Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 1516/15

In the matter between:

SSF VAN WYK **Applicant**

and

COMMISSIONEER L C SHANDU (*N.O.*) **First Respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **Second Respondent**

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

Heard: 7 December 2017

Delivered: 8 December 2017

Summary: (Review – reasonableness – probabilities warranted arbitrator's findings – unreasonableness must affect outcome materially (obiter))

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed review application. The answering affidavit was late and condonation has been sought for that. The applicant does not persist in opposing the condonation application but believes a cost award for the delay caused would be appropriate.

Brief synopsis

[2] The applicant ('Van Wyk') has applied to review an arbitration award which upheld is dismissal as substantively and procedurally fair. He was dismissed on 28 October 2012 after being found guilty of contravening regulation 20 (z) of the South African Police Service Disciplinary Regulations of 2006 in that on 11 April 2012 at 09:40 he had broken the burglary door of a supermarket and taken cigarettes and other groceries inside without permission, which it was characterised as a business robbery.

[3] It was common cause that Van Wyk, a warrant officer of several years' experience had entered the premises of the supermarket and after apparently briefly displaying his police identity badge proceeded to search the premises ostensibly for illegal cigarettes. He was accompanied by three other persons, namely an investigator from Imperial Logistics, who conducted investigations into stolen goods and other employees of the Tobacco Institute of South Africa ('TISA').

[4] Footage of the events in the store during the raid was shown during the arbitration hearing. During the course of the raid, a door into a cold storage area was broken by Van Wyk to gain access to the cold storage area. The applicant also seized approximately 12 to15 cartons of cigarettes. The video footage showed him being presented with certain papers by one of the shop staff, which he was not interested in inspecting. The staff member claimed he had tried to give Van Wyk an invoice for the cigarettes he had seized.

[5] The applicant claimed that he had conducted the raid after receiving information from Mr L Kroukam, a TISA employee, to the effect that Kroukam had received information from someone at Imperial Logistics that

illegal cigarettes were being sold at the supermarket premises. At the time he received a call, it is common cause that he was off duty. Initially Van Wyk's version was that had been stopped in the street by Kroukam.

[6] The applicant was off duty at the time, but claimed to have called his unit to 'book himself in' (a form of reporting for duty) but was told that he could no longer do that telephonically so he made an entry in his pocket book instead. The version put to SAPS's witnesses was that he had phoned and informed his commander to advise him he was on duty.

[7] The applicant claimed that he had initially conducted a fruitless survey of two buildings with the private investigators which they could not enter. He then went home but was phoned again by one of the TISA investigators who told him he had received a tipoff about the supermarket premises from a person working at Imperial Logistics. They then raided the supermarket. After confiscating the illegal cigarettes, he was returning to the police station when he met SARS officials in a vehicle. He stopped them and they agreed to take the alleged illegal cigarettes because they were conducting searches at the time. He then wrote down the details of the cartons in his pocket book and asked them to sign for it. He did not take the confiscated cigarettes to the police station because there was a lot of paperwork he would have to complete filling in an SAP 13 form recording the cigarettes as exhibits at the police station.

The arbitration award

[8] The salient parts of the arbitrator's analysis of the evidence can be summarised as follows:

8.1 It was common cause that Van Wyk had broken a burglar door in the flat above the store and a door to a cold room on the premises and that he had removed a number of cartons of cigarettes from the supermarket.

8.2 The manager of the store denied that commission had been given to break the door contrary to Van Wyks claim.

8.3 The applicant did not give the staff at the store any document to sign as proof that the cigarettes had been confiscated, and this was contrary to the procedure for handling exhibits as testified to by the investigating officer, whose evidence on this point was not contradicted. Further, the video footage supported the version of one of the staff member who claims he had attempted to give an invoice to Van Wyk for the cigarettes, but Van Wyk had refused to take it from him.

8.4 There was no acceptable evidence given by Van Wyk that the cigarettes he had removed were illegal.

8.5 There was undisputed evidence that a form from SARS purporting to be a document completed by the customs section of SARS in respect of the cigarettes, had not been signed by the manager of the store from which the cigarettes were removed. The arbitrator dismissed an objection by Van Wyk to the interrogation of the authenticity of document on the basis that in terms of the pre-arbitration minute, because he felt that "*I cannot ignore the compelling evidence presented by the second witness of the employer pointing to the fact that the document purporting to be from SARS is nothing to do with the cigarettes removed by the employee at his shop... The document is not signed anywhere by the* [manager of the store] *or any of the people who worked for Stella supermarket. Further, this document ought to have been completed at Stella supermarket in the presence of the* [manager of the store]*. It is also worth noting that the signature of* [Van Wyk] *who is the person that took the cigarettes does not appear anywhere in the document.*"

8.6 The evidence of the investigating officer that Van Wyk did not tell him where the cigarettes were when he asked him about them was not disputed. It was also not disputed that the investigating officer had not been informed by Van Wyk that the cigarettes had supposedly be handed over to SARS. Had he been told that he would have asked why Van Wyk had done so.

8.7 The arbitrator found it difficult to believe that someone who had been a Police officer for many years would seize items, which are supposed to serve as exhibits of criminal activity and, instead of recording them on the appropriate form, would hand them to SARS employees he accidentally met on his way to the Primrose Police station. The fact that he did not follow the proper procedure was a strong indication that the cigarettes taken from the supermarket were not illegal and it placed his motives for confiscating them in doubt.

8.8 The arbitrator also found that there were inconsistencies in the version put to SAPS witnesses as to how he came to conduct the raid and the version which he gave in his own evidence.

8.9 The arbitrator rejected Van Wyks claim that he obtained approval to open the burglar door to the flat from one of the staff, whereas a staff member had testified that he had handed the keys to Van Wyk and this was consistent with the written statement he made to the police.

8.10 The arbitrator was also persuaded that Van Wyk had taken other items from a safe in the flat (a watch, a pellet gun, a bracelet and cash in the amount of 50,000), which was too small to have held any meaningful quantity of cigarettes. In this regard, the arbitrator found the evidence of the employer's witness to the removal of these items to have been very convincing.

8.11 The arbitrator also dismissed the evidence of Mr Pretorius (who testified for Van Wyk) who claimed to have been present when the flat above the premises was searched and the additional items were found and removed from the safe. The arbitrator concluded that this witness had been called to deal with the compelling evidence of the store manager, who had testified to the effect that the other person with Van Wyk in the flat was black, whereas Van Wyk himself said that he was with Simon Motlana in the flat and did not mention Pretorius as being in the flat.

8.12 The arbitrator further concluded:

"The described conduct of the employee left me with no doubt that he went to Stella Supermarket not to perform any lawful activities as was expected

of him as a police officer but to perform criminal acts. He supposedly gets invited to conduct the raid by people who are not police officers and to have no powers or authority to conduct such. He goes ahead, during his rest day, please this raid flashing police appointment card knowing very well it is a raid not sanctioned by his commander let alone known to his commander. He then goes about breaking doors using a crowbar which he came prepared with. “He then leaves the premises of Stella supermarket with a box of cigarettes which up until today he is unable to account for. “

8.13 The arbitrator found that Van Wyk was an ‘unsavoury character’ and his testimony at the arbitration was unreliable. She felt that he had a greater incentive to lie in the arbitration whereas the other witnesses did not. She doubted that if they had been selling illegal cigarettes they would have gone so far as to have laid a false claim of business robbery against Van Wyk. In this regard, it can be mentioned that the complainant’s evidence had been that Van Wyk had told them they could fetch their cigarettes from the Police station and it was only after going to both Primrose and Germiston Police stations neither of which had a record of the seized items that they opened the case. In passing, the arbitrator’s comment on Van Wyk was clearly intended to be a remark about her assessment of his credibility but she should have used a more neutral description than appearing to make a moral judgment of his general character.

8.14 The arbitrator found that the conduct of Van Wyk was aimed at intimidating the complainant.

8.15 She dismissed the argument that no evidence had been presented to the effect that the trust relationship had broken down as a simplistic one given the nature of Van Wyk’s job and the offence he had been found guilty of.

8.16 In relation to the claim of procedural unfairness which concerned an allegation that Van Wyk had been deprived of an opportunity to answer to the charges because of the way the charge sheet was drafted, the arbitrator noted that there was no evidence presented to suggest that he had not been given a chance to state his side of the story and that the procedural claim was only raised in argument by

his representative. It had not been supported by evidence of Van Wyk about his supposedly inability to answer to the charges.

Review:

[9] Van Wyk's grounds of review essentially relate to the arbitrator's assessment of evidence. The test for review based on rationality , as expressed by the LAC reads:

> ""[38] Following the decision of the Constitutional Court in Sidumo & another v Rustenburg Platinum Mines Ltd & others on the review test this court provided further guidance on the test in a number of its decisions. In Head of Department of Education v Mofokeng & others, this court provided the following useful exposition on the test which needs to be quoted in extenso:
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> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) [(2013) 34 ILJ 2795 (SCA)] and this court in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others [(2014) 35 ILJ 943 (LAC)], have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.
>
> [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any

irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt , the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to "defects" as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] 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 enquiry. 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 enquiry, 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 I 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.' (Emphasis added.)" [1]

[10] In abbreviated form, it simply means that the court should only set an award aside based on an arbitrator's assessment of the evidence if the final outcome of the award is one that could not be arrived at by any reasonable arbitrator on the evidence before them, irrespective of the path of reasoning followed by the particular arbitrator in arriving at their conclusions. The applicant's particular criticisms of the arbitrator's reasoning are dealt with below, together with some specific observations on those points:

[11] The arbitrator failed to appreciate that neither the employer's first witness nor the second were present in the store when a third employee ('the uncle') gave him permission to break the burglar door to the flat. The respondents point out that it was not disputed that Van Wyk, already had his crowbar with him before he could have known whether or not he would gain access to the flat. The respondents also claimed that it is for the first time that this version was presented. In the arbitration, Van Wyk had claimed that he had broken the door because the keys he had been given did not open the door.

[12] The arbitrator ignored evidence of Pretorius, who was an expert, that the cigarettes were illegal and the video footage clearly showed that what was offered to him was not invoices but till slips.

[13] The arbitrator irrationally concluded that it was relevant that the owner had not signed the document from SARS and had rejected Van Wyk's version on that account. It was also illogical to suggest that the document would

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[1] ***National Union of Metalworkers of SA on behalf of Motloba v Johnson Controls Automotive SA (Pty) Ltd & others*** (2017) 38 *ILJ* 1626 (LAC)at 1638-9.

have been signed by the owner when SARS was not present when the cigarettes were confiscated. The respondents note that there is no other evidence of the details of the SARS officials to whom Van Wyk allegedly gave the cigarettes or any details of the vehicle into which they were loaded. Moreover, on his own version he claimed that the official had merely signed for the cigarettes on Van Wyks pocketbook, which makes it highly improbable that an inventory was completed by the SARS official. Further if the document was an inventory of the cigarettes handed over, it is inexplicable why Van Wyk would not at least have signed it. It is also telling that Van Wyk could offer no reasonable explanation why he thought it prudent to get the SARS officials to sign for the items in his pocket book but did not get the persons he had confiscated them from to also confirm what he had taken in the same book. His explanation that it had slipped his mind is hard to credit

[14] The arbitrator exceeded her powers by not accepting that the SARS document was what it purported to be. The respondents claim that the agreement about the status of the documents did not apply where the very authenticity of the document was in doubt. Moreover, the document only surfaced after Van Wyk claimed he had made several calls to SARS and the document was faxed to him, but he could not identify the SARS officials who had sent the fax or whom he had spoken to in this regard. Even if one has regard to the certificate at face value, it is addressed to a person at Stella Supermarket who was not present at the supermarket when the raid took place. Its provenance remains mysterious. Van Wyk did not name a single SARS official that he had dealt with even in relation to obtaining the document.

[15] The arbitrator also failed to draw a negative inference from the fact that the owner was aware what the SARS document should look like as he would only have known about this if he had sold illegal cigarettes. Whatever other inferences could be drawn from this, it does not suggest that it was normal procedure for SARS to complete such a form without getting the supposed owner of the confiscated goods to acknowledge what had been taken.

[16] The arbitrator misdirected herself in focusing on Van Wyk's alleged failure to follow proper procedures for entering exhibits into evidence, when he had not been charged with such an offence. In any event she failed to appreciate that SARS always retained cigarettes when they were seized in searches of that nature and the SARS document was proof that he had followed that procedure. Accordingly, her findings did not accord with the evidence before her. The respondents mentioned that Van Wyk conceded that he followed the wrong procedure in giving the cigarettes to SARS officials when they were not even participating in the search. When Mr Odeen, one of the supermarket staff, was shown the inventory of cigarettes attached to the SARS form, he claimed that none of the cigarettes listed there were stocked by the supermarket. He was not challenged on this. I do not think that Van Wyk's failure to follow standard procedures was irrelevant. It is true he was not charged with this, but it tends to reinforce an inference that the raid was not above board if standard procedures were not followed. Under cross-examination, it was also put to Van Wyk that it was odd that he had undertaken the raid on his day off but then found it too onerous to complete the necessary paperwork to hand in the seized cartons as exhibits.

[17] The arbitrator misconstrued the evidence in finding that there were two versions of how he came to be involved in the search and her finding that on the one hand, he was on lawful duty and on the other that he could not have obtained authority to be on duty as he claimed to have done by phone were irreconcilable findings. However, the respondents point out that Van Wyk had put it to the employer's witness that he had been stopped while passing through Primrose to assist with the raid and that he had phoned his commander in order to be booked on duty, which was not the same evidence he gave in chief. I am satisfied there were material differences in the version put to SAPS's witnesses and the version testified too by Van Wyk on the initiation of the raid and his involvement.

[18] In dismissing Pretorius's evidence, the arbitrator had failed to appreciate that he had not conducted the search of the flat but had been present when the search was conducted. He claims that the arbitrator's failure to appreciate this tainted the entire award with unreasonableness. However,

this ignores the fact that it was put to one of the employer's witnesses (Alam) that Pretorius had followed "the uncle" and it was never disputed that only three people were present when the search of the flat took place. Accordingly, given that Pretorius was not at the flat, it was not unreasonable the arbitrator to conclude that his evidence in that regard was fabricated .It was clear when Mr Alam was being questioned about the safe being opened that only three persons were present in the flat: himself, Van Wyk and Motlana. Further, Alam testified that he could not have placed the bank notes in his pocket as claimed by Van Wyk because he was in his traditional nightwear which had no pockets. In this regard, it should be mentioned that Van Wyk did not identify what Alam was wearing until he gave his own evidence. Lastly, even if a particular inference is flawed, unless one is talking of manifest bias appearing on the face of an award, the mere fact that one inference may be unreasonable does not 'taint' the whole award like a dye staining a fabric. That unreasonable inference must be such that it materially affects the evaluation of a key issue in the case and would necessarily make a difference to the ultimate question the arbitrator was deciding.

[19] In deciding that Van Wyk's credibility was questionable, whereas that of the store staff was not, the arbitrator placed "undue weight" on their testimony in finding that they had nothing to gain, because she ignored the fact that they never testified against him in the criminal proceedings and on the documentary evidence in the bundle, it was apparent that they were well known for dealing in illegal cigarettes. It is true they did not testify in the criminal proceedings, but that was not because they did not come to court but because they came late. Moreover, it seems remarkable if the cigarettes had been illegal that the complainants would have risked going to claim them from the police and even more remarkable that they would have laid a charge of robbery against Van Wyk when they could not be found. By contrast, Van Wyk never offered even a general defence to the charge when he was arrested. Even if he wished to retain his right to silence for the purposes of criminal proceedings, it is astonishing he would not have told the investigating officer in general terms that he had been engaged in official police work when the items were taken. Equally, it

would have been simple for him to have told the investigator to contact the SARS officials about the missing cigarettes, who could have cleared matters up at an early stage.

[20] In deciding that the trust relationship had broken down, the arbitrator ignored the fact that he continued to work for three months after the incident before being suspended. The fact that SAPS procedures might not have been implemented immediately does not necessarily mean his trustworthiness was unquestioned. Moreover, the criminal misconduct he was charged with is so completely at odds with his role as a policeman, that it is difficult to see how it could seriously be argued that dismissal would not be appropriate especially in circumstances where he played the leading role in events and was not an incidental or ignorant participant in them.

[21] The arbitrator's finding that his dismissal was procedurally unfair could not be based solely on the fact that he had a hearing. The arbitrator did consider his procedural claim but it was an issue canvassed in evidence so there was no evidentiary basis laid for the arbitrator to make a different finding.

[22] At the hearing of the review application, Van Wyk's counsel also contended the arbitrator had failed to appreciate that no violence could be established on the evidence before her to justify a finding of robbery. This particular ground of review was not expressly pleaded. In any event, even if it were competent for me to consider it, I would be disinclined to set aside the award on the basis that the alleged theft did not entail the use of violence or the threat of violence in order to remove the cigarettes. The factual description of the alleged misconduct was sufficient to describe the offence of theft and that also falls within the definition of misconduct in regulation 20(z).

[23] Apart from the specific comments made in setting out the main grounds of review above, it must be stressed that it is insufficient simply to raise certain perceived inadequacies in an arbitrator's analysis. The applicant in a review of this nature must show that the shortcomings complained of are such that it inevitably follows from those shortcomings that the arbitrator

could not have reached the conclusions they did. Notwithstanding that some of the alleged shortcomings are actually not, even if some of them might be partly true, they do not necessarily give rise to inferences which are incompatible with the findings of the arbitrator.

[24] Further, if one puts aside the arbitrator's own particular inferences on specific issues and considers if a conspectus of all the evidence could support her findings, I am persuaded that there was ample evidence on what was before her to prefer the version of the respondent to that of Van Wyk. Some of the considerations supporting such an outcome are the following:

24.1 Irrespective of whether Van Wyk was shown till slips or invoices by the staff member of the store, why did he make no effort to leave some record of what he confiscated in keeping with standard procedures. His only explanation that it was owing to an oversight is hard to reconcile with his claim that he made sure to record the handover of the goods to the SARS officials.

24.2 His failure to offer any exculpatory explanation even in the broadest terms when he was arrested such as referring the investigating officer to the relevant SARS officials is odd, even if he was entitled to rely on a right to silence. If he had handed over the cigarettes to SARS and informed the investigating officer accordingly that would have immediately cast serious doubt on any criminal intent on his part and in all probability would have brought the investigation to a rapid end.

24.3 Beyond the SARS document there was not a single person from SARS who was even identified as a person who could confirm the incident or the whereabouts of the cartons.

24.4 Van Wyk lied to the investigating officer about his pocketbook and admitted having done so even though he now says the pocketbook was crucial to his defence.

24.5 The explanation why one of the participants in the raid switched off the main switch in the store seemed implausible. It was not unreasonable to infer that the more probable reason was to disable

the CCTV cameras so the raid would not be recorded, but unfortunately for the applicant it was recorded, because the CCTV system was directly connected to the main power supply.

24.6 There was no plausible reason advanced why there would have been an attempt to take Van Wyk's pocketbook, especially as it was only himself who knew that it could support important aspects of his version at the time it was allegedly stolen from him when he turned his back whilst in custody.

24.7 His zealousness in conducting the raid whilst off duty, is hard to reconcile with his reluctance to complete the paperwork flowing from the 'fruits' of the raid.

24.8 His changing version of booking himself on duty and his failure to even mention the raid to his commander, or to record it in the occurrence book, despite the fact that the damage he caused could have given rise to a claim against SAPS also seems more consistent with a course of conduct which aimed to conceal what transpired than being transparent about an incident that was supposedly above board. It is also noteworthy in this regard that Van Wyk conceded there was no reason he did not contact the shift officer on duty to report on the search in case he needed support.

24.9 There is also the remarkable coincidence of him accidentally encountering roaming but as yet unidentified SARS officials just as he was on his way to hand in the confiscated cigarettes at the Police station.

[25] All of this suggests that the conclusions drawn by the arbitrator as to Van Wyk's guilt were not conclusions that no reasonable arbitrator could have drawn on the evidence before her even if they are not the only conclusions that could have been drawn.

[26] As mentioned previously the appropriateness of dismissal as a sanction did not require additional evidence to be led of Van Wyk's lack of trustworthiness given the nature of the misconduct and his job.

[27] On the question of costs, this was not an issue pressed by the respondent and I am not inclined to award the applicant costs on the basis of the delay in filing an answering affidavit, as the record initially filed was also incomplete.

Order

[1] The late filing of the answering affidavit is condoned.

[2] The review application is dismissed

[3] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Govender instructed by Thapelo Kharametsane Attorneys
RESPONDENT:	T Molokomme instructed by the State Attorney (Johannesburg)