



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PA16/2021

In the matter between:

MINISTER OF POLICE

Appellant

and

**THE SAFETY AND SECURITY SECTORIAL
BARGAINING COUNCIL (SSSBC)**

First Respondent

MXOLISI ALEX NOZIGQWABA N.O.

Second Respondent

JABULANI ISAAC MZILIKAZI

Third Respondent

NCEBA TEMPLETON BOYCE

Fourth Respondent

Heard: 8 November 2022

Delivered: 29 November 2022

Coram: Waglay JP, Kathree-Setiloane and Savage AJJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of the Labour Court, is against the judgment and order of the Labour Court (Lallie J) delivered on 22 October 2021 in terms of which the award of the arbitrator, issued under the auspices of the Safety and Security Sectoral Bargaining Council (bargaining council), was upheld on review.
- [2] The third and fourth respondents, Mr Jabulani Isaac Mzilikazi and Mr Nceba Templeton Boyce (respondents), were employed as policemen in the South African Police Service (SAPS). On 11 December 2013, the respondents were dismissed by the appellant, the Minister of Police, for bribery and corruption. This followed a complaint lodged with SAPS Crime Intelligence in Mthatha by a member of the public, Mr Tefayo Wiwi, that two policemen from the Mqanduli police station had demanded a R15 000,00 bribe from him to prevent a criminal investigation being conducted into whether he was driving a stolen vehicle or not.
- [3] Following the complaint to Crime Intelligence, on 17 August 2012, the SAPS sought authorisation under reference number C26/52/2 to conduct an undercover operation at the Mqanduli police station on 18 August 2012. In a letter dated the same day, 17 August 2012, the Director of Public Prosecutions, Mthatha, under the same reference number, authorised the undercover operation.
- [4] On 18 August 2012, the undercover operation was conducted at the Mqanduli police station by members of the SAPS, who were unknown to the respondents. Mr Wiwi was provided by the SAPS operation commander with R5 000,00 in banknotes, which were identifiable by their serial numbers, and he wore a concealed recording device which recorded his interactions with the respondents and from which a transcript and video recording was obtained. At the Mqanduli police station, Mr Wiwi met the respondents. He proceeded to hand over R5 000,00 in cash to the third respondent, who counted the money, in the presence of the fourth respondent. Thereafter, those members of the SAPS involved in the undercover operation entered the room. The fourth respondent threw his wallet out of the window and the third respondent threw the money in his possession under a table. The banknotes found in the wallet

and on the floor were verified as being those that had been provided to Mr Wiwi by the SAPS immediately before the operation. Following an internal disciplinary hearing, the third and fourth respondents were dismissed from their employment.

Arbitration award

- [5] Dissatisfied with their dismissal, the respondents referred an unfair dismissal dispute to the first respondent, the Safety and Security Sectoral Bargaining Council. At arbitration, Captain Mtshiyo and Colonel Nongogo testified for the appellant that they had both been on the scene of the undercover operation. Constables Thanduxolo Fonqo, Nceba Nogemane and Sivuyile Noxhaka witnessed the respondents attempting to get rid of the money from the scene. Their evidence was that the fourth respondent was seen throwing his wallet, in which banknotes were found, out of the window, while the third respondent had thrown banknotes onto the floor, and that the money provided to Mr Wiwi for purposes of the undercover operation was recovered on the scene.
- [6] Constable Odwa Mabandla testified as to the manner in which a concealed recording device had been placed onto Mr Wiwi's body prior to the operation. The video footage recorded by such device, which was shown at arbitration, was not disputed. From the transcript of the recorded discussion between Mr Wiwi and the respondents, it was apparent that Mr Wiwi had informed the third respondent that he had "*tried collecting so much*" and that he had even asked an "*elderly woman*" to assist with the money "*which we discussed*". He asked the third respondent to count the money, which the third respondent did in the presence of the fourth respondent. Mr Wiwi did not testify at arbitration as he was by then, unfortunately, deceased.
- [7] The third and fourth respondents' defence at arbitration was that Mr Wiwi was unknown to them; that he had wanted to see the third respondent for an unknown reason; that during this discussion Mr Wiwi had spoken about certain personal difficulties he faced; that in the presence of the fourth respondent, Mr Wiwi had asked the third respondent to count some money for him, which the third respondent did before returning the money to him; that the third

respondent gave his telephone number to Mr Wiwi for an unspecified reason; and that they were victims of a conspiracy which sought to falsely implicate them. This version was not put to any of the witnesses who testified for the SAPS.

- [8] The arbitrator found that the trap which had been set by the SAPS was illegal in that there was a discrepancy in the reference numbers used in the application for its authorisation. As a result, it was found that it could not be established with “*reasonable certainty*” that authorisation had been granted for the Mqanduli police station operation when authorisation may have been granted for a different operation. As a result, in the absence of admissible evidence proving misconduct, the arbitrator found the dismissal of the respondents to have been substantively unfair and awarded their retrospective reinstatement.

Judgment of the Labour Court

- [9] Aggrieved with the findings of the arbitrator, the appellant sought the review of the arbitration award by the Labour Court. The Labour Court took the view that the arbitrator could not be faulted in finding that there was no admissible evidence proving that the dismissal of the respondents had been substantively fair; and that requiring strict adherence to the provisions of section 252A of the Criminal Procedure Act¹ (CPA) was not unreasonable. The review application was therefore dismissed. An order of costs was made against the appellant on the basis that the review application was unreasonable, given that the appellant had not proved that the trap used had been authorised.

Submissions on appeal

- [10] On appeal, it was argued for the appellant that instead of relying on section 138 of the Labour Relations Act² (LRA), the arbitrator’s focus on section 252A of the CPA had had a distorting effect on the outcome of the arbitration in that it led to the exclusion of all evidence adduced by the SAPS; and that the finding that the operation undertaken had been illegal, which was made known to the parties for the first time in the arbitration award, was unreasonable. This, it was

¹ Act 51 of 1977.

² Act 66 of 1995, as amended.

submitted, had resulted in an award which was unreasonable and fell to be set aside on review. It was argued that in finding differently, the Labour Court had erred.

- [11] Counsel for the respondents was constrained in argument to accept that the arbitrator's finding that the undercover operation had not been authorised could not be sustained, as it was apparent from the documentary evidence put up that the same reference numbers had, as a matter of fact, been used. Instead, it was argued for the first time at the hearing of the appeal that the date of fax transmission recorded at the top of the authorisation letter received, indicated that the undercover operation was only authorised after the fact and that this made the admission of all evidence emanating from the operation unfair. However, when pressed on this issue by the Court, counsel accepted that the fax transmission date, recorded on the authorisation letter, did not support this contention. In conclusion, it was submitted for the respondents that no evidence, apart from that procured during the undercover operation, existed to support the appellant's version and that the appeal must therefore fail.

Evaluation

- [12] From the material before the arbitrator it was manifestly apparent that the undercover operation had been properly authorised and that it was lawful. The same reference numbers were used in requesting and authorising the operation, and the letter of authorisation was signed prior to the date of the operation. The effect of the arbitrator's rejection of this evidence was that all evidence emanating from the undercover operation, put up by the appellant at arbitration, was ignored at arbitration. In improperly ignoring such evidence, the arbitrator arrived at a result which was unsustainable on the facts and could not reasonably be reached on the material before him, properly construed.³ In finding differently the Labour Court erred.
- [13] In determining whether the allegations against the respondents had been proved on a balance of probabilities, the arbitrator was required to have regard

³ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) (*Sidumo*) with reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

to the evidence presented, and resolve the disputes of fact in the diametrically opposed versions of the appellant and the respondents. Doing so required the arbitrator to approach the conflicting versions in the manner detailed in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*⁴.

- [14] The evidence of the appellant's witnesses at arbitration was clear, consistent and reliable, while that of the respondents was not. This was evident from the respondents' version that at the Mqanduli police station a member of the public who was unknown to them, being Mr Wiwi, approached the third respondent, for an unexplained reason, to count R5 000,00 for him. No explanation was provided by the respondents for why Mr Wiwi referred to a previous telephone call with the third respondent if he was unknown to both respondents. After counting the money, the third respondent returned the money to Mr Wiwi. No explanation was given by the respondents for why the third respondent then gave his telephone number to Mr Wiwi.
- [15] The respondents denied the evidence of the SAPS witnesses that the fourth respondent was seen throwing his wallet, with banknotes in it, out of the window and that the third respondent was seen throwing banknotes onto the floor. They, however, failed to explain why the banknotes found in the wallet and on the floor were identified as those given to the third respondent by Mr Wiwi, who had been provided with them by the SAPS immediately prior to the undercover operation. The respondents were equally unable to explain why, from the transcript of the concealed recording device worn by Mr Wiwi, he was recorded as having said that he had "*tried collecting so much*" and had asked an "*elderly woman*" to assist with the money "*which we discussed*". Furthermore, no reason was advanced by the respondents for why Mr Wiwi would have had any reason to falsely implicate them by constructing the version of events that he recounted, and reporting such false version to Crime Intelligence.
- [16] In balancing the probabilities, the task of a decision-maker is to "*select a conclusion which seems to be the more natural, or plausible, conclusion from*

⁴ 2003 (1) SA 11 (SCA) at para 5.

amongst several conceivable ones...".⁵ Having regard to the evidence before the arbitrator, the appellant's version that the respondents had committed the alleged misconduct was patently more plausible when considered against the unlikely and improbable version put up by the respondents.

- [17] In turning to the issue of sanction, as was made clear in *Sidumo*,⁶ the importance of the rule that had been breached, the reason the employer imposed the sanction of dismissal and the basis of the challenge to the fairness of the dismissal are some of the factors which require consideration by an arbitrator. The Court in *Sidumo* recognised that:

‘There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.’⁷

- [18] The misconduct committed by the respondents is of an extremely serious nature and is the antithesis of the fundamental duties and obligations of a police officer. This goes to the core of the relationship of trust between employer and employees. Bribery and corruption, all too prevalent in our society, cannot be condoned, even more so when committed by those officers on whom the state places an obligation to enforce the law. Since the rule breached by the respondents was, and remains one, of critical importance for the SAPS, the appellant was entitled to send a clear message that such misconduct will not be tolerated. The sanction of dismissal imposed was, therefore, an appropriate operational response to the grave misconduct committed by the respondents, with no less severe sanction being appropriate. The arbitration award fell outside of the ambit of reasonableness required in ignoring the clear evidence put up at arbitration of the respondents’ misconduct. The Labour Court erred in making a finding to the contrary.

⁵ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-D.

⁶ *Sidumo* supra at para 78.

⁷ *Ibid.*

[19] For these reasons, the appeal must succeed. There is no reason in law or fairness why costs should be awarded in the matter.

Order

[20] In the result, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted as follows:
 - “1. The review application succeeds.
 2. The arbitration award of the second respondent is set aside and substituted as follows:
 - ‘1. The dismissal of the third and fourth respondents is procedurally and substantively fair.’”

SAVAGE AJA

Waglay JP and Kathree-Setiloane AJA agree.

APPEARANCES:

FOR THE APPELLENT:

P N Kroon SC and M Thys
Instructed by the State
Attorney

FOR THIRD AND FOURTH RESPONDENTS:

L Matotie
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LABOUR APPEAL COURT