

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 16167/09

DATE: 15/10/2010

IN THE MATTER BETWEEN:

MERRIMAN CYPRIAN XOLANI MNGUNI

APPLICANT

AND

DIRECTOR KH MOHAJANE NO

(MEMBER OF THE APPEALS AUTHORITY,

BEHAVIOUR MANAGEMENT, SOUTH

AFRICAN POLICE SERVICES)

FIRST RESPONDENT

THE PROVINCIAL COMMISSIONER:

GAUTENG SOUTH AFRICAN POLICE SERVICES

SECOND RESPONDENT

THE NATIONAL COMMISSIONER:

SOUTH AFRICAN POLICE SERVICES

THIRD RESPONDENT

JUDGMENT

BAM, AJ

[1] The applicant, a member of the South African Police Services, with the rank of inspector stationed at the Crime Prevention Rading Unit at Booysens, Johannesburg, was found guilty by a disciplinary tribunal on two counts of misconduct having contravened the provisions of Regulation 20(z) of the South African Police Services' Disciplinary Regulations. The sentence imposed was a dismissal from the police.

[2] The applicant's appeal against the conviction and dismissal was dismissed by the first respondent on 11 August 2008.

[3] Subsequently, on 20 March 2009, the appellant filed this review application in terms of Rule 53 of the Rules of Court. The basis of the review is the allegation that the first respondent on appeal, failed to properly apply his mind to the evidence which was presented before the disciplinary tribunal, which amounted to a misdirection and an irregularity, hence this application for review.

[4] Mr Hulley appearing for the respondents, raised four points *in limine*. (The first three points turned upon the alleged lack of jurisdiction of this court):

- It was contended that the matter should have been referred to the CCMA or bargaining council, having jurisdiction;
- The applicant failed to show that the first respondent was performing administrative actions under the provisions of Act 3 of 2000 (PAJA);
- The applicant failed to comply with the periods prescribed in PAJA;
- The applicant appealed the decision of the first respondent without having appealed the decision and finding of the chairman of the disciplinary tribunal.

[5] Regarding the first three points, applicant contended that this application for review was based upon the irregularities in the quasi-judicial functions of the disciplinary tribunal and the first respondent, which per se is subject to review by this court. It was contended by the applicant, with reference to *Fredericks and Others v FEAT 3(C)* 2002 (2) SA 693 (CC) at 713 [40], that this court's jurisdiction is ousted by the provisions of section 157 of Act 66 of 1995, the Labour Relations Act (LRA).

[6] The most recent decision regarding the issue in question is the matter of *Gcaba v Minister of Safety and Security* 2010 (1) BCLR 35 (CC) in which matter justice Van der Westhuizen, writing for the full court, found that the LRA does not destroy causes of actions and where a remedy lies in the High Court, section 157(2)

of the LRA cannot be read to mean that it no longer lies there. (See par. 7(2) and 7(3)).

[7] Mr Hulley, appearing for the respondent's, argued that the actions of the disciplinary tribunal and the subsequent dismissal of the appeal to the first respondent, constitute administrative actions as contemplated in Act 3 of 2000, the Promotion of Justice Act (PAJA) and that the applicant, consequently had to comply with the provisions of PAJA. In this regard the applicant was obliged to prove that the first respondent was performing an administrative act as well as that the applicant complied with the time periods provided for in PAJA. Mr Hulley referred me to several decided cases in this regard namely: *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC); *Gcaba (supra)* (2010) (1) SA 238 (CC) and *Sapu and Another v National Commissioner of the SA Police Services and Another* (2005) 26 IJL 2403 (CC) 9. In *Gcaba supra*, par. (74) the court held as follows:

"The specific term 'jurisdiction' ... has been defined as the power or competence of a court to hear and determine an issue between parties." And in paragraph (75); *"Jurisdiction is determined on the basis of the pleadings as Langa CJ held in Chirwa and not the substantive merits of the case."* *"In the event of the court's jurisdiction being challenged at the outset (in limine) the applicant's pleadings are the determining factor."*

[8] In view of the guidelines and the *ratio decidendi* of *Gcaba* above, it appears that the applicant, in formulating his case against the SA Police Services, throughout based his complaints on the quasi-judicial functions of either the disciplinary tribunal and/or the first respondent. To my mind it is clear that the applicant did not have in mind to address any administrative action.

[9] There can be no doubt that the procedure before the disciplinary tribunal and the first respondent as appeal tribunal, was “quasi-judicial process” falling under the provisions of rule 53 of the rules of court.

[10] Rule 53 does not provide for a time limit in which the review should be brought – although a reasonable time is contemplated, calling for a reasonable and acceptable explanation why the delay, if any, in the launching of the review application occurred and why it should be condoned.

[11] In this matter the applicant’s appeal to the first respondent was dismissed in August 2008 and this review application was instituted on 20 March 2009, some seven months after the dismissal of the appeal. The applicant’s explanation centres on a pecuniary problem as a result of his dismissal from the SA Police Services. After having perused the application and having heard the arguments of counsel I do not regard the delay unreasonable in the circumstances, and accordingly I find that the explanation advanced by the applicant is reasonable and acceptable.

[12] The respondents' fourth point *in limine* turns upon the applicants alleged attack on the dismissal of the appeal by the first respondent and not per se at the finding of the disciplinary tribunal.

The *fons et origine* of the applicants application for review starts with the hearing before the disciplinary tribunal. The decision of the disciplinary tribunal was on appeal confirmed by the first respondent. The two decisions are, for the purposes of this review, inseparable. It is to my mind clear that the applicant took the decision of the disciplinary tribunal on appeal to the first respondent on the same basis as the grounds of review indicated by the applicant to form the basis of this review application.

[13] Rule 52(2) of the Rules of Court requires from an applicant to set out in his founding affidavit the grounds, facts and circumstances upon which an application for review should be reviewed and the decision set aside. In this regard Mr. Van Schalkwyk, for the applicant, referred me to paragraph 7 of the founding affidavit which reads as follows:

"I respectfully submit that the first respondent has failed to apply his mind to the relevant issue and the evidence led at the disciplinary hearing and that the reasons for his decision to dismiss my appeal are vague."

Mr. Van Schalkwyk's submission was that the contents of this paragraph satisfy the requirements of section 52(2) referred to above.

[14] The grounds for review are contained in the applicant's founding statement that the first respondent did not apply his mind in (a) accepting the evidence adduced before the disciplinary tribunal and (b) finding that the said evidence has proved the guilt of the applicant pertaining to counts 2 and 3. However the applicant referred to the (elaborated) notice of appeal against his conviction and the sanction imposed on the 15th of January 2007. This notice of appeal reads as follows:

"Ad conviction

Appellants 1, 3 and 4.

1. *The presiding officer erred in finding that the respondent proved on a preponderance of probabilities that the appellants did indeed commit an act of corruption and therefore contravened section 20(z) of the South African Police Service Disciplinary Regulations.*

2. *The presiding officer further erred in accepting the evidence of the witness Clifford Nyoni notwithstanding material contradictions in his evidence.*

3. *The presiding officer further erred in not taking into consideration that the said witness and the motive and implicate the appellant's falsely.*

4. *The presiding officer further erred in that the video footage was accepted as correct notwithstanding the fact that the video footage which was relied upon was an edited version which could not be relied upon.*

5. *The presiding officer further erred in that he rejected the versions of the appellants as false notwithstanding the fact that their versions were corroborated by witnesses called on their behalf.*

6. *The presiding officer should have found that the respondent did not prove its case against the appellants on a preponderance of probabilities.”*

[15] The applicant further refers to a supplementary notice of appeal. This document, however, contains arguments and does not comply with what is required of a notice of appeal.

[16] The “irregularity” allegedly committed by the first respondent was to confirm the finding of the disciplinary hearing chaired by senior superintendent Pacehai.

The criticism was levelled at the first respondents’ confirming of the convictions and the sanction imposed by the disciplinary committee. From the outset I want to record

that the grounds of review upon which the applicant bases this application remained the same as the grounds for appeal contained in the applicant's notice of appeal.

FACTS

[17] The witness Clifford Nyoni entered the RSA from Zimbabwe as an illegal immigrant. Nyoni was subsequently arrested by members of the South African Police, a special unit, stationed at Booyens Johannesburg. Nyoni apparently became involved with corrupt policeman who allegedly took bribes to release some of the arrested people, mainly illegal immigrants. It appears from the evidence that Nyoni was perturbed about the way the police focused on illegal immigrants and then took bribes to have them released. In an effort to expose the corruption at the said police station, Nyoni approached a local television broadcast channel and proposed to set a trap for the corrupt policemen, to uncover the bribery and corruption. Neither Special Assignment nor Nyoni made an effort to contact any policeman in this regard. Nyoni and Special Assignment then agreed to set the situation in motion with the intention to trap the corrupt policemen. The agreement apparently contained that Nyoni would become the "trapping agent" or "agent provocateur" who would then expose the corrupt policemen. For that purpose Nyoni was supplied by representatives of Special Assignment with a "spy camera" which name explains a lot. The device is a very small video camera hidden in some cover, a bag, and handled by the carrier. Nyoni would talk to one of the suspect policemen to set things

in motion and at the same time taking a video of whatever happened thereupon. The procedure further entailed that Nyoni would make contact with one of the policemen in the police station, point out one of the arrestees and enquire whether that specific arrestee, after having supplied the policemen with a name, could be released upon the payment of a sum of money. The policemen involved would then tell what amount of money was required, usually R300-00, for the release of a specific person; he would take the money and then release the person from where he or she was detained. The detainees were apparently awaiting trial prisoners who were shortly before arrested on various charges including that of drunkenness, prostitution and illegal immigrancy. For some of these crimes admission of guilt in the amount of R300-00 was the norm excluding for illegal immigrants. The latter category would be removed from Booyens station to another police station to be kept in custody pending trial.

[18] Several counts were preferred against the applicant for mainly the contravention of regulation 20(z) of the Police Regulations. Regulation 20(2) provides for any alleged misconduct by a member of the SAPS which includes bribery and corruption.

[19] Nyoni's evidence regarding the applicant was as follows (page 150 of the papers and further.)

“No 1 told me to go and wait outside. During that time when he asked me how he could help, where I told him I am asking for my sister he asked me what I have brought for her. I told no. 1 money. He asked me how much. I told him R300-00. That is when he told me to go and wait outside.”

“After a while no 1 came and he was standing at the entrance and he told me to hand over the money. It was all in R100-00 notes. I was giving him R100-00 notes one by one. He said: put more, put more.”

“How much did you give him. I gave him R300-00 and the lady was released after that.”

“Presiding officer: the lady was released? Yes she was released. Who took her out of the room? Did she come out on her own? I gave no. 1 the money and he went inside. During that time the lady came out.”

“After handing over this R300-00 to no. 1, did you receive a receipt? I did not receive anything.”

“How many people were in the room” ... “What was done, after the said people were put in room 6A. All the detainees which were in most cases $\pm$ 30 people. When they were put in that room, relatives and friends would then be

allowed to come and talk to their people. Those with money would be released. Those without would be charged."

"After these incidents happened, this time you paid for the lady Nonhle, was that the last time you went there? That was the last time that we went there."

"Why did it stop there?"

"The executive producer of Special Assignment said that we have enough for the whole story."

[20] The video depicting the whole operation was shown to the disciplinary hearing and the witness Clifford Nyoni confirmed the contents thereof.

[21] During cross-examination Nyoni conceded that he was paid R3000-00 for his efforts by Special Assignment.

[22] What however, became apparent is that the video tape did not reflect the incident where Nyoni met the applicant. Nyoni in his evidence in chief testified that he met the applicant at room 6A. The video, as was conceded by Nyoni, did also not reflect the situation when the money (R300-00) was paid to the applicant. In this regard Nyoni advanced an explanation which reflects upon the representatives of Special Assignment having "edited" the video tape for broadcasting purposes. This

reason was advanced by Nyoni during cross-examination when he alleged that the video tape contained everything that took place during his “dealings” with the applicant.

[23] The applicant’s defence was put to Nyoni during cross-examination being that he conceded that he took money from Nyoni which money was intended for a fine of the amount of R300-00, for a specific person whose name he could no longer remember, who was as far as he remembered arrested for drinking in public. The applicant could not find the specific person when he called him by the name supplied by Nyoni and he thereafter returned the R300-00 to Nyoni.

[24] Nyoni described but one incident which occurred between him and the applicant. From the evidence it appears that this incident occurred in August 2005. According to Nyoni the woman who was released, Nonhle, was later located by the police. He, Nyoni, pointed this woman out to members of police force. However, this woman did not testify, no reason was advanced.

[25] The applicant testified, and denied the allegations of bribery. He confirmed his defence as was put to Nyoni during cross-examination.

[26] The disciplinary committee then convicted applicant on two counts of having contravened the provisions of section 20(z) of Police Regulations, counts 2 and 3. Applicant was acquitted on the count 1. The residing officer of the disciplinary

committee did not advance any reasons whatsoever for the conviction of the applicant on the said two charges of bribery. What the court however did was to refer to the said two counts as being two separate counts, the one allegedly committed in August and the other in July 2005 as reflected in the charge sheet. This was clearly a misdirection in that evidence which was adduced, Nyoni's evidence, concerned only one of the two charges, apparently the third count. According to Nyoni's evidence the incident must have happened during August 2005. Count 3, the charge sheet, refers to the incident in August 2005. There was no other evidence on record regarding the second charge of which the applicant was also convicted. In this regard I need to point out that the applicant by way of a supplementary notice of appeal inquired from the presiding officer senior superintendent Pacehai to state the basis for his conviction of the applicant on two counts. There was no reply.

[27] It was common cause that the applicant and the fellow police officers standing trial before of the disciplinary committee, were charged in the local magistrate's court on several counts of bribery and corruption flowing from the facts stated by Nyoni. According to the applicant, during his evidence in chief, the charges were however withdrawn by the state after Nyoni had testified in this disciplinary hearing. (The disciplinary hearing was repeatedly postponed for various reasons, after the evidence of Nyoni was led, before applicant testified.)

[28] Mr Hulley, for the respondents submitted that the fact that the applicant was released by the criminal court after the case against him was withdrawn, is irrelevant

pertaining to the disciplinary hearing. The guilt of the respondent in the disciplinary hearing, had to be proved on a balance of probabilities, and this is what happened, according to Mr Hulley.

[29] Mr Van Schalkwyk further argued that the disciplinary tribunal and the first respondent, on appeal, erred in having accepted the evidence of Nyoni. The grounds of this contention by Mr Van Schalkwyk include his criticism that Nyoni was a self confessed criminal in that he bribed the policemen, that he entered the republic as a illegal immigrant and further assisted the policemen to commit crimes of corruption. Mr Van Schalkwyk further contended that the evidence pertaining to the use of Nyoni as a trap, in the circumstances, should not have been accepted by the disciplinary hearing and should not have been confirmed by the first respondent on appeal.

[30] Evidence of traps used to get convictions on certain crimes in criminal courts has been criticized over many years. As a result thereof a cautionary rule has developed. Courts should be careful in accepting the evidence of traps without considering issues like hidden agenda. In *S v Chesane* 1975 (3) SA 172 (T) at 173 the following was remarked by McEwan J:

“Persons used as traps may have a motive in giving evidence which may outweigh their regard for truth.”

A close monitoring of traps employed by the South African Police Services has in the past been a requirement to make this type of evidence acceptable. The issue of traps were that controversial that the legislature has enacted section 252A of the Criminal Procedure Act, now regulating evidence obtained through traps. I need not quote the contents of section 252A for purposes of this judgment. It however appears from the record that Mr Van Schalkwyk's submission that the disciplinary hearing and the first respondent did not pay heed to the aforesaid precautionary rule in the circumstances seems to me correct. This issue has nothing to do with the onus of prove as suggested by Mr Hulley for the respondents.

[31] What I regard as important is the fact that where one would have expected corroboration of Nyoni's evidence by way of the video tape it appears now that there is no such corroboration for some or other unknown reason, which remained unexplained. The suggestion that somebody could have edited the tape and removed specific relevant parts from it is unsubstantiated. This explanation by Mr Nyoni is totally unsatisfactorily and to my mind amounts to pure conjecture. All that I can find now is that there appears no such evidential material on the tapes. Instead of the video tape corroborating the version of Nyoni in that regard, to my mind the "lack" of that evidence does a lot of damage to the case against the applicant.

[32] There is further no explanation on record why no member of the South African Police Services was involved or contacted or advised of the situation. Nyoni's actions were uncontrolled which is, to say the least, a matter of grave concern. To my mind

any tribunal or court should discourage conduct of this nature and should be very careful before accepting same as evidence.

[33] The quality of the evidence of Nyoni therefore concerns me. Nyoni's evidence is to my mind a classic example why the evidence of traps should be considered with caution. Nyoni could have planned revenge and could have had a hidden agenda; he had previous experiences or encounter with the same police unit which to his mind affected the rights of "fellow illegal immigrants". Nyoni's evidence was in any event that of a single witness and a trap. It is clear that a cautionary approach to his evidence was called for. See Hiemstra Suid-Afrikaanse Strafprosesreg 7de uitgawe p679.

[34] These cautionary rules were not applied during the disciplinary hearing or by First Respondent. The version of Nyoni and the version of the applicant are mutually destructive. When the probabilities are therefore considered I find that the probabilities favour the applicant. See *Koster Koöp Landbou Maatskappy Beperk v SA Spoorwee en Hawens* 1974 (4) SA 420 (WPA).

[35] The aforesaid principles are usually applied in criminal matters where the accused's guilt has to be proved beyond reasonable doubt. However to my mind the same principles are applicable on the facts of this matter.

[36] A proper consideration of all the circumstances and the facts referred to above shows that the chairman of the disciplinary tribunal and the first respondent on appeal, did not apply their minds to the evidence adduced against the applicant.

[37] The evidence shows that the versions of Mr Nyoni could not pass muster. On the probabilities the applicant's exculpatory version should have been accepted.

[38] I have already pointed to the considerations of facts above. To my mind the conviction of applicant was irregular.

1. The applicant's application for the review of the proceedings before the disciplinary hearing and the confirmation thereof on appeal by the first respondent succeeds.
2. The proceedings are reviewed and set aside.
3. Respondent is ordered to pay the applicant's costs.

AJ BAM

ACTING JUDGE OF THE HIGH COURT OF NORTH GAUTENG

FOR THE APPLICANT:

INSTRUCTED BY:

FOR THE RESPONDENTS:

INSTRUCTED BY:

DATE: 6 OCTOBER 2010