

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. 4031/2007

In the matter between:-

MILLY MARIA SWANEPOEL

First Applicant

DANIël JOHANNES VAN DER BERG

Second Applicant

and

T A MASHIGO NO

First Respondent

J S SELEBI NO

Second Respondent

C NQAKULA NO

Third Respondent

JUDGMENT BY:

VAN DER MERWE, J

HEARD ON:

13 SEPTEMBER 2007

DELIVERED ON:

27 SEPTEMBER 2007

- [1] This is an application to review and set aside the decision of the first respondent, taken on 16 August 2007, to suspend the applicants from their employment with the South African Police Service (“SAPS”) without any remuneration, pending disciplinary procedures against them.

[2] The first applicant is a superintendent in the SAPS. She has 26 years service in the SAPS and from 23 July 2003 to 13 July 2007 she was the station commissioner of the Navalsig police station. The second applicant is a captain in the SAPS, with 20 years service. From November 1997 to 13 July 2007 he was the commander: crime prevention of the Navalsig police station. The first respondent is the provincial commissioner of the SAPS in the Free State in his official capacity, the second respondent is the national commissioner of the SAPS in his capacity as such and the third respondent is the Minister responsible for the SAPS.

[3] When a crime or alleged crime is reported to the SAPS, the particulars in respect thereof are entered into a computer system referred to as the Crime Administration System ("CAS") and a CAS number is allocated to the case. The CAS number consists of the following, in that sequence, namely the name of the police station, the letters CAS, a serial number, the month and the year. When a case docket is opened for purposes of investigation of the case, the case docket bears the same CAS

number. The essential allegation against the applicants is that they manipulated crime statistics at the Navalsig police station by intentionally and without justification changing crimes or alleged crimes in the CAS system and on case dockets to less serious crimes. This was allegedly done to present a brighter picture in respect of crime in the area served by the Navalsig police station.

[4] The whole saga in respect hereof commenced when the newspaper Volksblad on 5 July 2007 published an anonymous letter containing allegations of this nature. It later transpired that the letter was written by one Johan Luwes, who previously served as a police officer at the Navalsig police station. This led to several articles published in Volksblad, including an editorial of 13 July 2007, wherein *inter alia* the integrity of the crime statistics published by the second respondent, was questioned.

[5] Also on 13 July 2007, both applicants were instructed in writing to assume duties at Park Road police station on Monday 16

July 2007. Both applicants duly complied. It appears from the answering affidavit of the first respondent that temporary transfers pending disciplinary action, were intended. On 17 July 2007 both the applicants were arrested and taken to the magistrate's court, where the case against them was postponed to 27 October 2007. On 24 July 2007 the attorney for the applicants wrote to both the SAPS and the Director of Public Prosecutions. In each letter it was stated that the applicants are willing to co-operate and therefore intend to furnish (so-called warning) statements, but that they are unable to do so without knowledge of charges against them and/or without copies of the statements in the docket. The attempt to obtain such copies proved to be fruitless. The case docket in respect of the case against the applicants was delivered to the Director of Public Prosecutions on 27 July 2007. The stated purpose hereof was to formulate the charges against the applicants.

- [6] In terms of section 24(1) of the South African Police Service Act, No. 68 of 1995, the third respondent made The South African Police Service Discipline Regulations, 2006 ("the

regulations”). The regulations were promulgated under Government Notice No. R643 in Government Gazette No. 28985 of 3 July 2006. On 1 August 2007 the first respondent issued to each of the applicants a notice of intended suspension in terms of regulation 13(2) of the regulations. In terms of these notices the applicants were informed that their suspension without any remuneration under regulation 13(2) of the regulations will be considered on the ground that the applicants allegedly committed serious misconduct

“during the period 2006/08/01 to 2007/07/11 (by) contravening Regulation 20(Z) of the Discipline Regulations, 2006, in that you allegedly committed a common law offence, to wit, defeating or obstructing the course of justice and fraud”.

The applicants were also informed that they are entitled to submit written representations in this regard. Such written representations dated 3 August 2007 were indeed forwarded to the first respondent on behalf of each of the applicants by their attorneys. In the representations on behalf of each of the applicants it was *inter alia* stated that the charges against the

applicants have not yet been formulated and that it is uncertain whether there are any grounds for such charges. It was also intimated that the case docket had been delivered to the Director of Public Prosecutions on 27 July 2007 for purposes of formulation of the charges and that the Director of Public Prosecutions intimated that it might take quite some time to evaluate the alleged charges. On behalf of each applicant it was reiterated that they have professed full co-operation to answer to the alleged charges as soon as they are made available and copies of the aforesaid letters of 24 July 2007 were attached. None of this is disputed.

- [7] On 20 August 2007 the first respondent informed each of the applicants that he had decided on 16 August 2007 to suspend them in terms of regulation 13(2) of the regulations with immediate effect without any remuneration on the ground that they allegedly:

“during the period 2006/08/01 to 2007/07/11 contravening (sic) Regulation 20(Z) of the Discipline Regulations, 2006, in that you

allegedly committed a common law offence, to wit, defeating or obstructing the course of justice and fraud”.

[8] The said regulation 13 provides as follows:

“13. Precautionary suspension

- (1) The *employer* may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.
- (2) The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in Annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: Provided that –
 - (a) before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations;

- (b) the Commissioner considers the representations and inform the employee of the outcome of the representations;
- (c) the disciplinary process must be initiated within fourteen (14) *calendar days* of the date of the decision to suspend the employee without remuneration; and
- (d) if the disciplinary process is not completed within sixty (60) *calendar days* from the commencement of the suspension, the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider. The Commissioner must take any decision on continued suspension within seven (7) *calendar days* of receiving written representations on continued suspension and inform the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of thirty (30) *calendar days*.

- (3) A suspension is a precautionary measure.
- (4) If an employee is suspended with full remuneration or transferred as a precautionary measure, the *employer* must hold a disciplinary hearing within sixty (60) *calendar days* from the commencement of the suspension or transfer. Upon the expiry of the sixty (60) days, the chairperson of the hearing must take a decision on whether the suspension or temporary transfer should continue or be terminated.”

Annexure A to the regulations includes the crimes of fraud and defeating the course of justice.

- [9] As the suspension of an employee without any remuneration before a disciplinary hearing is a very extreme measure, it must clearly be exercised only in exceptional circumstances. In this regard one can perceive of a case where it is so inevitable that a police officer will be convicted of a serious crime and dismissed as a result thereof that it is not in the public interest that the person remain on as a paid police officer. The papers before me contain extracts from an official document entitled Guidelines: South African Police Service Discipline

Regulations, 2006 (“the guidelines”) issued by or on behalf of the second respondent. The guidelines therefore also expressly state that the procedure provided for in regulation 13(2) may only be used in exceptional circumstances when the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed during a disciplinary hearing.

- [10] As appears from the above, regulation 13(2) specifically provides that the employee must be given a reasonable opportunity to make written representations. This is in accordance with section 3(2)(a)(ii) of the Promotion of Administrative Justice Act, No. 3 of 2000. Such opportunity relates to all relevant factors that may be taken into account by the decisionmaker. What will constitute a reasonable opportunity will naturally depend on the circumstances of each case. The seriousness of the allegations and of the possible consequences of the disciplinary action are important matters in this regard. Compare J R de Ville, **Judicial Review of Administrative Action in South Africa**, Revised First Edition,

p. 252 – 254 and especially **DU PREEZ AND ANOTHER v TRUTH AND RECONCILIATION COMMISSION** 1997 (3) SA 204 (A) at 234 H – I.

[11] In the present case I do not think that the applicants were afforded adequate opportunity to make meaningful representations. It is not disputed that the applicants dealt with approximately 150 case dockets per month and that therefore during the period 1 August 2006 to 11 July 2007 they dealt with in excess of 1 500 cases and case dockets. Apparently some 70 of these case dockets form part of the docket of the case against the applicants. During argument counsel for the respondents argued in this regard that the applicants had obtained the requisite or sufficient knowledge as a result of a conversation that took place on 12 July 2007 between the applicants and an officer or officers appointed by the first respondent to investigate the case. It appears, however, that on the evidence for the respondents, only one docket was discussed on that occasion. In my judgment a reasonable opportunity to make representations in the specific

circumstances of this case at least required that the applicants be referred to the specific CAS numbers and the crimes or alleged crimes before or after the alleged variation thereof, much in the same way as the first respondent did in his answering affidavit in respect of only four dockets. After 16 July 2007 there was no acceptable reason to act in haste and in my opinion this requirement would not ask too much from the first respondent. In my judgment the point is very well illustrated by the answers provided by the applicants in the replying affidavit in respect of the four dockets referred to by the first respondent. *Prima facie* these answers are quite convincing. They include that changes were made in good faith on account of further information, investigation or evaluation by collective decision of approximately twelve members of the Navalsig police station at daily meetings held in terms of standard procedure. They include that these changes were reflected in official minutes of these meetings, copies of which were attached to the replying affidavit. They include that one of these four cases, namely CAS 116/08/2007, was reported during August 2007, that is after transfer of the applicants to Park Road police station. In

fact, it appears from the serial number of this case that it may even have been reported for the first time after the decision to suspend the applicants, taken on 16 August 2007. It is clear to me, therefore, that had the first respondent referred the applicants in the notice of intended suspension to case numbers and alleged changed crimes as he did in the answering affidavit, the applicants would have been enabled to furnish representations that could have materially influenced the decision. I conclude, therefore, in the first place that the decision of the first respondent to suspend the applicants in terms of regulation 13(2), must be set aside because the applicants were not afforded a reasonable opportunity in the circumstances to make representations as required by regulation 13(2).

[12] The first respondent's answering affidavit consists of 45 pages.

I do not think that it is unfair to state that the answering affidavit is extremely vague and replete with platitudes such as that the decision in question was taken on all the relevant facts and in line with the law or legislation. It is not at all clear what

information was available to the first respondent or considered by him when the decision in question was taken. Of particular importance in this case is that nowhere in the answering affidavit is it stated by the first respondent that he reached the conclusion that the case against the applicants is so strong that it is likely that the applicants will both be convicted of the alleged crimes and be dismissed, nor, of course, does the first respondent state any grounds for such conclusion. In my view, the inference is inescapable that the first respondent failed to apply the test specifically provided for in regulation 13(2). Therefore the decision is fatally flawed as a result of material error of law.

- [13] Furthermore it is clear from provisions of regulation 13 that the purpose of any suspension in terms thereof is to serve as a precautionary measure. In this regard the following is stated in the guidelines:

“The suspension of an employee may only be considered if –

- the continuation of the employee's employment is likely to result in him or her continuing with or committing further misconduct;
- the continuation of the employee's employment may negatively impact on the investigation;
- the employee will be in a position to hide, destroy or embezzle the evidence if his or her employment is continued;
- interference with or intimidation of witnesses might occur if the employee's employment is continued; or
- the continuation of the employee's employment may negatively impact on service delivery by the Service."

The first respondent does not say that in the absence of a suspension there was a likelihood of any of the applicants continuing with or committing further misconduct. Nor does he say that the continuation of the employment of the applicants may negatively impact on service delivery by the SAPS. The first respondent does seem to say that he entertained a reasonable fear of interference by the applicants with the investigation of the case against them if they were not suspended, but does not state any reasons for such conclusion.

In my opinion, a reasonable person could on the available information not conclude that suspension of the applicants was required as a precautionary measure. As pointed out already, the applicants were transferred from the Navalsig police station with effect from 16 July 2007 and on 27 July 2007 the case docket in respect of the case against the applicants was already in the possession of the Director of Public Prosecutions. I fail to understand how the applicants could in these circumstances have interfered with the investigation of the case against them. For the same reasons the suspensions are not rationally connected to the purpose of the empowering provision. On this ground too, the application must succeed.

[14] In the light of these conclusions it is not necessary to consider the other grounds for review relied upon on behalf of the applicants.

[15] In conclusion there is one aspect of the case that I feel constrained to mention. It will be remembered that the applicants were arrested and taken to court on 17 July 2007.

On that date the case was postponed to 27 October 2007 and the applicants were released on caution. Only on 27 July 2007 the case docket was referred to the Director of Public Prosecutions in order to formulate the charges against the applicants and, no doubt, to assess the case against the applicants. This is in accordance with what I consider to be an unhealthy practice that, in my experience, is employed all too often. Justice and the administration of the law as well as logic require that in a case such as this where there is no real risk of flight or interference with the investigation or witnesses, the investigation should be completed and the charges formulated before the accused person is required to appear in court. To do otherwise (or the other way around) is to cause injustice to the accused person and to place an unnecessary burden on the courts. It may also result in questioning of the motives for bringing the accused person before court in this fashion or of the motivation to complete the investigation expeditiously.

[16] In the result the following orders are made:

1. The decision of the first respondent of 16 August 2007 to suspend the applicants without any remuneration, is reviewed and set aside.
2. The first respondent is ordered to allow the first applicant and the second applicant to serve at the Park Road police station in terms of notice dated 13 July 2007, pending the finalisation of disciplinary steps against the applicants.
3. The respondents are ordered to pay the costs of the application.

C.H.G. VAN DER MERWE, J

On behalf of applicants:

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Instructed by:
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BLOEMFONTEIN

On behalf of respondents:

Adv. T.F. Mathibedi
Instructed by:
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