**NOT REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO. JR 365/06**

In the matter between:

**PATRICK LEBOHO** Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** First Respondent

**SIPHO RADEBE** Second Respondent

**SOUTH AFRICAN REVENUE SERVICES** Third Respondent

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**JUDGMENT**

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**A VAN NIEKERK, AJ**

**Introduction**

1 Mr Leboho (to whom I shall refer as 'the Applicant'), was employed by the Third Respondent (SARS) at the OR Tambo International Airport. He was dismissed in 2002 after being found guilty of extorting an amount of USD 600 from a visiting Chinese national. The dismissal was confirmed after an appeal hearing. Mr Leboho referred a dispute concerning an alleged unfair dismissal to the CCMA. On 4 August 2005, the Second Respondent (the commissioner) handed down an

arbitration award, upholding the Applicant's dismissal. In these proceedings, the Applicant seeks to have the award reviewed and set aside.

2 The factual background to the dispute is the following. On 30 August 2002, a Mr Chijen ("Chijen") arrived at the airport, on a flight from Singapore. Chijen claimed that on arrival at terminal 1, he had been searched and found in possession of five passports belonging to friends in South Africa. The Applicant and two other persons told Chijen that his possession of the passports was an offence, and that he could be fined. Chijen gave the men the sum of USD 600, for which he did not receive a receipt. Chijen complained, and was taken to the SARS office at the airport, where he positively identified the Applicant as one of the employees who had extorted money from him. SARS convened a disciplinary enquiry, at which Chijen gave evidence. Chijen again positively identified the Applicant as one of the persons who had extorted money from him. He also laid criminal charges against the Applicant, which were later withdrawn by the prosecutor.

3 The arbitration hearing was held on 14 and 22 July 2005. The commissioner records that only the substantive fairness of the dismissal was challenged. I do not intend to record all the evidence given at the arbitration but in summary, SARS' main witness, a Ms Tripmaker, testified that Chijen had been brought to her office, that she gave him two photograph albums, and that he identified the Applicant. She also testified that it was possible for the Applicant to have bypassed the security measures in place by moving from one terminal to the other, without detection. The Applicant denied having met Chijen prior to his disciplinary enquiry, or that he had demanded money from him. On the day in question, the Applicant contended that he had been deployed at terminal 2, at that the only time that he was at terminal 1 was when he reported for work, before 6am.

4 In his analysis of the evidence, the commissioner concluded that the evidence of SARS's witnesses was credible, and that he had no reason to doubt their testimony. The commissioner accepted that the identification of the Applicant from photograph albums was fair, and that it was probable that the Applicant had moved from terminal 2 to terminals 1 where he and his colleagues extorted money from Chijen.

5 The commissioner considered the primary issue raised in this Court, namely, the admission of hearsay evidence, being evidence given by Tripmaker as to what Chijen had said at the various stages of the investigation and disciplinary process. The commissioner noted that Chijen's unavailability at the arbitration was not of SARS's making. That notwithstanding, the Applicant had been afforded an opportunity to cross-examine Chijen at the disciplinary enquiry, and he had been able to deal with all aspects of Chijen's evidence. On this basis, the commissioner ruled that the hearsay evidence surrounding Chijen should be admitted. He concluded that the Applicant had been fairly dismissed.

6 In these proceedings, Mr Luthuli (an official of the United Peoples Union of South Africa) represented the Applicant. Mr Luthuli raised two primary arguments during the course of his submissions. The first related to the withdrawal of criminal charges against the Applicant, the second to the admission of hearsay evidence in the arbitration proceedings.

7 As I understood him, Mr Luthuli submitted that the withdrawal of criminal charges against the Applicant, based as they were on the same facts what formed the subject of the disciplinary enquiry, ought to have been dispositive of the case brought against the Applicant by his employer. There is no merit in this submission. It is trite that criminal proceedings and disciplinary enquires are discrete processes, with different objectives. The fact that criminal charges against the Applicant were withdrawn is not relevant to either disciplinary or arbitration

proceedings. Criminal charges are withdrawn for a variety of reasons, not all necessarily relevant to the merits of those charges.

8 In relation to the decision by the commissioner to admit hearsay evidence, Mr Luthuli submitted that hearsay evidence was always inadmissible in arbitration proceedings conducted under the auspices of the CCMA, and that the commissioner's award should be set aside for this reason. There is similarly no merit in this submission. Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act) which provides as follows:

> *'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:*
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> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
> *(c) the Court, having regard to –*
> *(i) the nature of the proceedings;*
> *(ii) the nature of the evidence;*
> *(iii) the purpose for which the evidence is tendered;*
> *(iv) the probative value of the evidence;*
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
> *(vii) any other factor, which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice.*
>
> *(2) ……..*
> *(3) ……..*
> *(4) For the purpose of this section:*
>
> *"hearsay evidence" means evidence, whether oral in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;"*

9 In ***Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & Another*** (2000) 21 *ILJ* 1315 (LAC), the Labour Appeal Court said the following (at para 14):

> *'The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case the Court thought it would be in the interest of justice that such evidence to be admitted …*
>
> *The factors which a Court must take into account in order to determine this are those which are set out in s 3(1)(c)(i) – (vii) which includes any other factor which, in the opinion of the Court should be taken into account.'*

10 In the present instance, the interests of justice and the factors listed in s 3 (1) (c) justified the admission of hearsay evidence by the commissioner. First, in relation to the nature of the proceedings, arbitrations conducted under the auspices of the CCMA are informal. Section 138 of the LRA enjoins a commissioner to determine a dispute with the minimum of legal formality. This does not imply that a commissioner has carte blanche to admit hearsay evidence, but it is a factor that must necessarily be taken into account when a party seeks to admit evidence that is hearsay. The nature of the evidence, being viva voce evidence by Tripmaker, clearly points to the Applicant as one of the persons who had extorted money from Chijen. The evidence clearly establishes that the Applicant was identified in the photo album and in person. He was afforded an opportunity to cross-examine SARS's witnesses and Chijen at the disciplinary hearing but failed to disprove Chijen's contention.

11 Although Chijen did not testify in the arbitration proceedings, he had testified at the disciplinary hearing. At the disciplinary hearing, Chijen gave evidence in the presence of the Applicant and the Applicant was afforded an opportunity to cross-examine Chijen. Chijen did not give evidence at the arbitration hearing because by the time those proceedings had been convened, he had returned to China, and SARS was not in a position to determine his whereabouts or compel his attendance at the arbitration.

15 In ***Rand Water v Legodi NO & others*** (2006) 27 *ILJ* 1933 (LC), the person who was the complainant in the matter which gave rise to the charges levelled against the employee concerned testified at the disciplinary hearing, but not at the arbitration hearing. The arbitration hearing was postponed in order to obtain her presence and testimony. Tracing agents employed were unsuccessful in tracing her whereabouts, and the rescheduled arbitration continued without her. The Court concluded:

> '*…. The fact that arbitration proceedings are regarded as hearing de novo does not mean that the legislation permitting hearsay in certain circumstances would not apply in arbitration hearings … the decision-maker or truer of fact, faced with the same situation as the arbitrator was faced with in this case, had a discretion to permit hearsay evidence or to exclude it ….*"
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> *… in terms of s 3(1) of the Amendment Act, hearsay evidence may be permitted in certain circumstances such as when the relevant witness is not available and it would be in the interest of justice to do so. Once the decision is made to admit the evidence, then the weight to be given to the particular testimony depends on the probabilities and credibility of the witness …*
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> *…. the arbitrator erred in law by rejecting the transcript entirely as hearsay, and then selectively relying on it to make certain findings in favour of Mauna (employee). The arbitrator's error resulted in an unfair trial*

17 The commissioner's decision to admit hearsay evidence and to uphold the Applicant's dismissal must be measured against the standard established in ***Sidumo v R Rustenburg Platinum Mine*** [2007] 12 BLLR 1097 (CC). In that case, the Constitutional Court developed what it termed a "reasonable decision-maker test". On this approach, this Court is entitled to interfere with an arbitration award only if the arbitrator makes a decision that a reasonable decision-maker could not reach. The Labour Appeal Court has recently held (see ***Edcon Limited v Pillemer N.O. & others*** (DA4/06)) that this "*boils down to saying the decision of the commissioner is to be reasonable …. meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision-maker at the arbitration whose function it is to weigh all the*

*relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof*" (see paragraph 21 of the judgment). I understand this to mean that this Court is required to determine whether the arbitrator's decision was reasonable or not having regard particularly to the reasons given for the decision. In this regard, the Court must remain alive to the distinction between appeals and reviews and the significance of that distinction. The Court's function primarily is to ensure that decisions made by arbitrators exercising their functions under the Labour Relations Act fall within the bounds of reasonableness (***see Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*** 2004 (4) SA 490 (CC)).

18 In ***Palaborwa Mining Company Limited v Anthony James Cheetham & 2 others*** (unreported JA 7/2006) the Labour Appeal Court elaborated further on the significance of the ***Sidumo*** judgment, and its consequences for applications for review brought in this Court. The Court confirmed that the standard to be applied is whether a decision reached by a commissioner is one that a reasonable decision-maker could not reach. The Court referred further, with approval, to the minority judgment of Ngcobo J who noted that the intention of the LRA is that "*as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances*".

19 The Labour Appeal Court observed that the effect of the ***Sidumo*** judgment was to reduce the scope for a dissatisfied employee to take his or her dispute further when it comes to an employer's decision to dismiss, and reduces the potential for the Labour Courts to exercise scrutiny over the decisions of commissioners appointed to arbitrate in terms of the Labour Relations Act (see page 9 of the unreported judgment). The Court went so far to suggest that the test is now "*very much narrower and simpler …. indeed it will be rare indeed that the Courts can interfere with a dismissal which has been confirmed by a Commissioner*".

20 I am satisfied that the arbitrator's decision to uphold the Applicant's dismissal was not one which a reasonable decision-maker could not reach.

21 I accordingly make the following order:

1 the application is dismissed, with costs;

2 In terms of section 162(3) of the Labour Relations Act, the United Peoples Union of South Africa, as the representative of the Applicant, is jointly and severally liable with the Applicant, the one paying the other to be absolved, for the costs of this application.

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**ANDRE VAN NIEKERK,**
**Acting Judge of the Labour Court**

Date of Hearing: 27 March 2008

APPEARANCES

For the Applicant: Mr Luthuli
UPUSA

For the Third Respondent: Advocate E Mokutu
Instructed by Ndou Attorneys