

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: 20122/07

In the matter between: ~~DELETE WHICHEVER IS NOT APPLICABLE~~
1. REPORTABLE: YES/NO.
A J VILJOEN (2) OF INTEREST TO OTHER JUDGES: YES/NO. APPLICANT
(3) REVISED.
And 27 May 08
HN NEMASISI N O DATE SIGNATURE 1ST RESPONDENT
PROVINSIALE KOMMISSARIS 2ND RESPONDENT
NASIONALE KOMMISSARIS 3RD RESPONDENT
MINISTER VAN VEILIGHEID EN SEKURITEIT 4TH RESPONDENT

JUDGMENT

TLHAPISA

- [1] The applicant was a detective inspector attached to the Organized Crime Unit of the South African Police Services. He was stationed at its Provincial Head Office in Polokwane before his discharge from the service on the 7 December 2005. The applicant seeks to review the actions of the first and second respondents in particular with regard to his suspension without salary and benefits effective the 1 June 2005 and his dismissal or discharge from service on the 7 December 2005.

BACKGROUND

- [2] The applicant was arrested with two of his colleagues on charges of fraud on the 26 April 2005.

He was released on bail on the same day. The second respondent suspended him from duty without salary or benefits by letter dated 1 June 2005. Contrary to what was said in this letter, and as required by the regulations (**Regulations for the South African Police Service No. 17662 dated 27 December 1996**), he was never given the opportunity to make any representations to the second respondent prior to his suspension. He contended that the second respondent had therefore failed to exercise proper discretion when considering his suspension.

- [3] On the 19 August 2005 he received notification to attend a disciplinary hearing to be convened from the 29th to the 30th of the same month. He was given less than 7 days notice to prepare as required by the regulations and the charge sheet was not annexed to such notice. He failed to attend the hearing due to ill health and a sick note was handed in on his behalf. Another notification dated the 30 August 2005 was served on him on the 28 September 2005. It advised him of the next scheduled date of the enquiry, the 4 October 2005. The charge sheet was again, not attached and, short notice was given for preparation of the disciplinary hearing.
- [4] The applicant assumed that the charges were similar to those of the criminal case against him, which had already commenced. He applied for another postponement for purposes of preparation and in order to secure legal representation provided for by the state, in respect of the disciplinary hearing. Applicant averred that the second respondent was responsible for effectively denying him the right to legal representation with full knowledge that he required such assistance because he was facing serious charges and, because he could not afford one due to his suspension without a salary. This occurred despite an entitlement to legal representation as provided for in the regulations.

- [5] On the 21 November 2005 the applicant received a letter dated the 18 November 2005 which noted his failure to attend the disciplinary hearings of the 29th August and 4 October 2005. He was informed that he was required in terms of the regulations, to arrange a date with the disciplinary officer for the next sitting of the disciplinary hearing. A letter in this regard was forwarded on the 2 December 2005 by his union, Solidarity. Prior to receiving a response and on the 3 December 2005, the applicant addressed a letter of concern to the Commissioner of Police and others.

The second respondent informed Solidarity that a disciplinary hearing had been convened for the 5 December 2005. The notification was not in the prescribed format and, in this instance too, insufficient time had been given for preparation. The applicant failed to attend this hearing and caused a sick note to be handed in at the hearing. The second respondent addressed another letter dated the 6 December 2005 which convened the disciplinary hearing for the following day, the 7th. Further, the letter informed him that failure to attend could result in his dismissal effective the 5 December 2005. The applicant was dismissed after failing to attend the hearing of the 7th and notification in this regard was only received by him on the 16 January 2006.

- [6] According to the applicant, the minutes of the disciplinary proceedings of the 7th reflected that he had been found guilty by the first respondent. He was not certain if any evidence had been led before such finding. The applicant averred that his dismissal by the first respondent was not in accordance with the regulations 10 (1) (c) – 10 (5) (a) and (b) and his reasons for dismissal in a letter dated the 13 December 2005 to the second respondent, did not reflect the true state of affairs. The applicant referred a dispute to the Bargaining Council (SSSBC) on the 8 February 2006. The dispute related to the manner in which his case was handled and the referral was

accompanied by an application for condonation for the late referral of the dispute.

A response to his letter of concern of the 3 December 2005 and reasons for his dismissal were communicated to him by letter during March 2006. He was further informed that his dismissal was in terms of regulation 5 which did not provide for any process of appeal.

- [7] The determination of the applicant's referral to the Bargaining Council was only heard on the 28 March 2007. According the panelist J B Mthembu, condonation was not granted. Further, Mr Mthembu stated in his analysis of the arguments, the Bargaining Council lacked jurisdiction to hear the matter and advised that the dispute be referred to the Labour Court. Consequently the applicant approached this court for the review of his suspension and dismissal in terms of the PAJA (Promotion of Administration and Justice Act 3 of 2000).
- [8] The first respondent contended that the regulations made provision for a suspension without a hearing. Further, that it could not establish from the contents of the applicant's file whether applicant had made any representations to the second respondent regarding his suspension, save to state that the applicant failed to challenge his suspension as provided in regulation 15 (3). The first respondent denied that the applicant was not served with a charge sheet and according to him notice was given timeously. According to the first respondent: the applicant failed to arrange the rescheduling of the disciplinary hearing prior to its sitting on the 29 August 2005 as required in terms of the regulations and that his failure to attend constituted a misconduct in terms of regulation 10(2). The hearing was postponed for twenty one days to the 4 October 2005 and the applicant was notified accordingly. He failed to attend this hearing. The first respondent contended that the hearing had been constituted and that applicant's concerns relating to legal

representation and other issues would have been dealt with if taken up with the presiding officer at the hearing. Instead applicant failed to attend the hearing, and chose to take the matters up with the second respondent.

- [9] Having failed to attend the hearing of the 4 October 2005, the provisions of regulation 10 (5) (a) (ii) were invoked and the matter was indefinitely postponed. According to this regulation the applicant was required to reconvene the hearing by making arrangements with the presiding officer within two months calculated from the 4 October 2005 failing which he would be deemed to be discharged from the service. The first respondent conceded that the applicant's union was informed of the hearing scheduled for the 5 December 2005. The concerns addressed in the applicants letter dated the 3 December 2005 did not reach the presiding officer. The first respondent contends that the applicant used all tricks to avoid attending the hearing and that this was displayed in the content of the said letter. The first respondent denies that the applicant's failure to attend the hearing of the 5 December 2005 was motivated by medical unfitness. He contended further that he had complied with all the regulations relating to the postponements and finally dismissed the applicant by operation of law.
- [10] Three points in limine were raised on behalf of the first respondent. The first point *in limine* concerned the applicant's failure to comply with section 7(1) of PAJA. The second point *in limine* concerned the applicant's failure to comply with section 7(2) of PAJA. The third point in limine concerned the jurisdiction of the High Court.

It was submitted on behalf of the applicant that the founding affidavit as at paragraph 25 relied on PAJA. No reference was made in the founding affidavit to section 23 of the Constitution or to the

dispute being that of an unfair labour practice as envisaged in the LRA. In as far as applicant's dismissal was concerned he was not afforded a right of appeal despite this being availed in terms of rule 13.

- [11] The applicant seeks his reinstatement from the 1 June 2005 with full benefits. It is therefore important for me to deal with the issue of the suspension of the applicant without salary and benefits.

Certain documents of importance were not attached to the founding affidavit being applicant's referral of the dispute to the Bargaining Council (SSSBC), the application for condonation for the late referral of the dispute and, the notice informing his dismissal dated the 16 January 2006. The condonation ruling of Mr Mthethwa does however give indication of what was before him. Paragraph 25 of the founding affidavit should not be read in isolation. My understanding of the ruling which resulted in the launching of this application is that the applicant referred an unfair dismissal dispute. He alleged that he had been dismissed without been afforded a hearing, that is, the *audi alteram partem* rule had not been adhered to. This suggests to me that the applicant's case before the SSSBC was of a procedurally and substantively unfair dismissal and this view is supported by his averment in paragraph 14.4 and 20, of the founding affidavit. According to the applicant the charges before the disciplinary hearing were similar to those of the criminal case and he had been dismissed without any evidence been heard in respect of the charges. Ordinarily this dispute would have had to be adjudicated under the LRA, that is, under the conciliation and arbitration process and possible review before the Labour Court.

- [12] The applicant referred this dispute to the SSSBC on the 8 February 2006. It was expected of the parties to exchanged 'pleadings' before the matter was considered. (section 191(3) LRA). The applicant was therefore aware of the opposition to his referral and of the issues raised regarding his dismissal. The letter dated the 13 December 2005 from the first to the second respondent and the letter addressed to the applicant by his employer dated the 9 March 2009 clearly explained the nature of his dismissal. Further, it is evident from the ruling that not only was the applicant's application for condonation opposed, the respondent, the South African Police Services, contended that the dismissal was by operation of law.
- [13] The applicant contends that the condonation hearing was heard without giving him an opportunity to present his case. The ruling does state that findings were made on consideration of the papers only and, this process is allowed in terms of the rules, (29 (5), (6) (8) and (9) of the Rules of the SSSBC). On the 28 March 2007, a year after the dispute and application for condonation were referred, the SSSBC declared that that it did not have jurisdiction to deal with the matter and the applicant was advised to approach the Labour Court. It was submitted on behalf of the applicant that it was not necessary for him to have approached this court on an earlier date or within the 180 days as prescribed by section 7(1) of PAJA because he awaited the outcome of his referral to the SSSBC. Further, that no application for condonation was required.
- [14] In as far as his suspension was concerned it does not appear from the founding affidavit that applicant availed himself of the process to challenge his suspension in terms of regulation 15. His referral documents are not part of the founding papers and it is also evident from the condonation ruling that the applicant did not refer a dispute relating to his unlawful suspension to the

SSSBC. His failure to do so cannot be ignored because he seeks an order to reinstate his salary and benefits. In my view the failure by an employer to engage the applicant as required by regulation 15 resulted in an unfair labour practice which had to be dealt with in terms of the LRA. If the applicant had referred a dispute then, the said dispute would have followed the route of conciliation, arbitration and possible review of the award before the Labour Court as provided by the LRA. The applicant did not avail himself of this process.

[15] If he approaches this court on the assumption that PAJA was applicable then section 7(1) provided that the review application be brought without unreasonable delay and within a 180 days of the date of incident. The applicant's suspension was not effected as a result of regulation 10. He was suspended in terms of regulation 15, effective the 1 June 2005 and this application was launched on the 23 May 2007. In my view, the issue of his suspension was never before the SSSBC. The condonation ruling would have reflected such fact. Therefore the explanation that he awaited adjudication of his referral does not assist him.

[16] The applicant referred a dispute to the SSSBC on the 8 February 2006. I have already indicated that he was aware as early as March 2006 that according to the respondents, his dismissal did not relate to the charges against him and that the first and second respondent contended that his dismissal was by operation of the law and that there was no right of appeal. The issue is whether the processes engaged by the first and second respondent from the time when the first disciplinary hearing was convened up to the 7 December 2005 could be reviewable under PAJA. The LRA and the rules prescribed time limitations within which certain processes should unfold. The aim is to enable speedy resolution of a dispute. It is unacceptable to me that the applicant as

litigant allowed his application with the SSSBC to go unattended for so long, February 2006 to March 2007 and for him to approach this court without explaining why he as litigant allowed the process to delay what efforts he engaged with the SSSBC to have his matter set down or heard, before approaching this court.

- [17] It is my view that in as far as the applicant sought to rely on PAJA he ought to have brought a substantive application for condonation to explain why the application was not brought within the 180 days and further, apply for exemption as provided for in section 7(1) and (2) of PAJA before the merits of the case could be considered.
- [18] The dismissal or discharge from service of the applicant was the result of an operation of law. **M G Phetheni v The Minister of Education and Others, (2006) 9 BLLR 821 (SCA)** determined that a discharge by operation of law did not amount to administrative action because it did not involve the exercise of a discretion. Therefore, the applicants dismissal cannot be challenged under PAJA, **Chirwa v Transnet Limited and others (2008) 29 ILT 73 (CC)** as at paragraphs 143, 149 and 150.
- [19] In the premises the following order is made:

1. The application is dismissed with costs which include the costs of both counsel.