



Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2028/09

In the matter between:

INSPECTOR SIMON NDWELENI MPHIGALALE **Applicant**

and

SAFETY & SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

JAN STEMMETT, N.O **Second Respondent**

SOUTH AFRICAN POLICE SERVICE **Third Respondent**

Heard: 10 November 2011

Delivered: 7 December 2011

Summary: Review proceedings – inconsistent application of discipline – previous error did not require imposition of same sanction - seriousness of offence of corruption by police officer justified dismissal – review application dismissed

JUDGMENT

SAVAGE AJ

Introduction

- 1] This is an application to review and set aside an arbitration award made by the second respondent (“the commissioner”) on 15 July 2009 in which the dismissal of the applicant for corruption in accepting R500 from an illegal immigrant was found to be both procedurally and substantively fair.

The facts

- 2] The applicant was employed by the third respondent in 1987 as a police inspector. He was dismissed from his employment on 23 April 2007 after having been found guilty of corruption in accepting R500 from an illegal immigrant named Ms Stabile Masomere (“Ms Masomere”) to secure the release of Ms Masomere and three other illegal immigrants.
- 3] The applicant referred an unfair dismissal dispute against the third respondent (“SAPS”) to the first respondent where his dismissal was found to be both procedurally and substantively fair.

Arbitration award

- 4] The SAPS called four witnesses at the arbitration hearing: Mr Rendani Makani, the investigating officer in the criminal case; the chairperson of the disciplinary hearing, Senior Superintendant Tuwani Mashadzha; and Ms Masomere and Ms Milka Muringi, both of whom are Zimbabwean citizens. The applicant testified for himself. In finding the applicant guilty of corruption, the commissioner found that the applicant had no witnesses at the time of the incident and that while there were some discrepancies between the statements of Ms Masomere and the evidence given by her at the arbitration hearing, and in spite of him treating her evidence with caution, her evidence was “given in a straightforward and convincing manner and that it was supported in all material respects by the evidence of Ms Muringi”. The commissioner accepted that there were probably

language difficulties when she made her initial statements to police officers who did not understand Shona.

- 5] The commissioner was not convinced that the applicant was not aware that Ms Masomere and others were from Zimbabwe when he had experience in the identification of Zimbabwean citizens and failed to form a suspicion when they were found near the border fence with hand luggage normally associated with illegal immigrants. The commissioner found it strange that the applicant was patrolling the border but was not curious to see what was in Ms Masomere and her companions' bags. Furthermore, while the applicant contended that Ms Masomere was fluent in Venda, the commissioner came to the view that this did not appear to be the case at the arbitration hearing. In addition, the names of Ms Masomere and her companions were typically Zimbabwean names which should have raised the applicant's suspicion.
- 6] While the applicant claimed that an identity parade should have been held in the matter, the commissioner found that this was unnecessary as the applicant had not disputed giving Ms Masomere and her companions a lift.
- 7] The applicant had not advanced any convincing reason why Ms Masomere and Ms Muringi would have a motive to give false evidence against him. In this regard, the commissioner found that Ms Masomere had given her initial statements in 2005 and 2006 and had persisted with her version at the disciplinary and arbitration proceedings. The commissioner rejected as highly improbable the applicant's allegation that Ms Masomere and Ms Muringi had conspired with his previous commander to bring the applicant into disrepute, even if it were true that the commander had a grudge against the applicant.
- 8] The commissioner handed down an award in which he found dismissal of the applicant to have been procedurally and substantively fair. He concluded that dismissal was an appropriate sanction in that the aggravating factors outweighed the mitigating factors and the SAPS could not reasonably be expected to continue to employ the applicant. In considering the appropriateness of the sanction, the commissioner considered the applicant's 19 years of service, his

clean disciplinary record, the impact of dismissal, the circumstances of the matter, the seriousness of the misconduct which constitutes gross dishonesty and the impact of the transgression on the employment relationship.

- 9] On the issue of consistency, the commissioner concluded that the sanction short of dismissal imposed in previous disciplinary proceedings on two other employees, Inspector Nkawane and Constable Bugana, was an error which did not justify the reinstatement of the applicant and that there was no evidence that the third respondent had habitually or frequently condoned such misconduct in the past. He found that the third respondent would not be able to trust the applicant to perform his duties without constant supervision and took into account the efforts of the SAPS to stamp out corruption amongst its employees. The dismissal of the applicant was accordingly found to be substantively fair.
- 10] The commissioner found that “judged as a whole” the applicant was given a fair opportunity to present his case at the disciplinary hearing and that the delay in finalising the enquiry “did not cause any real prejudice”. The commissioner rejected the applicant’s claim of collusion between the chairperson of the disciplinary hearing and the disciplinary officer. He was also not convinced that the applicant was prejudiced by threats made to him by the disciplinary officer.

Grounds of review

- 11] The grounds of review raised by the applicant in his founding and supplementary affidavits relate to the commissioner having exceeded his powers in making factual findings that did not correspond with the evidence before him, including by accepting Ms Masomere’s evidence as probably true notwithstanding the glaring discrepancies between her statements to the police and her testimony during the arbitration. Furthermore, the applicant contended that the commissioner committed a gross irregularity by finding that reinstatement was not justified notwithstanding the inconsistent application of discipline in similar circumstances given that there was “no evidence that the respondent had habitually and frequently condoned such misconduct in the past”. The applicant also attacked the commissioner’s finding that the SAPS would not be able to

trust the applicant to perform his duties without constant supervision, on the basis that there was no evidence led by the SAPS to this effect.

Evaluation

12] A commissioner is required to determine which of the conflicting versions before him or her is more probable and in doing so to make some attempt to assess the credibility of the witnesses by reference to any internal and external inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version.¹ Faced with two mutually exclusive versions, the technique set out in *SFW Group Ltd and Another v Martell et Cie and Others*² per Nienaber JA is to be applied:

“...an analysis of the probabilities of the evidence placed before him. In so doing, I am satisfied that he took the steps necessary to resolve On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall

¹ *Isaacs v Education Labour Relations Council* (unreported) C460/2008).
² 2003 (1) SA 11 (SCA).

thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”³

13] It is clear that the commissioner considered the credibility and reliability of the evidence tendered by witnesses at the arbitration and that he undertook the materially different versions before him. He considered the existence of some discrepancies between Ms Masomere's statements made initially and the evidence given by her at the arbitration and treated her evidence with caution. His finding that Ms Masomere's evidence at the arbitration “was given in a straightforward and convincing manner and that it was supported in all material respects by the evidence of Ms Muringi” is not an unreasonable one based on the evidence before him. Similarly, his conclusion that the failure of the SAPS to hold an identity parade was not material was a reasonable conclusion on the evidence before him given that the applicant had not disputed giving Ms Masomere and her companions a lift.

14] The commissioner's further findings with regards to the commission of the offence are also reasonable based on the material placed before the commissioner. The applicant's case is that there was no direct evidence to prove that he had accepted the money and that he was not aware that Ms Masomere and others were from Zimbabwe as they spoke Venda and gave a satisfactory account of why they were at the border. This Court does not sit as a court of appeal. On a conspectus of the facts before the commissioner, I am satisfied that the decision made by him and the conclusions drawn with regards to aspects of the evidence are rationally connected to the material before him. Furthermore, the commissioner applied the appropriate legal principles and considerations in dealing with the materially different versions before him.

15] In applying his mind to the applicant's evidence, the commissioner concluded that he found there to exist aspects of the applicant's testimony which did not lead him to support the applicant's version of events. I am unable to fault the

³ At paragraph 5 of the judgment.

approach taken by the commissioner with regards to his analysis of the competing versions before him. His conclusions with regards to these competing versions fall clearly within the required band of reasonableness. Having heard the evidence of witnesses, the commissioner was placed in a position to consider the credibility, reliability, demeanour, candour, calibre, veracity and cogency of the witnesses and to assess the quality and integrity of such evidence in weighing up the probabilities in the matter. A review court should not interfere with a credibility finding given that the court, unlike the commissioner, lacks the advantage of first-hand observation of the witnesses and their demeanour, and where there is no apparent basis from the record to justify calling a commissioner's finding into question.⁴

- 16] The applicant's further ground of review relates to the inconsistent application of discipline by SAPS and the commissioner's conclusion that SAPS would not be able to trust the applicant to perform his duties without constant supervision in the absence of evidence to this effect. The evidence before the commissioner was that in a previous instance of corruption the chairperson had in error imposed a sanction short of dismissal upon two other policemen. There was no evidence tendered at the arbitration hearing relating to the existence of any distinguishing features which differentiated the previous decisions from the decision taken to dismiss the applicant. There was also no evidence tendered of any steps taken by SAPS to reiterate to its employees that corruption as an offence would lead in future to dismissal. The commissioner concluded that the error of the chairperson in imposing a sanction short of dismissal in previous instances of corruption did not justify the reinstatement of the applicant and that there was no evidence that the third respondent had habitually or frequently condoned such misconduct in the past. He took into account that the SAPS would not be able to trust the applicant to perform his duties without constant supervision as well as efforts to stamp out corruption amongst its employees.

- 17] Conradie JA in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration and Others*⁵ stated:

⁴ See *Isaacs v Education Labour Relations Council* (unreported) C460/2008 at para 24.
⁵ (2000) 21 ILJ 1051 (LAC).

‘...A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise’.

18] This ‘sensible operational response to risk management’ is one which must be undertaken fairly. In determining whether a decision to dismiss is fair, a commissioner must take cognisance of the fact that the discretion to dismiss lies primarily with the employer and interference with the sanction imposed should not be lightly contemplated, with a measure of deference afforded to the sanction imposed by the employer⁶. The Code of Good Practice: Dismissal establishes a guideline to test the fairness of a dismissal, which includes consideration as to whether “the rule or standard has been consistently applied by the employer”. As a general rule, fairness requires that like cases be dealt with alike,⁷ whether in the consistent enforcement of a rule or in the imposition of a penalty.⁸ As pointed out by Brassey in ‘The Dismissal of Strikers’ (1990) 11 ILJ 213 at 229:

‘...The parity principle, a basic tenet of fairness, requires that like cases should be treated alike: if two employees are caught committing much the same wrong, one should not be disciplined if the other goes free; nor, if their personal circumstances are much the same, should one be more severely punished than the other’.

19] Inherent in making the decision as to whether to dismiss or not, there exists inevitably the potential for some degree of inconsistency. Conradie JA in *SACCAWU and Others v Irvin & Johnson*⁹ found that:

‘...the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that

6 At page 403 see too *Avril Elizabeth Home / CCMA* [2006] 9 BLLR 833 (LC).

7 Nugent AJA in *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC).

8 Du Toit et al *Labour Relations Law* 5th ed (Lexis Nexis 2006) at page 401.

9 (1999) 20 ILJ 1957(LAC).

kind of wrong decision....a wrong decision can only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy'.¹⁰

20] The LAC continued:

'...it must be so that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency...While the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias'.¹¹

21] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,¹² Van Niekerk J reiterated that there existed no confusion in the jurisprudence as it relates to the consistency requirement, nor any conflict between the decisions of the Labour Appeal Court in *SACCAWU and Others v Irvin & Johnson* and *Cape Town City Council v Masitho and Others*.¹³ Nugent JA in *Masitho* cites with approval the conclusion in *SACCAWU* that an employer "cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency" but indicates that the proper course is to let employees know "clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future".¹⁴

22] The evidence before the commissioner was that the chairperson's decision in respect of the two previous instances of corruption by police officers had been one made in error. Applying the judgment in *SACCAWU*, the SAPS is not required to repeat a decision made in error or one which is patently wrong. This is all the more so given the nature of the misconduct committed. In *S v Shaik*

¹⁰ At para 29.

¹¹ At 751D F.

¹² [2009] BLLR 1128(LC) at para 12.

¹³ (2000) 21 ILJ 1957(LAC).

¹⁴ At para 14.

*and Others*¹⁵ the Constitutional Court warned that corruption is 'antithetical to the founding values of our constitutional order.' Similarly, in *South African Association of Personal Injury Lawyers v Heath and Others*, 2001(1) SA 883 (CC) this Court held that:

'[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They were the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

23] In *Glenister v President of the Republic of South Africa and Others*.¹⁶ the Constitutional Court held:

'Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights...

For our country to win the war against these serious crimes, we need to enhance the capacity of the police to prevent, combat and investigate these crimes and other national priority crimes. Strengthening the ability and the capacity of the SAPS to address the scourge of corruption and other national priority crimes is unquestionably a legitimate governmental purpose'.¹⁷

24] Corruption by a police officer, employed in a position of trust and with a duty to perform his or her functions in the interest of society and in accordance with the fundamental values of the Constitution, is a material factor to be considered in determining the appropriateness of the sanction to be imposed. Not only is it a "sensible operational response to risk management" but it provides a sound reason to justify a finding that the imposition of the sanction of dismissal was fair in the circumstances.

¹⁵ 2008 (5) SA 354 (CC).

¹⁶ 2011 (3) SA 347 (CC) at para 57.

¹⁷ At para 58.

Where the case of one employee is distinguished from another in circumstances in which they have engaged in the same misconduct, there must exist sound reasons for treating the employees differently,¹⁸ such as on the basis of their respective records or on the basis of other material factors.¹⁹

Given the nature of the serious misconduct committed, his position as a policeman and the impact of the misconduct on society, I am satisfied that the finding of the commissioner that dismissal was a fair sanction was a reasonable conclusion made with regard to and based on the evidence before him. Dismissal amounted to 'sensible operational response to risk management' given that the misconduct is "completely indefensible on any ground" (as per *Toyota SA Motors (Pty) Ltd v Radebe and Others*²⁰), more so when perpetrated by an employee from whom an employer is entitled to expect trust and honesty in the performance of its functions.

25] This Court, in numerous previous decisions, has viewed dishonesty in a serious light and has come to the conclusion in most instances that it results in a breakdown of the trust relationship between the parties.²¹ I am accordingly satisfied that the decision of the commissioner that the dismissal of the applicant was fair, in spite of the existence of a previous inconsistent sanction imposed on two policemen previously for the same misconduct and mitigating factors, was reasonable. It follows therefore, given the nature of the misconduct committed by the applicant that the SAPS "cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency", even in spite of there being no evidence of notice by the employer to its employees that employees who were found guilty of corruption would henceforth face dismissal. This is particularly so given the criminal nature of the misconduct, the fact that it was committed by a person employed in the trusted office of policeman, as a result of the severe impact that corruption has upon society and the importance of an

¹⁸ *Rustenburg Platinum Mines Ltd (Bafokeng Rasimone Platinum Mine) v CCMA & others* [2006] 11 BLLR 1104 (LC).

¹⁹ *National Union of Mineworkers & Others v Amcoal Collieries & Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) at 1453B; *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie's Mine* (1993) 14 ILJ 341 (LAC) at 357J; Le Roux & Van Niekerk: *South African Law of Unfair Dismissal* (Juta 1994) 110-111.

²⁰ (2000) 21 ILJ 340 (LAC) at 344D-G.

²¹ *City of Cape Town v South African Local Government Bargaining Council and Others* (2011) 32 ILJ 1333 (LC) at para 23.

appropriate operational response when imposing an appropriate sanction in the current circumstances. Objectively, there exists little need to remind those officials employed in positions of trust and responsibility in society that fundamentally dishonest practices may result in dismissal. This must logically follow from employment in such responsible a position. Were this Court to find that it was incumbent upon the commissioner to have imposed a lesser sanction only due to a two previous incorrect decisions (even when other employees may have been dismissed for corruption) and simply because no notice to employees had been given by the employer that in future corruption will lead to dismissal, would suggest that employees need to be reminded of the very core values of honesty and integrity so fundamental to the performance of their functions. I am satisfied that such a conclusion would be unwarranted and would only serve to minimise the seriousness and effect of the scourge of corruption currently faced by our society.

26] In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*²² Molahlehi J held:

‘...the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship’.

27] The conclusion reached by the commissioner therefore that the SAPS would not be able to trust the applicant to perform his duties without constant supervision, given the nature of the misconduct committed by him and in spite of his mitigating circumstances is not an unreasonable conclusion on the facts before the commissioner. It is in fact, a rational conclusion drawn from the evidence and serious nature of the misconduct committed.

28] In conclusion, it is not the correctness of the commissioner’s decision that this

22 [2008] 3 BLLR 241 (LC) at para 42.

court must determine on review. In finding the dismissal of the applicant to be procedurally and substantively fair, I find that the result falls within the band of reasonable decisions which stood to be made by the commissioner based on the evidence before him and that there exists no basis on which to interfere with such decision.

29] Costs

30] The court has a broad discretion, established by section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful in this application militates in favour of a costs order in favour of the SAPS. There are no reasons before me to suggest why costs in this matter should not follow the result.

Order

Accordingly, I make the following order:

31] The application is dismissed with costs.

K M Savage

Acting Judge

LABOUR COURT

APPEARANCES

FOR THE APPLICANT: L Pillay

Instructed by Saljee Du Plessis Van der Merwe Inc.

THIRD RESPONDENT: M S Mphahlele

Instructed by the State Attorney, Pretoria