



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Not Reportable

LAC Case No: JA 98/14

Labour Court Case No: JR 2208/2012

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Appellant

and

GERRIT JOACHIM SMIT

First Respondent

J N MTHUKWANE, N.O.

Second Respondent

**THE SAFETY AND SECURITY
SECTORAL BARGAINING COUNCIL**

Third Respondent

Heard: 13 November 2015

Delivered: 21 January 2016

Summary: Arbitrator correctly identified the true nature of the dispute between the parties – the court *a quo*'s contrary finding overruled.

Coram: Waglay JP et Coppin JA et Savage AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal with the leave of this Court against the whole of the judgment and order of the Labour Court (Ngcukaitobi AJ) delivered on 28 March 2014, reviewing and setting aside an arbitration award of the second respondent, who acted as arbitrator under the auspices of the third respondent, and which referred the matter back to the third respondent (*"the SSSBC"*) for a hearing *de novo* before a different arbitrator. The appellant (*"the SAPS"*) was also ordered to pay the first respondent's costs.
- [2] The following facts were common cause and are not really disputed. The employee, Mr Smit, was first employed by the SAPS on 28 January 1987. After working for the SAPS in various capacities, he *"purchased"* his discharge from the service in 1992, whereupon his employment with the SAPS was terminated. This procedure, whereby an employee voluntarily *"purchases"* her or his discharge from the employment with the SAPS, was recognised and is also provided for in the regulations. In effect, the parties agree to the employee's termination and it is not like a resignation which constitutes a unilateral act. Following upon his discharge the employee would be paid out his or her pension benefits.
- [3] In 2001 Mr Smit successfully re-applied for employment at the SAPS and he was re-appointed on 3 December 2001 in the position of Detective-Sergeant.
- [4] In 2007 Mr Smit, desirous of assisting his wife with the raising of their newborn child, and in order to complete his studies, applied for 1 year's unpaid leave. This was refused.
- [5] It so happened that in the same year Mr Smit was involved in a motorcycle accident which resulted in him suffering a foot injury which rendered him unable to walk. He was bedridden and unable to work.
- [6] While he was at home, recuperating from his injuries, he was visited by his commander, Lieutenant-Colonel Tshabalala to whom he gave a doctor's letter to confirm his unfitness for work. Mr Smit accepted assurances from

Lieutenant-Colonel Tshabalala that his sick leave application would also be taken care of.

- [7] It appears that the application for sick leave was not processed. In about May 2008 Mr Smit was advised that he could purchase his discharge from the SAPS. An official, Mr Sekhweni from the SAPS, visited him at home and requested him to sign a discharge form, advising that if he did not purchase his discharge his salary would be stopped.
- [8] According to Mr Smit he signed the form which, but for the inclusion of his personal details, was blank. Together with that form he signed a request to withdraw his pension benefits on the basis of his voluntarily discharge from service.
- [9] From the evidence it appears that on or about 27 May 2007 an inventory had been printed indicating that Mr Smit had handed back his SAPS work-related items, including handcuffs, ammunition and firearms. An exit form was also completed in which, *inter alia*, it was certified that the items were handed in and that there was no disciplinary action pending against him. Of significance, there was a section, which was signed certifying that Mr Smit had no outstanding medical certificates. This despite the fact that his request for sick leave had not been granted by the time his application for discharge was submitted to the SAPS.
- [10] Subsequent to the submission of his application for a voluntary discharge and for the payment of his pension benefits and during about July 2008, Mr Smit's salary was stopped by the SAPS.
- [11] The stopping of his salary appears to have been due to a perception at the SAPS that Mr Smit was on unpaid leave, even though he had been refused leave.
- [12] Towards the end of 2008 Mr Smit's salary was still not paid and he had not been given information about his discharge or his pension. He made enquiries

at the SAPS and was informed that his application for a discharge had not been processed as yet because the SAPS was awaiting a letter from the Sandton Police Station.

- [13] According to Mr Smit the delay in determining his request for a discharge resulted in him changing his mind about his discharge. In October 2008 Mr Smit spoke to a Lieutenant-Colonel Sharpe and *inter alia* informed him that he had decided to withdraw his application for a discharge.
- [14] It is not disputed that Lieutenant-Colonel Sharpe spoke to a Director Basson about this, who, in turn, advised that Mr Smit should put his request in writing. Mr Smit complied and he was subsequently informed by the Provincial Office that they were awaiting documents from head office in order to process his request for the withdrawal of his discharge.
- [15] Delays resulted in Mr Smit approaching Mr Bushy Engelbrecht, who at the time was Assistant Commissioner and Cluster Commissioner for Alexandra and who, in the presence of a Captain Taljaard, agreed that Mr Smit could withdraw his request for a discharge. It is on record that a letter was written on 13 August 2009 by Mr Engelbrecht to the head office – Head of Service Terminations in the SAPS, informing them that Mr Smit had withdrawn his request for a discharge, recommending his re-enlistment in the SAPS and requesting that the matter be finalised quickly.
- [16] Steps were taken in respect of Mr Smit's re-enlistment in the SAPS. On record is a letter written by a Senior Superintendent who was the Section Head of Personnel, Provisioning and Maintenance to the Provisional Commissioner, informing that there had been fifty persons' names who had been sent for re-enlistment and that Mr Smit was one of those and requesting a report-back on the matter. The printout from a central database of the SAPS confirmed that Mr Smit's re-enlistment request was in the process. There was also an email dated 17 June 2010 written by or on behalf of a J Rademeyer which stated that Mr Smit's absence could no longer be regarded as leave without pay and that he should be re-enlisted in the SAPS.

[17] It was not disputed by the SAPS that it never informed Mr Smit that his application for a discharge was finalised. The SAPS in their answering affidavit in the review application admitted as much and that Mr Smit's employment had not been terminated by the discharge. The SAPS contended that by requesting a discharge Mr Smit had resigned and that as resignation was a unilateral act he could not withdraw his "*resignation*". Ironically, the SAPS in their answering affidavit nevertheless admit that Mr Smit had informed Lieutenant-Colonel Sharpe in October 2008 that he was withdrawing his request for a discharge.

[18] However, on 3 May 2010 Brigadier M Jamieson, the Head of Employee Relations and Lifecycle Management at the SAPS, wrote a letter to the Gauteng Provincial Commissioner informing that Mr Smit's withdrawal of his application for a discharge had not been approved.

[19] On or about 1 July 2010 Mr Smit referred the dispute to the SSSBC. He essentially complained about the contradictory messages he was getting from the SAPS pertaining to his re-enlistment and his discharge. For example, he received an email on 17 June 2010 stating that the SAPS were now processing his discharge and that he would have to apply for re-enlistment. He averred that it was contrary to what he was told and what had been agreed to. He complained about the delay in finalising the process. He alleged a failure by the SAPS to reinstate him in terms of the agreement and sought relief in the form of reinstatement and back-pay for the period during which he was awaiting the processing of the withdrawal of his discharge.

[20] The arbitrator formulated the issue to be decided as follows:

"I am required to determine whether there was an agreement between the applicant and the respondent to reinstate or re-employ the applicant in accordance with the provisions of section 186(2) of the Labour Relations Act 66 of 1995, as amended (the Act)."

- [21] Mr Smit testified at the arbitration proceedings and called two witnesses namely Mr Steven Sikhweni and Mr Benjamin Taljaard. The appellant (who was the respondent in the arbitration proceedings) called two witnesses to give evidence on its behalf namely, Ms Isabella Wiese and Ms Jeannette Basson.
- [22] Briefly, the thrust of Mr Smit's evidence was as summarised above, namely, that he was advised to purchase his discharge; that he signed forms but due to the delay in that regard he decided to withdraw his application for a discharge; that he had not been informed of the decision regarding his discharge or that the withdrawal of his discharge had been accepted. The essence of Mr Steven Sikhweni's evidence was that Mr Smit did not want to resign, but was forced to resign when his application for unpaid leave was not granted. Mr Sikhweni had accompanied the HR officer to Mr Smit's residence where Mr Smit signed the resignation document.
- [23] Mr Taljaard testified in essence that he was employed in Mr Engelbrecht's office and that part of his duties was to deal with the re-enlistment of members. He wrote a letter to the head office of the SAPS in August 2009, on the instruction of Mr Engelbrecht, requesting Mr Smit's reinstatement. He also testified that there was an agreement between Mr Smit and Mr Engelbrecht that Mr Smit would start to work immediately.
- [24] Ms Wiese testified that as Captain in the SAPS Provincial Office part of her duties were to deal with the re-enlistment of members. If a person applied for re-enlistment he or she was to complete an application form, which had to be submitted to her department. They would then prepare a report on the matter for the attention of the Provincial Commissioner. In the case of Mr Smit they had received an application for re-enlistment and the report was submitted to the Provincial Commissioner on 8 December 2009. The Provincial Commissioner did not recommend Mr Smit's re-enlistment. She testified regarding the reasons why the Provincial Commissioner decided accordingly. According to her, it was because Mr Smit had resigned twice already and did not appear to be loyal to the SAPS. According to her the application for a re-

enlistment (after the Provincial Commissioner had seen it) would be sent on to head office at the SAPS, because it was for the National Commissioner to make a final decision on the matter.

[25] Ms Basson testified in brief that she was Head of Personnel Services at the SAPS Provincial Office. Part of her duties related to dealing with service terminations, the reinstatement of members, leave and the transfer of members. According to her there was no agreement between the SAPS and Mr Smit that he would be reinstated. She testified that the only person who could approve Mr Smit's reinstatement (or re-enlistment) was the National Commissioner.

[26] Having considered the evidence and the submissions made by or on behalf of the parties the arbitrator concluded as follows:

"25. In the circumstances I found that the applicant failed to prove on a balance of probabilities that there was an agreement to reinstate him. The fact that the applicant sought to withdraw his resignation was of no consequence once the respondent did not entertain the issue. The applicant's resignation was accepted by the respondent. [See *Essack and Another v Commissioner for Gender Equality* (2000) 21 ILJ 467 (W).]

26. Even if I were to find that there was an agreement between Mr Engelbrecht and the applicant that he would be reinstated, the applicant would still have failed in his claim. It is trite law that it is only the National Commissioner who may employ a person into the respondent's service and it follows that it is only the National Commissioner or a person duly delegated by him who can enter into an agreement to reinstate the applicant.

27. The purported agreement to reinstate the applicant and Mr Engelbrecht would be of no force and effect because Engelbrecht did not have the authority to enter into such agreement on behalf of the respondent.

28. Taljaard testified that Engelbrecht had powers to 'hire and fire' but my view is that he did not have the authority or powers to reinstate the applicant into the

respondent's service. My conclusion is therefore that the applicant's claim of an agreement to reinstate him was not supported by evidence and applicable law."

[27] The arbitrator accordingly dismissed Mr Smit's claim and made no order as to costs.

[28] Mr Smit brought an application in the Labour Court (the court *a quo*) to review and set aside the arbitrator's award. The grounds briefly were the following: Mr Smit averred that the arbitrator (i) failed to properly evaluate the evidence and "*completely misdirected*" himself in finding that he (i.e. Mr Smit) had not proved an agreement to reinstate him; (ii) made a material error by failing to consider the uncontested documentary evidence confirming his (i.e. Mr Smit's) version that there was such an agreement; (iii) made a material error by "*confusing the withdrawal of the resignation ..., which was a reinstatement, with the re-enlistment of a member of the SAPS*"; and (iv) the arbitrator did not state on what basis he preferred and accepted the evidence tendered by the SAPS; (v) the arbitrator made an award which was not rationally justifiable having regard to the evidence that was before him "*and misconstrued the legal position in finding that there was no agreement*" between Mr Smit and SAPS "*while there was overwhelming evidence showing that such an agreement existed and the reinstatement was processed*"; and lastly, (vi) that a reasonable arbitrator would not have made the same decision as the arbitrator.

[29] In a supplementary affidavit Mr Smit gave a much fuller version of the events which culminated in the arbitrator making the award, which was the subject of the review before the court *a quo*. Mr Smit *inter alia* pointed out "*I made it clear from the outset of the arbitration, ... that the issue concerned 'that there was an agreement for reinstatement'. In my referral from, my dispute is clearly stated as 'withdrawal of my discharge'. Therefore, the dispute was not related to any application to re-enlist*".

- [30] Mr Smit also took issue with the arbitrator's award, suggesting that the arbitrator concluded that his re-enlistment was unsuccessful, whereas the evidence indicated the contrary and that this showed that the arbitrator misunderstood what the dispute was about, or simply did not consider the evidence before him.
- [31] Mr Smit also averred that he had presented support for his evidence that there was a verbal agreement to reinstate him, but, according to him, all such documentary evidence, including the printout from the SAPS database, was not taken into account by the arbitrator.
- [32] Mr Smit further, in essence, averred that the arbitrator ought to have found that the documents which he (i.e. Mr Smit) had relied upon "*supported the fact that there was not only an agreement but a clear meeting of minds that he would return to the employment with the SAPS*".
- [33] The court *a quo* held that in terms of the law as laid down in *Sidumo and Another v Platinum Mines Ltd and Others*¹; *Heroldt v Nedbank Ltd*²; *Toyota SA Motors (Pty) Ltd v Radebe and Others*³; and *Telcordia Technologies Inc v Telkom SA Ltd*⁴, misconceiving the nature of the enquiry is a gross irregularity and is by itself reviewable. The court *a quo* expressed itself on this point as follows:
- "58. From these judgments, it is apparent that the ground of review based on misconception of the enquiry is to be distinguished from an instance where an arbitrator acts outside his statutory powers. Misconceiving the enquiry recognises that the arbitrator is acting within his or her jurisdiction. But even when acting within scope an arbitrator must direct his or her attention to the real issue which is required to be decided either in terms of the relevant statute or in terms of the referral to arbitration or indeed an issue which was raised in the evidence before the arbitrator. The failure to address the main issue presented for arbitration is an irregularity. But there is a further leg to

¹ 2008 (2) SA 24 (CC).

² 2013 (6) SA 224 (SCA).

³ 2000 (21) ILJ 340 (LAC).

⁴ [2007] (5) BCLR 503 (SCA).

the enquiry. The LRA sets the review bar high. It requires an irregularity to be 'gross' in order to constitute a reviewable defect. The defect will be regarded as gross if the real issue has not been tried as a result of the irregularity committed by the arbitrator. Unlike the review ground based on unreasonableness of the result, this ground is ultimately concerned with the methods – or the process – of the arbitration.”

[34] Examining the award against the standard posited by the court *a quo*, that court concluded:

“[65] The arbitration award does not even record the dispute pertaining to the discharge of the applicant, despite the fact that it was a pertinent issue raised before him. It also did not examine or answer this question at all. It focused on the application for re-enlistment or reinstatement, which logically flows from the question whether the employment relationship terminated in the first instance. The implications of the arbitrator's approach are profound. Had the arbitrator appreciated the true nature of the enquiry before him, namely, whether the applicant had in fact been discharged as required by regulation 15, he clearly would have taken a different path pertaining to the nature of the evidence to be led and the burden of proof on the disputed items. But he did not do this. His failure to enquire into the question of the discharge of the applicant has prevented a fair trial of the issues that were before him. That he had been told by the parties to enquire into the existence of an agreement to reinstate the applicant could not possibly divest him of his primary duty once the evidence was presented and the applicant's true case laid bare before him.”

[35] The court *a quo* went on to hold that the fact that Mr Smit's wife was not allowed to represent him at the arbitration and that he was therefore unrepresented, was another factor which ought to have been taken into account by the arbitrator in “*the understanding of the true nature of the enquiry*”. The court *a quo* concluded that the arbitrator had committed a gross irregularity in that he had misconceived the nature of the enquiry resulting in a failure to resolve the most pertinent aspect of the applicant's case.

Nonetheless, the court *a quo* went on to deal with the reasonableness of the outcome.

- [36] I shall first deal with the finding that the arbitrator had misconceived the true nature of the enquiry and then deal with the issue of reasonableness and the other aspects pertaining to this matter, such as the issue of costs.

Did the arbitrator misconstrue the nature of the enquiry?

- [37] Counsel for Mr Smit, in support of the court *a quo*'s judgment, made submissions in the affirmative, whereas counsel for the appellant submitted that the arbitrator did not only not misconstrue the true nature of the enquiry, but was correct in his approach, handling of and decision on the issue that was before him.

Discussion

- [38] It is indeed so that an arbitrator acting in terms of the Labour Relations Act⁵ ("*the LRA*") is bound to identify the issues between the parties, albeit with minimum legal formalities, and is not bound by the parties' characterisation of the nature of the dispute. This is what was held by the Constitutional Court in *Cusa v Tao Ying Metal Industries and Others*⁶, albeit with reference to a commissioner acting under the auspices of the Commission for Conciliation, Mediation and Arbitration ("*the CCMA*").

- [39] Failing to identify the real issue(s) between the parties or mischaracterising the nature of the dispute between them, is an instance of misconstruing the true nature of the enquiry, which, as has been held in *Heroldt*⁷ and *Goldfields Mining (SA) (Pty) Ltd v CCMA*⁸, to be a gross irregularity. However, in *Goldfields* this Court held that in the case of a gross irregularity, such as

⁵ Act No 66 of 1995.

⁶ [2009] 1 BLLR 1 (CC) paras [65]-[66]; see also *NUMSA on behalf of Sinuko v Powertech Transformers (Pty) Ltd* [2014] 2 BLLR 133 (LAC) at 138, paras [16] and [17].

⁷ *Supra*.

⁸ [2014] 1 BLLR 20 (LAC).

misconstruing the true nature of the enquiry, the investigation does not stop with the establishment that the arbitrator misconstrued the true nature of the enquiry, but extends to whether the final outcome or result was unreasonable.⁹

[40] It would be a process-related irregularity which will only justify interference by the reviewing court if the final decision is one that a reasonable arbitrator would not have come to.

[41] As I mentioned earlier, the arbitrator construed the true nature of the enquiry to be – for him to determine (in the light of all the evidence presented) whether there was an agreement between Mr Smit and the SAPS for the latter to reinstate (or re-employ) Mr Smit – and as envisaged in section 186(2)(c) of the LRA.

[42] Section 186(2)(c) of the LRA defines the term “*unfair labour practice*” as meaning any act or omission that arises between an employer and an employee involving – (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement.

[43] The record shows that the arbitrator specifically enquired from Mr Smit, at the outset of the arbitration hearing, what the issue was that had to be determined in the arbitration and that Mr Smit unhesitatingly affirmed that the issue was whether there was an agreement between him and the SAPS to reinstate him.

[44] It is also important to note that when the matter came before the arbitrator it had been referred by an order of the Labour Court back to the SSSBC for a hearing *de novo*, after the Labour Court had reviewed and set aside a ruling by another arbitrator in that forum, when the matter had first been referred to it, that the SSSBC did not have jurisdiction to arbitrate the dispute referred by Mr Smit, because he was no longer in an employment relationship with the SAPS.

⁹ See *Goldfields (supra)* pages 24-25 para [14].

[45] The Labour Court, that had referred the matter back, held that the plain wording of section 186(2)(c) of the LRA, which was the section relied upon by Mr Smit, entitles a former employee to seek enforcement of an agreement to reinstate, or to re-employ him or her.

[46] Another important factor, or aspect, is that Mr Smit clearly understood the nature of the enquiry that was required. He could not seek to enforce (and allege) an agreement to reinstate him, unless he accepted that he had in fact resigned. The enquiry, as Mr Smit himself stated, was not about whether he (effectively) resigned, but whether he was reinstated (or re-employed). Mr Smit specifically states in his supplementary founding affidavit in the review proceedings, the following:

“Much evidence was led particularly by the first respondent about the fact that I resigned. This is not in dispute – I resigned from the first respondent in May 2008 following a dispute over my unpaid leave.”

[47] Mr Smit then states in that same affidavit that the “*onus*” fell on him to prove the agreement with SAPS to reinstate him.

[48] The true issue before the arbitrator was thus not – and could not be – whether Mr Smit’s purchase of a discharge had been finalised. It could also not have been about whether he was re-enlisted in the SAPS. He knew that he was not re-enlisted, but relied on an alleged agreement of reinstatement, or re-employment, which he alleged he concluded with the SAPS, represented by Mr Engelbrecht. Mr Smit accepted that he had resigned.

[49] The act of resignation is a unilateral act and did not require acceptance by anyone in the SAPS to be effective.

[50] In terms of Regulation 15 of the Regulations¹⁰ made by the previous Minister responsible for Safety and Security in terms of the previous Police Act¹¹ a non-commissioned member who had served a continuous period of at least three years may resign upon giving three calendar months' prior written notice of his or her intention to resign. Under the current South African Police Service Act¹² section 49(1) only restricts resignation in three circumstances of necessity as provided in that section. But otherwise there is no restriction on resignation. It is only the withdrawal of the resignation that requires the consent of the National Commissioner¹³ thus, unless withdrawn, the resignation would be final.

[51] A fundamental ground which the court *a quo* relied upon in coming to the conclusion that the arbitrator had misconstrued the enquiry was – according to the court *a quo* – that Mr Smit “*denied that he resigned or that the employment relationship had come to an end*”. This is clearly not correct as Mr Smit confirmed in his supplementary founding affidavit which was before the court *a quo*. Contrary to what the court *a quo* held, Mr Smit stated clearly and unequivocally that he had resigned and that his resignation was not in issue.

[52] Although Mr Smit claimed a continuing employment relationship, he did so on the basis of an alleged agreement of reinstatement or re-employment which he alleged he had concluded with Mr Engelbrecht (which, according to him, was binding on the SAPS).

[53] The question whether Mr Smit's application to purchase his discharge had been finalised, or withdrawn, was not the real issue before the arbitrator. In any event, if it had been Mr Smit's case that he was in fact still employed by the SAPS on some other basis, then the arbitrator could not have dealt with the dispute in terms of Section 186(2)(c) of the LRA – which presupposes that

¹⁰ i.e. the Regulations for the South African Police: GNR203 of 14 February 1964.

¹¹ i.e. the Police Act 7 of 1958.

¹² i.e. Act No 68 of 1995.

¹³ See Regulation 47 of the South African Police Service Employment Regulations.

the employee seeks a restoration of the employment relationship by the enforcement of an agreement to reinstate or re-employ him or her.

- [54] The court *a quo* seemingly confused the issue of Mr Smit's resignation (which required reinstatement), with his purchase of a discharge, and the withdrawal by him of that application and his application for re-enlistment.
- [55] The SAPS had not been called upon to deal with the acceptance or rejection of the purchase of a discharge, or the issue of re-enlistment. The arbitrator in this matter correctly tried the real issue.
- [56] I shall now consider the second aspect, namely, whether the arbitrator reasonably concluded that Mr Smit had not proved that he had concluded an agreement with the SAPS for his reinstatement.
- [57] Counsel for the appellant stated that the arbitrator's findings and conclusions were not only reasonable, but correct.
- [58] Counsel for Mr Smit on the other hand, argued that the arbitrator could not reasonably have come to the conclusion given the evidence. It was submitted that there was sufficient evidence that Mr Engelbrecht had agreed to reinstate Mr Smit.
- [59] The arbitrator had found that Mr Smit had failed to produce documentary proof that he had concluded an agreement of reinstatement with Mr Engelbrecht, but the court *a quo* found the contrary, and in particular, that there were at least three documents that supported Mr Smit's claim that he had concluded an agreement with Mr Engelbrecht.
- [60] According to the court *a quo* the first document was a letter of 13 August 2009, written by Mr Engelbrecht, in his official capacity, to the Head "Service Terminations" based at the SAPS headquarters in Pretoria. The second being a letter from Senior Superintendent Stoltz to the Divisional Commissioner, which I referred to earlier, in which Mr Smit's name was said to be one of fifty

submitted for re-enlistment and the third being an email dated 17 June 2010, which I also referred to earlier, in which it was mentioned that Mr Smit's absence from work could no longer be regarded as absence without leave.

- [61] If one considers the contents of the three documents referred to, it is clear that they do not prove that Mr Engelbrecht entered into an agreement of reinstatement with Mr Smit. The court *a quo* in my view misconstrued those letters as being such proof. The arbitrator's finding in relation to the absence of documentary proof is thus not only reasonable, but correct.
- [62] The court *a quo* also found that Mr Smit's version was adequately supported by that of Mr Taljaard and that Mr Smit had no need to call Mr Engelbrecht to prove that an agreement for his reinstatement had been concluded.
- [63] This finding was in response to the arbitrator's express concern that Mr Engelbrecht was not called in circumstances where the version of Mr Smit and Mr Taljaard was apparently contradicted by the contents of the letter of 13 August 2009, in which no mention is made of an agreement to reinstate or re-employ Mr Smit.
- [64] The letter which has as its subject the "*Re-enlistment*" of Mr Smit, merely states that Mr Smit had on 24 February 2009 forwarded a letter to withdraw his intended resignation; that a copy of that letter was on the file at the addressee's office; that the office of Mr Engelbrecht "*recommends*" Mr Smit's "*re-enlistment*" and the reason for such recommendation. The arbitrator's observations and concerns are therefore in my view reasonable.
- [65] The court *a quo*'s conclusion that the evidence of Mr Smit and Mr Taljaard were in the circumstances of the matter conclusive, is not correct. The arbitrator could reasonably conclude that their evidence was not borne out by the documentary evidence, or by the law.

- [66] The arbitrator in my view reasonably found that it had not been shown that Mr Engelbrecht had the necessary authority to conclude an agreement of reinstatement with Mr Smit. The court *a quo*'s contrary finding, is incorrect.
- [67] The court *a quo* accepted that the overall power of appointments rested with the National Commissioner, but concluded that such power could be delegated.
- [68] It is trite that power that is given in terms of a law to a specific person may only be delegated if the law so allows. To conclude in the absence of legal proof that such power could have been delegated and in the absence of factual proof that it had in fact been lawfully delegated to Mr Engelbrecht, is not correct.
- [69] The court *a quo* seemingly accepted that "*on the evidence which was before the arbitrator it was not clear if such power had in fact delegated*", but the court *a quo* went on to conclude that "*in any event*" its problem with the arbitrator's finding, that Mr Engelbrecht had no authority, was that "*if in fact it was true that an agreement was reached with Engelbrecht as testified by the applicant it would be unfair on the part of the SAPS to seek to resile from such agreement*".
- [70] Firstly, this basis of holding the SAPS liable is founded on speculation, rather than fact. It assumes that Mr Engelbrecht had entered into an agreement with Mr Smit. Secondly, there is nothing to suggest that the arbitrator was to consider whether the SAPS was bound on the basis of some kind of estoppels, or principle of fairness.
- [71] The further grounds of review that were raised by Mr Smit in his review application were not dealt with by the court *a quo* and they were not addressed in argument before this Court and were, seemingly, abandoned. None of the parties requested us to deal with such other grounds or to refer the matter back to the Labour Court. In any event from an analysis of Mr

Smit's affidavit it is apparent that there is no merit in those grounds. The arbitrator's award in my view was reasonable in all respects.

[72] There is no reason why the costs of the review of the award should not have followed the event. I propose to only grant the costs of one counsel in the circumstances. In respect of the costs of appeal, I am of the view that it is proper in fairness and in law that there should be no costs order.

[73] In the result:

73.1 The appeal is upheld.

73.2 The order of the court *a quo* reviewing and setting aside the award is set aside and substituted with the following order:

"The application is dismissed with costs."

P Coppin
Judge of the Labour Appeal Court

Waglay JP and Savage AJA concur in the judgment of Coppin JA.

Appearances

For the Appellant: Adv. G I Hulley SC with Adv. S B Nhlapo

Instructed by: The State Attorney, Johannesburg

For the First Respondent: Adv. G A Fourie with Adv. Z Ngwenya

Instructed by: Bouwer Kobeli Morabe Attorneys

LABOUR APPEAL COURT