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(3) REVISED.

16/05/25
DATE


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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No. JR 705/21

In the matter between:

THE MINISTER OF THE DEPARTMENT OF

HOME AFFAIRS

Applicant

and

PSA OBO NKOSI N S

First Respondent

SIVUYILE TSHINGANA N.O.

Second Respondent

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

Third Respondent

Heard: 9 April 2025

Delivered: 16 May 2025

JUDGMENT

ORR, AJ

Introduction

- [1] This is an application to review and set aside an award issued by the second respondent (the Commissioner). In the award, the Commissioner found that the dismissal of the first respondent (Nkosi) by the applicant (the Department) was substantively unfair and awarded Nkosi retrospective reinstatement. There is also an application for condonation before me for the late delivery of the review application, and I will address that application first.

Condonation

- [2] The Department received the award under review on 25 February 2021. The review application should have been delivered by 8 April 2021. The review application was served on Nkosi on 22 April 2021 and filed on 23 April 2021. The delay is therefore 15 days. This is not a significant delay.
- [3] The explanation for the delay is contained in the review application itself and revolves largely around the practice by the State Attorney to send out invitations to tender for the review to counsel who are on the State Attorney panels. This inevitably leads to some delays, meaning that counsel was only appointed on 31 March 2021 and had papers prepared by 13 April 2021. The founding affidavit in the review was signed on 14 April 2021. Why it took a further nine days to effect service and filing is not explained at all.
- [4] Counsel for the Department accepted that there was no explanation at all for this admittedly short period. However, he contended that the matter was one of some importance concerned as it was with unlawful access to the Republic. That, coupled with reasonable prospects of success, meant that condonation should be granted.
- [5] Although the condonation application was opposed, given that the matter is one of some importance and the delay is slight, I am inclined to grant condonation.

The common cause facts

- [6] In order to properly evaluate the review application, it is necessary to set out what the common cause facts were at the arbitration.

- [7] Nkosi was employed as an immigration officer by the Department. Prior to her dismissal, she was deployed at the Lebombo Port of Entry at the border between South Africa and Mozambique.
- [8] On 18 December 2018, at approximately 10h00, Sergeant Zikalala, a member of the South African Police Service flying squad, was informed that a taxi driver, travelling from Lebombo to Johannesburg, was suspected of carrying passports of individuals who were not in the taxi with him. The vehicle was stopped at Matafeni, and the taxi driver was found to be in possession of 27 passports. None of the 27 passport holders were in the taxi.
- [9] The passports were handed over to an official of the Department, Erick Nendauni. On inspection, it was found that a number of the passports had been stamped and processed by Nkosi in the early hours of 17 April 2018. As a result, the Department charged Nkosi with two counts of misconduct.
1. It is alleged that you committed an act of misconduct in that on or about 17 December 2018 at or near Lebombo Port of Entry, you contravened Section 6(30)(a) of the Immigration Act 13 of 2002 (as amended) by endorsing entry stamp number 563 in the passports of the Mozambique nationals to enter the Republic of South Africa who did not identify or present themselves as prescribed.
 2. It is alleged that you committed acts of misconduct in that on or about 17 December 2018 at or near Lebombo Port of Entry, you captured the entry movement of the following Mozambique nationals on the Enhance Movement Control System (EMCS) to enter the Republic of South Africa.
- [10] The Mozambique nationals referred to were the same in relation to both charges: Sara Joao Nhachale, Meriamo Ameu Sumane and Ana Admira Bernado. Stripped of its verbiage, the allegation against Nkosi is that she stamped the passports of the three individuals and then processed them through the system even though the individuals did not physically present themselves for processing.

The arbitration

- [11] At the arbitration, the Department led evidence to confirm the facts which I have set out above. Nkosi did not place any of these facts in dispute. What she disputed was that she had stamped the passports and processed them in the absence of the individuals concerned. Her evidence was to the effect that she had done so when these three individuals presented themselves for transit on 17 December.
- [12] The Department did not lead any direct evidence to establish that Nkosi processed the passports in the absence of the three individuals. The Department's case was that this was the most probable inference on the basis of the common cause facts and that Nkosi's version should be rejected as being improbable.

The award

- [13] The Commissioner correctly identified that there was no direct evidence which established that the three Mozambican nationals were not before Nkosi when the passports were processed and stamped. He also correctly identified that the Department relied on an inference to be drawn from the common cause facts. In assessing the respective versions, he considered that it was unlikely that the three Mozambican individuals, having legitimately entered the Republic, would hand over their passports to someone else so that they would ultimately end up in the possession of the taxi driver.
- [14] On the other hand, he considered the delay of over a day between the processing of the passports and the arrest of the taxi driver, and the direct evidence of Nkosi that the three individuals were in front of her when the passports were processed. He ultimately concluded that, in the absence of any direct evidence to the contrary, he accepted Nkosi's version. It had to follow that she did not commit any act of misconduct, her dismissal was substantively unfair, and she was entitled to reinstatement.

The review

- [15] The review papers are not a model of clarity. A ground of review is raised in very generalised terms that the Commissioner could not reasonably have come to the finding that he did. The papers lack any specifics on how the Commissioner erred. No attempt is made to suggest that he considered irrelevant factors in comparing the two versions before him. Nor is it suggested that, taking those factors into account, he could only reasonably have come to a decision to accept the Department's circumstantial case against the direct evidence of Nkosi. No allegation is made that Nkosi's version is so improbable that no reasonable decision maker could have accepted it.
- [16] In those circumstances, it is unsurprising that Mr Ngwana did not spend much time in oral argument trying to persuade the Court that the decision reached by the Commissioner was one which no reasonable decision maker could reach. The point was not outright abandoned, however, it needs to be addressed. I am satisfied that the finding by the Commissioner to accept the direct evidence of Nkosi over the circumstantial evidence of the Department falls within the range of reasonable outcomes.
- [17] Mr Ngwana focused far more strongly on two other grounds of review. Firstly, he contended that the Commissioner's refusal to allow the Department to call the taxi driver as a witness amounted to an act of misconduct which rendered the award reviewable. Secondly, he contended that Nkosi was charged with two acts of misconduct and the Commissioner dealt only with the first in his award, rendering the award reviewable. I will deal with each in turn.
- [18] In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*¹ (Bafokeng), this Court has held that the refusal by a commissioner to allow a party to call a witness can amount to a reviewable irregularity. This, even where the Court was somewhat dubious about whether the evidence of the witness would materially support the parties' case²:

¹ (2015) 36 ILJ 3045 (LC).

² Ibid at para 28.

'Although it is somewhat difficult to see how Mbuli would have been able to offer a persuasive justification for the employer's stance in the light of the rest of the evidence, it was certainly testimony that ought to have been heard because it would have been very relevant to the outcome. It might also have raised issues the arbitrator did not consider because it was excluded.'

- [19] Mr Mila for Nkosi suggested that this ground of review should be rejected because the evidence of the taxi driver would not have taken the Department's case any further. As is apparent from *Bafokeng*, the real issue is not whether the excluded evidence would have strengthened the case but whether it would be relevant to the issues at hand. I don't think it can be disputed that the taxi driver's evidence might have been relevant to the issue at hand.
- [20] To my mind, the real issue is whether the Commissioner actually refused to allow the Department to lead this evidence. The record reveals that Mr Tsiye, who represented the Department at the arbitration, indicated that he wished to call the taxi driver. The Commissioner then expresses a view that, given that Nkosi does not challenge any of the facts relating to the apprehension of the taxi driver, the discovery of the passports and the absence of the Mozambican nationals in the taxi, he, the Commissioner, did not understand why the evidence of the taxi driver was necessary. An exchange follows between Tsiye and the Commissioner, some of which is unfortunately not audible for the purposes of the recording. The Commissioner concludes, *"So I also, I have a feeling that there will be no necessity for the driver to be called"*.
- [21] The record reveals the Commissioner expressing a view, albeit a strong one, that the evidence of the taxi driver would not be necessary. The record shows Tsiye accepting that view. The record does not show any attempt by Tsiye to call the taxi driver notwithstanding the views expressed by the Commissioner. Given that the Commissioner had expressed no more than a view at this stage, nothing precluded Tsiye from doing so. The only conclusion that can be drawn is that Tsiye was persuaded by the Commissioner's views and chose not to call the taxi driver. No ruling precluding the Department from calling the taxi driver was made by the Commissioner. On that basis, this ground of review must fail.

- [22] If the ground of review is generously interpreted to extend to the Commissioner's conduct in expressing a view on the relevance of the evidence of the taxi driver, I am of the view that it is still without merit. A commissioner cannot be criticised for expressing views on whether a witness is, in the view of the commissioner, going to take the evidence any further. That must surely fall within the powers of a commissioner to run the proceedings as they see fit. Unless the allegation is made that the Commissioner in some fashion bullied Tsiye into choosing not to call the taxi driver, and no such allegation is made in this matter, no misconduct arises when a commissioner makes his views clear, as in this matter.
- [23] I should add that the views of the Commissioner that the evidence of the taxi driver would not take the issues before him any further, was one with a great deal of merit. According to Sergeant Zikalala, who arrested the taxi driver, the taxi driver told him that he had received the passports from a queue marshal at the border gate. However, as I have already indicated, the real issue is that no ruling was made by the Commissioner that the evidence could not be called.
- [24] I turn now to the ground of review relating to the alleged failure by the Commissioner to deal with both acts of misconduct with which Nkosi was charged. Mr Mila contended that this ground of review should be rejected on the basis that it was not raised in either the founding or supplementary affidavits as a ground of review. In response to this challenge, Mr Ngwana was unable to direct me to paragraphs in either of the affidavits where this ground of review was articulated, despite being given ample opportunity to do so. He insisted that it had been raised, however.
- [25] As I have already indicated, the Department's papers are not a model of clarity. The founding affidavit does allude to the second charge in the following fashion at paragraph 5.3: *'There is no reasonable person in the position of the Second Respondent who would have found that a failure to capture the passport by the Immigration Officer in the ECMS is a misconduct. In so doing the Second Respondent committed gross irregularities'*.

- [26] I assume, to the benefit of the Department, that the end of the first sentence should read '*is not a misconduct*'. The following observations can be made. Firstly, a finding of this nature does not appear anywhere in the award. Secondly, Nkosi was not charged with failing to capture any details of the Mozambican nationals in ECMS, the charge is that she did do so, presumably in their absence. Thirdly, this is not the ground of review argued by Mr Ngwana. This ground of review relates to a finding made by the Commissioner, not to a failure to make a finding.
- [27] In the supplementary affidavit, the second charge is alluded to as follows at paragraph 4.3: '*There is no reasonable person who in the position of the Commissioner that would not have found that flouting the EMCS in processing of travellers by the Immigration Officer is a misconduct. In failing to find that it is a misconduct on the part of the IO, the Commissioner committed gross irregularities*'.
- [28] In relation to this ground of review, similar observations can be made to those made in relation to paragraph 5.3 of the founding affidavit. Firstly, as with the founding affidavit, no finding was made by the Commissioner that the flouting of EMCS procedures was not misconduct. Secondly, unlike the case with the founding affidavit, this paragraph at least approximates the charge against Nkosi; processing the Mozambican nationals in their absence is covered by flouting the EMCS procedures. Thirdly, as with the founding affidavit, this is not the ground of review argued by Mr Ngwana. This ground of review relates to a finding made by the Commissioner, not to a failure to make a finding.
- [29] The point raised by Mr Mila is valid. Neither the founding nor supplementary affidavits raise a ground of review to the effect that the Commissioner failed to determine the second act of misconduct. The absence of this ground of review in the papers means it is impermissible for Mr Ngwana to raise it in argument, and I need not consider it.
- [30] It is correct that the award does not refer explicitly to the second act of misconduct. The acceptance by the Commissioner of Nkosi's evidence that she stamped the passports and processed the entries of the Mozambican nationals

in their presence disposes of the second charge in any event. Once this evidence was accepted, there could be no other finding but that the second charge was not proved.

[31] Insofar as the paragraphs of the affidavits referred to amount to a challenge to this implicit finding, there is no merit in the challenge. As I have already indicated, the Commissioner's finding to accept the evidence of Nkosi cannot be described as unreasonable. It is worth mentioning that the cross-examination of Nkosi on the second charge was almost completely incoherent. It was not apparent that Mr Tsiye properly understood the charge, as he kept referring to issues not raised in the charge or suggesting that the charge was actually a failure to process the Mozambican nationals on the ECMS. The Commissioner had to remind Mr Tsiye of the content of the charge on several occasions. The evidence before him in relation to the second charge was confused at best. There is no basis to criticise the Commissioner for accepting the evidence of Nkosi over that of the Department in this regard.

[32] For all of these reasons, I find that there is no merit in the review. Mr Mila pressed for costs on the basis that the merits of this matter were so poor that costs should be awarded. I do not share these views. Although I have found no merit in the review application, I am not persuaded that it was so without merit that this warranted a costs order.

The Department's heads of argument

[33] The Department's heads of argument make abundant reference to the evidence before the Commissioner. At least 25 paragraphs of the heads make direct reference to the evidence. Notwithstanding this, there are only two citations providing page references. The Court is left to guess what portions of the evidence are being referred to in the other paragraphs.

[34] When I raised this issue with Mr Ngwana at the hearing of the matter, he apologised. His explanation was that he did not have a paginated transcript before him when he drafted the heads. Even if this were so, and this does not explain why he was able to include two citations, it is no excuse. Nothing

prevented Mr Ngwana from subsequently preparing a set of heads, with proper citations, which could have been delivered well before the hearing of this matter.

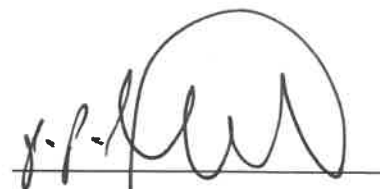
[35] Regrettably, this is not the only incidence I have encountered of parties preparing heads without citations. The practice is wholly unacceptable. When heads of argument refer to evidence given in a transcript, they must be accompanied by proper citations so that the Court can have regard to the evidence which is being referred to instead of being left to guess. Heads without citations are effectively useless. They do not properly convey the argument of a party to the Court or to the other side.

[36] Had Mr Mila pressed for some form of costs order in relation to the preparation of Nkosi's heads, I would have given this serious consideration, given the state of the Department's heads. As he did not, I do not think it would be appropriate to make an order of that nature *mero motu*. The Court does make the observation that the state of the heads is such that Mr Ngwana should not be entitled to recover a fee for the drafting of them.

[37] In the premises, I make the following orders:

Order

1. The late delivery of the review application by the Applicant is condoned.
2. The application for review is dismissed.
3. There is no order as to costs.



C Orr

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr T I Ngwana

Instructed by: the State Attorney

For the First Respondent: Mr T Mila

Instructed by: Zwane Inc Attorneys

LABOUR COURT