and an assessment that the SAPS had failed to proof its case in respect of any of the charges on a balance of probabilities. Unfortunately for the Applicant this strategy was not successful. A case was made out that he ought himself to have answered by giving evidence.

[21] The Applicant complains as to various statements made by the Commissioner in his judgement, specifically the following:–

> 'The incident that triggered the assault was his possession of a firearm'
>
> 'The Applicant had no business being on private property wrestling with a civilian on the ground carrying a State issued firearm whilst being off duty.
>
> I have to conclude that in the absence of testimony from the Applicant that he had tried to conceal his identity for as long as possible as he was aware that he was pursuing his own private business interest carrying a State owned firearm.
>
> The conduct of the Applicant by carrying a State owned firearm onto private premises to pursue his private business interests and by so doing endangering the lives of other civilians for financial gain is a misuse of his State owned firearm entrusted to him which lead to the incident of 12 April 2008.'

[9] (2007) 28 ILJ 2405 (CC)

[22] These statements are to be viewed in context and it is clear that they did not constitute the *ratio decidendi* of the Commissioner's decision. The first statement referred to above was made in the context of the altercation or "wrestling" that took place between Engelbrecht and the Applicant.

[23] It cannot be seriously contented that the Applicant's firearm, whether State owned or not, was not a significant factor in causing the altercation, initially between Engelbrecht and the Applicant, which then involved other people ultimately arresting the Applicant and the Applicant coming to considerable harm in the process.

[24] The comment concerning a State issued firearm must be viewed in light of the evidence of De Beer that the Applicant told him that the firearm belonged to the Applicant's wife. It is simply a tangential factual matrix which supports the conclusions which the Commissioner comes to in relation to the Applicant doing work outside the scope of his employment with the SAPS, without written permission. I will refer to this conduct below as "moonlighting".

[25] The issue of the Applicant's identity, that is to say that he was a policeman, and his failure to reveal this is an entirely legitimate conclusion for the Commissioner to arrive at under the circumstances. It is clear from the evidence as a whole that, in appropriate circumstances, a policeman may be given written permission to work outside the scope of his duties for the SAPS. In these circumstances there would be no need for him to conceal the fact that he is a policeman. People in society have every reason to expect policeman, whether they are acting in their capacity as such or in the private business world to conduct themselves in a proper manner, such as anyone else may. The mere fact that the individual is a policeman does not in any sense lead automatically to the conclusion that he would use his authority and powers as a policeman, in a civilian commercial context, to advantage himself.

[27] I am in agreement with the Commissioner that the act of concealing his status as a policeman did the Applicant no credit.

[28] Notwithstanding the above this is, as set out above, clearly not the *ratio decidendi* of the Commissioner's decision and only goes to how the Applicant's failure to identify himself contributed to causing the fracas whereas had he conducted himself in a proper manner, it is unlikely that these events would have transpired. The implied question was legitimately asked by the Commissioner as to why the Applicant did not disclose his identity.

[29] This is not to say that I am making a finding that the Applicant had a duty to disclose that he was a policeman, but simply to consider the impact that this disclosure would have had, had it been made at an earlier point in time than it ultimately was.

[30] The fact of the matter is that regardless of whether the Applicant identified himself as a policeman, had he not assaulted Rossouw, it is unlikely that any of the subsequent events would have taken place.

[31] Undue emphasis has been placed on the issue of the carrying of the firearm. This is not the gravamen of these statements, which the Applicant seeks to criticize.

[32] The relevant comment made by the Commissioner was:-

> *'...*started with a phone call that become several phone calls that the Applicant had pointed a firearm at Rossouw and had assaulted her'[10]

This is a reflection of evidence that was given at the arbitration. Again this is not a conclusion in respect of one of the charges. The Commissioner was well aware of the fact that no attempt was made to shoot or point a firearm at Rossouw. He was referring merely to the phone calls. As set out above,

he made a finding in this regard in favour of the Applicant.

[32] If reference is had to the charges, the "elements" thereof cannot be compared to the "elements" which make up a criminal offence. In this regard, in his heads of argument, Counsel for the Third and Fourth Respondents refers to "assault" as the unlawful and intentional (a) applying of force to a person of another directly or indirectly; or (b) threatening another with personal violence in circumstances which leads the threatened person to believe that the other intends and has the power to carry out the threat. These are the traditional "elements" of a crime. In regard to the charges which were preferred against the Applicant it could never have been in the contemplation of the SAPS that, if regard is had, for example, to charge number two that if the pointing of a firearm was proved, but a threat to kill and assault were not proved or, alternatively, that an assault was proved but not a threat or pointing a firearm this would mean that the charge had not been proved. This would, with respect, be an absurdity. One simply cannot break down the elements of these charges in the way one would a criminal charge. If the Applicant is found guilty of what is properly regarded as an offence, such as assault, this finding stands on its own. This is in effect what happened in this matter in regard to the assault on Rossouw.

[33] Contrary to the submissions made on behalf of the Applicant, the assault on Engelbrecht was in fact an issue at the arbitration. The mere fact that the Applicant was found not guilty of this charge at the disciplinary hearing is not relevant:[11]

> 'During argument, counsel for both parties spent a great deal of time debating whether or not it was proper at the arbitration hearing for the arbitrator in determining the fairness of dismissal to have had regard to the evidence relating to the alternative charge on which Myers was acquitted at

[10] Record top of page 504
[11] *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para [42] per the Judgment of Zondi AJA

> the disciplinary enquiry. The debate on this issue was in my view unnecessary as the law regarding the form of the proceedings before the arbitrator is clear. The legal position is that the proceedings before the commissioner take the form of a hearing de novo. The findings of an earlier disciplinary enquiry are irrelevant and not binding on the commissioner who is called to arbitrate the dispute.'[12]

[34] Notwithstanding the above there was no proper evidence on which a finding could be based that the Applicant was guilty of assaulting Engelbrecht. This issue is accordingly moot. In any event the Commissioner did not make a finding in this regard.

[35] The commissioner only made findings in relation to two charges:-

35.1 the assault on Rossouw;[13] and

35.2 the moonlighting charge.[14]

[36] It is correct that the commissioner does not neatly identify the charges and deal with each charge and each part of each charge in a sequential and ordered manner. This however, does not constitute a gross irregularity for the purposes of testing the decision against the requirements for reviewing it. I must still have regard to the test for reasonableness as set out in *Sidumo (supra*) and determine whether the two findings, as set out above, in respect of the assault and the moonlighting are findings that a reasonable commissioner could not have come to. I do not regard them as such. I must also emphasise that there cannot be any question that the Applicant was aware of and understood the charges against him.

[37] It is also significant, when regard is had to the charges and the evidence,

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[12] See also *County Fair Foods (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* 1999 20 ILJ 1701 (LAC) para 11. See also *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* (2012) 33 ILJ 1081 (LAC) at para 14

[13] Pages 442 and 443 of the record

[14] Page 444 of the record.

that it is the two charges where the evidence is most cogent and reliable against the Applicant, in respect of which the commissioner makes finding against him. The evidence in respect of the assault on Rossouw was simply not challenged. Although a version was put to Rossouw that the Applicant would say that he never pushed her, notwithstanding having put such a version, the Applicant failed to testify.

[38] It is a well established rule in our law that a party put so much of his own case or defence as concerns that witness, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, as to give him fair warning and an opportunity of explaining the contradiction and defending his own character.[15]

[39] On several occasions versions were put to witnesses which versions were not subsequently placed in evidence by the Applicant, as he failed to give evidence at all. As much as it is a well established rule in our law that a version should be put in cross-examination, as set out in the authorities cited above, there must similarly be consequences where a witness is put on notice that their evidence will be contradicted and, with no reason whatsoever being advanced, the relevant witness who was to contradict that evidence, in this case the Applicant, does not himself give evidence. However it must be that the Applicant's reason for not giving evidence after having put those versions, was that ultimately the Applicant, at the end of the SAPS case, took the decision, for better or for worse, that the SAPS had not made out a case. Obviously he could not rely on those versions put to witnesses, in respect of which no evidence was subsequently given, to sustain his argument that the SAPS did not make out a case.

[40] The Applicant's failure to give evidence was not satisfactory on two bases, firstly that he did not give the evidence required to support particular

[15] *Smal v Smith* 1954 (3) SA 434 (SWA) per the Judgment of Judge Classen at 438. See also the judgment in *Masilela v Leonard Dingler (Pty) Ltd* 2004 (25) ILJ 544 (LC) at paras 28-29, and the judgment in the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 SA 1(CC) at 61 to [63] and *General Food Industries Ltd v Food and Allied Workers Union* (2004) 25 ILJ 1260 (LAC)

propositions put to witnesses and, secondly, that he did not give evidence when a case had been made out against him in respect of the assault on Rossouw and the moonlighting charge. As examples of versions being put and not sustained in evidence, which were relevant for the purposes of underlying or supporting allegations that the SAPS had not made out a case I refer to firstly a proposition put to Musthan as follows:-

> 'What do you say to that, Zama (the Applicant) says despite those documents I am not the owner of that cheque' (should be truck),[16]

> And, secondly when the Applicant's representative put it to Rossouw, which is a critical aspect of this whole matter concerning the assault on her as follows:-
>
> 'and I forgot to put this to you, that is that Zama denies and pushed [inaudible] and you are not going to conceive that he didn't push you?
>
> Rossouw:–No he, no he did push me.'[17]

[41] I understand that it was the Applicant's election not to give evidence if the SAPS did not make out a case and that in this context it may be excusable that versions were put and no evidence supporting those versions was led. However, the difficulty remains that those propositions have no probative value and to the extent that the Applicant was incorrect in his assessment of whether the SAPS made out a case, which I believe he was, there was no evidence from the Applicant on which the Commissioner could rely to make any contrary finding on the two particular issues referred to above.

[42] The evidence in respect of the alleged assault on Engelbrecht was fraught with difficulty and, as correctly pointed out by the Applicant's counsel Engelbrecht conceded that he had initiated the conflict with the Applicant.

[16] Page 128 of the Record lines 15 to 16

The commissioner in any event made no finding in this regard.

[43] In respect of themoonlighting charge, the evidence was thorough and the evidence given by Ahmed Musthan ("Musthan"), a Lieutenant Colonel in the SAPS[18] was comprehensive, thorough and supported by documentary evidence. This evidence was supplemented by the evidence of Basil Christiaan van der Westhuizen ("Van der Westhuizen")[19] who pertinently gave evidence that one of the documents referred to by Musthan which indicated payment to the Applicant, was in fact a proof of payment document of Banson.

[44] As far as the commissioner's findings in relation to Lekhalakala as a witness are concerned, it is not the function of this court to lightly overturn a credibility finding made by the commissioner. The commissioner was in a unique position to observe the demeanour of Lekhalakala and his assessment in this regard should stand in the absence of some compelling consideration or considerations to the contrary.

[45] A further difficulty that I have in reviewing the impeachment of Lekhalakala as a witness is that his version was never put to Rossouw in cross-examination.

[46] While I accept, for these purposes, that Lekhalakala could only be called by the Applicant at a later stage and that the Applicant may only have been able to interview him for the purposes of giving evidence at a late stage, under these circumstances, bearing in mind that the Applicant was legally represented, clearly by a competent practitioner, application could have been made to recall Rossouw for the purposes of putting Lekhalakala's version to her.

[47] It is a critical aspect in the matrix of evidence in this matter as Lekhalakala's

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[17] Page 49 of the record lines 10 to 13
[18] The evidence of Musthan commences from page 86 of the Record
[19] The evidence of van der Westhuizen commences at page 176 of the record

evidence goes directly to one of the key findings made by the Commissioner, that is to say whether or not Rossouw was assaulted. I'm of the view that in the circumstances the application to recall Rossouw would have been proper and probably granted by the Commissioner. It is clear that the commissioner considered Lekhalakala evidence as well as his presence or absence at the time, this being a contentious issue in the evidence. The Commissioner devotes some time to this analysis.[20] It is interesting that in his original statement Lekhalakala corroborated the assault on Rossouw.[21] This is one of the Commissioner's concerns, that Lekhalakala's evidence contradicted his statement.

[48] Other reasons given by the Commissioner for rejecting the evidence of Lekhalakala were:-

48.1 he contradicted other witnesses called by the Applicant;

48.2 he contradicted the evidence of De Beer who the Commissioner found was a credible witness;

48.3 his version was not put to witnesses who denied seeing him on the scene when the incident took place;[22] and

48.4 it would be strange for him to present throughout the incident and do nothing to stop it. It was his duty.[23]

[49] I cannot say that the Commissioner unreasonably rejected the evidence of Lekhalakala. In his heads of argument counsel for the Third and Fourth Respondents referred the court to the decision in *Moodley v Illovo Gledhow and Others*[24] where the court observed –

[20] Pages 504 to 505 of the record
[21] Record page 474
[22] Engelbrecht 163, van der Westhuizen 189 line 17 and van der Walt page 246 lines 10 – 12
[23] Van der Westhuizen pages 180 to 181
[24] [2004] 2 BLLR 150 (LC) at para.21.

> '[21] sitting as I do as a review Judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. She was steeped in the atmosphere of the proceedings before her. I cannot see that I can interfere merely on an assessment that she misdirected herself by reason of the fact that she considered whether the witnesses were credable before determining what the probabilities were in light of their testimonies.'

[50] The fact that neither Lekhalakala nor Rossouw read their witness statement and that only Lekhalakala was criticised for this must be had regard to in light of the commissioners assessment of the evidence as a whole as well as Rossouw stating pertinently that she believed that what she was saying was in fact being written down by the police officer taking her statement in an accurate manner.

[51] In relation to charge four, the "moonlighting" charge, I am of the view that there was a strong case put up by the SAPS through the evidence of Musthan and van der Westhuizen together with the relevant documentation to which they referred in their evidence.

[52] As examples of this I refer to the evidence of Musthan where he identifies the relevant truck and the fact that it is owned by the Applicant.[25] Musthan further identifies documents which clearly indicate the payments which were made for example banking information,[26] which it subsequently transpired in the evidence of Van der Westhuizen was proof of payments to the Applicant indicating that the Applicant was paid, by Banson, during the period from 8 November 2007 to 4 April 2008 an amount of well in excess of R100 000 (one hundred thousand rand). Van der Westhuizen's evidence made it clear that the letters and numbers "BT12" referred to Branson Truck number 12 and that this code explained what it was that appeared on the proof of

[25] Record page 91 lines 15 – 16 and page 465 of the record
[26] Record page 448

payment.

[53] The link between the Applicant, as the owner of the truck, that it was in fact the relevant truck concerned, and that payments were made into the Applicant's bank account were clearly established in evidence.

[54] As set out above Van der Westhuizen gave evidence that indeed the statement that appears in the record[27] is proof of payment from Banson Trucking to the Applicant in respect of the truck he owned being BT12. I cannot in any way fault the Commissioner for coming to the conclusion that he did in relation to this charge. The fact that it could not precisely be identified which payment was for which work is irrelevant. The nature of the transactions is clear.

[55] It appears that this is a reasonable deduction to be made given the evidence before the Commissioner. The Applicant placed himself at risk by failing to testify in the light of evidence of this nature. The SAPS regarded this charge as most serious. In the record relating to the findings and other matters concerning the disciplinary enquiry of the Applicant the chairman states -[28]

> 'the contraventions by the employee all arose out of his intentional neglect to comply with National Instruction 7/2000 (a collective agreement). This constitutes gross insubordination and then the employee contravenes the law and the constitution by means of assault …'

[56] There is simply no sense whatsoever in the attempt on the Applicant's behalf to construct a defence that the truck was not really owned by him but by his wife's close corporation, when scant evidence to this effect was lead. Similarly in respect of the defence that he did not benefit from the work as the contract was between his wife's company and the trucking company. There was clear evidence of payment into his account and under these

[27] Page 48
[28] Page 438 of the record from the bottom of the page

circumstances and given the close domestic relationship between the supposed parties to this enterprise, it was incumbent on the Applicant, the SAPS having clearly made out a case, to rebut it. The Applicant's failure to do so was to his detriment.

[57] Again the test is on a balance of probabilities and the criteria in terms of which the Commissioner's decision must be regarded, for the purposes of the review, is whether a reasonable commissioner could not come to these conclusions. In my view a reasonable commissioner could most certainly come to the conclusion that the Applicant was deriving benefit from work which he was doing outside of the scope of his employment with the SAPS without having received a written permission to do such work.

[58] I do not believe that the Applicant was in any way denied a fair hearing. To the extent that he personally was not heard, this was an election which he made.

[59] Reference is made by the Applicant's legal representative to the judgment of Ngcobo J in *Sidumo*[29] where he deals with the failure of a commissioner to have regard to material facts and same preventing the aggrieved party having its case fully and fairly determined. This, in terms of the *dictum*, constitutes a gross irregularity in the conduct of the arbitration and the award falls to be set aside, not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.

[60] I am of the view that the Commissioner did have regard to the relevant material facts and came to a reasonable conclusion in respect of both the assault and the moonlighting charge.

[61] It appears that the Applicant wishes to rely on both the test in *Sidumo*, (*supra*) to the extent that the averment is made that the decision reached by

[29] At para 267

the commissioner is not one that a reasonable decision maker could have reached, as well as on a process or dialectic related review as emerges from the Judgment of Ngcobo J in *Sidumo* and as has been described and analysed by Advocate Anton Myburgh SC in an article in the Industrial Law Journal "Determining and Reviewing Sanctions after *Sidumo*"[30] and more recently dealt with in other decisions of this Court and by the Labour Appeal Court in, *inter alia*, *Heroldt v Nedbank Ltd.*[31] where the following dictum appears:–

> 'there is no requirement that the commissioner must have deprived an aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked and that the latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

[62] Key elements of this *dictum* are that there is the potential for prejudice and the possibility that the result may have been different as a result of the manner in which the commissioner dealt with the arbitration, particularly in relation to factual material.

[63] In my view the manner in which the Commissioner dealt with the matter did not carry potential prejudice for the Applicant in that the Commissioner was keenly aware of the evidence that was given, particularly relevant being the evidence of Rossouw, Musthan and Van der Westhuizen. He correctly appreciated and analysed the matrix of evidence in regard to both the assault and the moonlighting charge.

[64] Similarly, I do not believe that there is a possibility that the result may have

[30] (2010) 31 ILJ at p 1
[31] (2012) 33 ILJ 1789 (LAC) at para39

been different. The Commissioner simply did not fail to apply his mind to material facts or issues before him.

[65] Accordingly, I am of the view that the decision was reasonable in terms of the test in *Sidumo* as set out above as well as in terms of the minority judgment of Ngcobo in *Sidumo* as has been expanded upon and applied in, *inter alia, Heroldt v Nedbank (supra).*

[66] In the premises, I make the following order:

66.1 The application for review is dismissed;

66.2 There is no order as to costs

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pp. Snider A J

Acting Judge of the Labour Court of South Africa

Appearances -

For the Applicant:	Attorney Martin Hennig
For the Third and Fourth Respondents:	Advocate F A Boda
Instructed by:	The State Attorney