



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR 2208/12

In the matter between:

GERRIT JOACHIM SMIT

Applicant

And

SOUTH AFRICAN POLICE SERVICE

First Respondent

J N MTHUKWANE N.O.

Second Respondent

SAFETY & SECURITY SECTORAL

Third Respondent

BARGAINING COUNCIL

Heard: 13 March 2014

Delivered: 28 March 2014

Summary: Test for review of arbitration award where issue is arbitrator misconceiving nature of enquiry.

JUDGMENT

NGCUKAITOBI AJ

INTRODUCTION

[1] Although the founding papers contain a number of review grounds, during oral argument it became clear that only two review grounds were being pursued by the applicant. The first is that the arbitrator misconceived the nature of the enquiry before him; and the second is that the outcome of the arbitration award is unreasonable.

[2] Recently, the Supreme Court of Appeal in the judgment of *Herholdt v Nedbank Ltd*¹ concluded that these two grounds are manifestations of the grounds for review covered by section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 (the “LRA”). This section defines one of the statutorily recognized reviewable “defects” in an arbitration award to include an instance where an arbitrator “*committed a gross irregularity in the conduct of arbitration proceedings*”.

¹ 2013 (6) SA 224 (SCA).

- [3] Thus, an arbitrator who misconceives the nature of the enquiry before him or her by asking the wrong question or an arbitrator delivering an arbitration award whose result is unreasonable, commits a reviewable irregularity under section 145 of the LRA.
- [4] The basis for the first review ground is that the arbitrator misunderstood the nature of the enquiry before him. He should have dealt with the issue of whether the employment relationship between the applicant and the SAPS in fact and in law terminated. He failed to do this. On this basis, it is stated that he asked the wrong question. The consequence of this irregularity was that the arbitrator embarked on the wrong track to a predictable and unavoidable outcome, which did not address the case presented by the applicant before him. Because of this, there was no proper ventilation of the real issues which were referred by the applicant for arbitration. This resulted in a failure of a fair trial.
- [5] The second ground, on the other hand, is that the outcome of the arbitration is unreasonable when regard is had to the evidence which was before the arbitrator. On the evidence before him, it is submitted that the arbitrator could not have found that there was no agreement between the South African Police Service ("SAPS") and the applicant that the applicant should be re-employed or reinstated into the SAPS. The conclusion that the applicant did not reach an agreement for

reinstatement is unreasonable because it is in conflict with the evidence which was before the arbitrator.

[6] A related aspect of the reasonableness argument is that it was unreasonable for the arbitrator to conclude that the specific official who concluded the agreement of reinstatement with the applicant, Mr Bushy Engelbrecht ("Engelbrecht"), had no authority to conclude the reinstatement agreement with the applicant.

[7] It is convenient that I start this judgment with the facts presented before the arbitrator in order to evaluate the criticisms leveled by the applicant.

MATERIAL FACTS

[8] At the heart of this dispute is a disagreement about the employment status of the applicant. Notwithstanding this dispute, some facts are either common cause or were established during the arbitration hearing.

I intend setting out what I understood to be common cause from an examination of the record of the arbitration proceedings and indeed the pleadings exchanged in this review application.

[9] The applicant was first employed by the SAPS on 28 January 1987. After working for the SAPS in various capacities he was discharged from

service in 1992. The process by which he was discharged entailed what is referred to within the SAPS as “*purchasing one’s discharge*”. This means that an employee pays a certain amount of money to the SAPS in order to be permitted to resign. The resignation is subject to the permission of the SAPS, unlike the usual position where a resignation is a unilateral act.² Employees who are granted a discharge would be entitled to their pension benefits which would otherwise not be the case had they resigned in the normal course without the permission of their employer to purchase their discharge.

[10] Subsequent to the applicant’s discharge in 1992, he re-applied for re-employment in 2001. This application was successful. On 3 December 2001 the applicant was re-appointed to the SAPS.

[11] From 2001 the applicant worked to the position of Detective Sergeant.

[12] In 2007 the applicant wanted to take a substantial period of leave from his duties in the SAPS, as he explains it, “*to assist my wife with our*

² See for instance the judgment of Van Niekerk J confirming the unilateral nature of the act of resignation: *Mafika v South African Broadcasting Corporation* 2010 (5) BLLR 542 (LC). The qualification, however, is that the act of resignation must be unequivocally conveyed to the employer in order to be valid. In this regard see: *African National Congress v The Municipal Manager, George Local Municipality* 2010 (3) BLLR 221 (SCA). Nicola Smit, an academic at the University of Johannesburg has written a thought provoking article on the nature of the

newborn baby as she could not take the time out due to her position and profession". In this regard, he applied for one year of unpaid leave for family responsibility reasons and also to complete his studies in security management. Initially, the application was approved. However, the SAPS changed its mind and told the applicant that there were not enough detectives and accordingly he could not take unpaid leave as initially agreed.

- [13] In the same year, 2007, the applicant was involved in a motorbike accident, which resulted in a serious foot injury. A plaster cast was put on his foot and for a while he was unable to walk. As a result he was bedridden and remained at home, unable to work. During this period of sick leave, Lieutenant Colonel Tshabalala ("Tshabalala"), the commander of the applicant, visited him and was given a copy of a letter from the applicant's doctor to confirm the fact that the applicant was unfit for work. Tshabalala told the applicant that his sick leave application form would be taken care of upon the applicant's return to work which assurance was accepted by the applicant.

[14] The applicant's request for sick leave appears not to have been processed by the SAPS. The record shows that the human resources system reflected that the applicant was on unpaid leave. It is not clear how this occurred because the applicant's version at the arbitration that he was injured and his commander was aware of the injury, remained uncontested.

[15] Nevertheless, it was put to the applicant in cross examination at the arbitration that he was in fact on unpaid leave, a suggestion he strongly refuted with reference to the facts as narrated above. It was, however, never put to him that he was not in fact injured as he claimed. Nor was it suggested that the conversation with Tshabalala did not happen. No witness was called to explain how it came about that the SAPS computer system reflected the applicant as being on unpaid leave when it was known that he was on sick leave.

[16] For several months between December 2007 and May 2008 the request for sick leave was not processed. In about May 2008 the applicant was advised that he could buy his discharge from the SAPS. An official from the SAPS visited the applicant at his house and informed him that he had to sign a discharge form because his salary would be stopped if he did not apply to purchase his discharge. According to the applicant, the

form was blank at the time he signed it. He did not know how it was subsequently populated beyond his basic personal details.

[17] Indeed, the form itself contains some peculiar features. In the section where the applicant should indicate the date of his discharge, that date is “2008/05/30”. However, the date of signature of the form itself is “2008/06/18”. That would mean that the applicant would have been discharged before he applied for his discharge. This is clearly illogical. Similarly, on the second page of the form, the “approving officer”, RM Griessel signed on 18 June 2008. But on the same page the applicant’s date of discharge is 30 May 2008. This again does not make sense because the applicant could not have been discharged before the discharge was approved.

[18] For his part, in his evidence, the applicant denied paying the required application fee in respect of the discharge and persisted with his version that the form was blank when he signed it and he was effectively under duress because he believed that his salary would be stopped otherwise.

[19] Together with the request for a discharge, the applicant signed a request to withdraw his pension benefits under the Government Employees Pension Fund. He indicated, in the application form, that the reason for the withdrawal of the pension benefits was “*voluntary resignation*”.

[20] An inventory appears to have been printed out on or about 27 May 2008 indicating that the applicant handed in several work related items including handcuffs, bullet resistant rounds, and some handguns. An exit form also was completed in which some items had to be certified, such as disciplinary action against the applicant, civil claims and State property in the applicant's possession. The section certifying that the applicant had no financial debts against the State was not signed. The section certifying that the applicant had no outstanding medical certificates was signed. This is despite the fact that the applicant's request for sick leave was outstanding by the time of the application for a purchased discharge.

[21] After the submission of the discharge forms together with the request for the withdrawal of the pension, no steps appear to have been taken by the SAPS to finalise the termination of the applicant's employment and to process the payment of the pension benefits due to the applicant by the Government Employees Pension Fund.

[22] In about July 2008 the SAPS terminated the applicant's salary. There is no evidence on the record to indicate whether there was any notice to the applicant prior to the termination of his salary. The reason for the termination of the salary appears to have been the belief within some officials at the SAPS that the applicant was on unpaid leave, despite the

fact that the unpaid leave had in fact been refused by the SAPS. No consideration seems to have been given to the fact that the applicant was on sick leave because of his injury.

[23] No communication was sent to the applicant to confirm whether or not his requested for a purchased discharge had been processed or approved, in accordance with the standard process. Nor were the pension benefits due to the applicant paid out to him.

[24] Towards the end of 2008 the applicant had still not heard from the SAPS concerning the status of his discharge request. His salary, however, remained suspended. He had discussions with various officials of the SAPS to query the status of his discharge request. He was informed that the request to be discharged had not been processed at the head office of the SAPS because they were waiting for a letter from the Sandton Station, which was responsible for the processing of the applicant's request for a discharge in the first instance.

[25] This delay resulted in the applicant changing his mind about his request for a discharge. In the answering affidavit of the SAPS, it is accepted that during October 2008 the applicant had a discussion with Lieutenant Colonel Sharpe ("Sharpe") during which the applicant stated that he had decided to withdraw his application for a discharge.

- [26] Sharpe in turn spoke to Director Basson, who requested the applicant to put his request in writing. Subsequent to the letter being written, the applicant was informed by the Provincial Office that they were waiting for certain documents from head office in order to process the withdrawal of the request for discharge.
- [27] Because of the delays being experienced by the applicant in regard to his withdrawal of the request for discharge, the applicant approached Engelbrecht, at the time an Assistant Commissioner and Cluster Commander of Alexandra. Engelbrecht agreed that the applicant could withdraw his request for a discharge. Present during this conversation was Captain Taljaardt ("Taljaardt").
- [28] A letter was written to the Head of Service Terminations at the SAPS Head Office on 13 August 2009 signed by Engelbrecht specifically recording that the "*intended resignation*" of the applicant was withdrawn and the applicant was recommended for re-enlistment to the SAPS. Engelbrecht's letter ended by recording that the matter should be finalized speedily.
- [29] Some steps were thereafter taken to process the re-enlistment of the applicant. They included a letter written by a Senior Superintendent Stoltz ("Stoltz"), the Section Head: Personnel Provisioning &

Maintenance to the Divisional Commissioner in which it is stated that there were fifty (50) employees whose names were sent for re-enlistment and requested a report back with regard to such re-enlistments. It was common cause that the applicant's name was included in the list of 50 employees.

[30] Furthermore, a printout from the central database of the SAPS which was generated by a Colonel Goosen confirmed that the applicant's re-enlistment was in process.

[31] Finally, there is an email of 17 June 2010 written on behalf of J Rademeyer recording that the applicant's absence could not longer be regarded as leave without pay and he should be re-enlisted.

[32] As noted, none of this was contested at the arbitration hearing.

[33] In its answering affidavit to the review application, the SAPS did not place this chronology in any dispute. In fact, in two material respects the version of the applicant was confirmed. First, the SAPS admitted that the applicant was never informed that his discharge was finalized and accordingly the employment relationship terminated by way of a discharge. Instead, the SAPS argued in the answering affidavit that since resignation is a unilateral act the applicant could not "*withdraw*

such resignation". Secondly, the SAPS confirmed that Sharpe was notified by the applicant in about October 2008 that he no longer intended proceeding with his request for a discharge.

- [34] On or about 3 May 2010 the Head of Employee Relations and Life Cycle Management, Brigadier M Jamieson, wrote a letter to the Provincial Commissioner of Gauteng stating that the applicant's "*application to withdraw his discharge has not been approved*". This letter seems to follow documents submitted to the head office by the provincial office. It is unclear whether the Provincial Commissioner, Mr P Naidoo, had in fact approved or disapproved the request by the applicant to be reinstated. The form which was completed by Mr Naidoo requires an election to be made between "recommended" and "not recommended". The words "*not recommended*" have been scratched out, but there is a scrawled handwritten annotation made before the word "*recommended*", which says "*not*", thus creating the impression that the request for reinstatement was in fact rejected by the Provincial Commissioner. Although this appears to have been a disputed issue at the arbitration hearing, the evidence seems to have been inconclusive and I intend making no final findings in that regard. In any event, it is clear that the view taken by the national office was to reject the request for re-enlistment. I propose approaching this case from this factual footing.

[35] Before I deal with the grounds of review, I should perhaps mention that in argument Counsel for the SAPS requested me to take into account certain printouts from the Persal system of the SAPS. I have considered these printouts. They do not appear to support the stance of the SAPS in regard to the issue whether the discharge of the applicant was finalized and approved in accordance with the relevant regulations. The printout of 5 August 2009 produced at 12h27 records that the applicant was in the process of "*purchasing*" his discharge. It does not state whether or not such a purchase of a discharge was accepted, approved or communicated to the applicant. Similarly, the printout of the same date produced at 12h28 records a delay in the processing of the discharge request by the applicant because the applicant had applied for reinstatement. The final set of printouts produced on 8 December 2009 do not take the matter further because they too state that the applicant was still in the process of purchasing his discharge. Importantly however, these printouts show that the applicant was still regarded as being in service, although his absence was regarded as leave without pay.

- [36] The applicant referred a dispute to the Safety & Security Sectoral Bargaining Council on or about 1 July 2010. In the referral form the applicant gave the following summation of the disputed issues:-

“I was told that the withdrawal of my discharge was to be processed, and I was to return to work as soon as this was done. When I called to follow up, they said (Province) that they would let me know soon when I could return as the process was basically complete. I have now received an email dated 17 June 2010 stating that they are only now processing my discharge, and that I will need to re-apply for re-enlistment. This is contrary to what I was told and agreed to. This process has dragged on for two years.”

- [37] The outcome required by the applicant was the following:-

“Reinstatement to previous position and retrospective pay for period that I have been waiting for processing of withdrawal of discharge (since February 2009)”.

- [38] Under the section “*Nature of the dispute*” the applicant characterized the dispute as “*unfair labour practice*” “*relating to failure to reinstate in terms of an agreement*”.

[39] At the commencement of the arbitration the parties were requested to explain the nature of the dispute. After setting out a brief sequence of the events leading up to the arbitration, the applicant explained the status of his resignation and/or request for a discharge as follows:-

“What happened thereafter is that the resignation was never finalized. So Superintendent Sharpe came to my house and said what do I want to do? I said well it was not finalised, I phoned the police and asked them what is happening. They said they never knew that I had resigned and what is the story. So and I said well, I did actually resign but actually I want to cancel it”.

[40] The SAPS on the other hand stated that its position would be that the applicant never reached an agreement with it to cancel his resignation and return to work.

[41] In his evidence in chief and indeed under cross examination, the applicant's case was that his request to purchase his discharge was never processed by the SAPS and he was never informed that he had been discharged from service as required by the applicable procedures and policies. Furthermore, the applicant testified that he never received his pension payout within the period that he was expecting. It was in these circumstances that he elected to withdraw his application for a discharge and to ask for re-enlistment, particularly bearing in mind that

the SAPS was treating his absence from work as leave without pay. The advice given by the officials who spoke to the applicant was that he had to apply formally for re-enlistment which he did upon agreement with Engelbrecht.

[42] The SAPS, on the other hand, led no evidence to show that the request for discharge of the applicant was accepted by the SAPS or that the applicant was ever informed that he had been discharged from service. It gave no explanation for the delay in the processing of the applicant's request for a discharge. Furthermore, the SAPS led no evidence concerning the delay in the payment of the pension payout of the applicant. It will be recalled in this respect that the testimony of the applicant had been that the relevant forms were apparently not transmitted to the head office of the SAPS from the Sandton Station, which must have contributed to the delay in the processing of the request for a discharge by the applicant.

[43] The arbitration also dealt with the issue of the agreement reached between the applicant and Engelbrecht concerning the re-enlistment of the applicant to the SAPS. The applicant's evidence was corroborated by one witness, Taljaardt, who was present in the conversation with Engelbrecht. Engelbrecht did not testify at the arbitration hearing. That meant that there was no credible factual contestation of the version

given by the applicant, which seems to be consistent with the documentary evidence which was before the arbitrator.

[44] In his arbitration award, the arbitrator characterized the issue to be decided as follows:-

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

[45] In his analysis, the arbitrator stated that the onus of proof is on the applicant to show on a balance of probabilities that there was an agreement between the respondent and him regarding the reinstatement. He concluded that there was no such agreement. The basis for the conclusion was twofold. First he criticized the applicant for not producing “*any document*” that shows that there was an agreement to reinstate him. Second he criticized the applicant for not calling Engelbrecht as a witness to support the claim of an agreement for reinstatement. On this basis the arbitrator found that the applicant had failed to discharge the onus to prove the existence of the reinstatement agreement. In addition, the arbitrator found that even if such agreement

existed, Engelbrecht did not have any authority to bind the SAPS to reinstate the applicant.

ANALYSIS

[46] The basis for the judicial review by this court of arbitration awards of bargaining councils and the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) is section 145 of the LRA. Section 145(1) permits any party alleging a defect in any arbitration proceedings to apply to the Labour Court for an order setting aside the arbitration award containing the defect. Section 145(2) tabulates the grounds upon which arbitration awards may be reviewed and set aside. It provides:-

“(2) A defect referred to in sub-section (1), means –

(a) that the Commissioner –

- (i) committed misconduct in relation to the duties of the Commissioner as an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceeded the Commissioner’s powers; or

(b) that the award has been improperly obtained”.

[47] As noted above, several grounds have been advanced by the applicant for the setting aside of the arbitration award. It is not necessary to regurgitate all the review grounds. In my view, the matter must be approached on the basis of an allegation of the gross irregularities committed by the arbitrator.

[48] The most recent authoritative statement about reviews of arbitration awards in terms of section 145 of the LRA is *Herholdt v Nedbank Ltd*. That case concerned an attack principally on findings of fact made by a CCMA Commissioner. That case is significant at two levels. The first is that it clarified, for the first time, the relationship between the test of “reasonableness” laid down by the Constitutional Court in *Sidumo & Another v Platinum Mines Ltd. & Others*³ and the grounds of review codified by section 145(2) of the LRA. In this regard in *Herholdt* it was stated that reviews could be brought on the unreasonableness ground set out in the *Sedumo* decision and the specific grounds in Section 145(2) of the LRA. The grounds in Section 145(2) “*had not been extinguished by the Constitutional Court but were to be ‘suffused’ with the constitutional standard of reasonableness*”.⁴

³ 2008 (2) SA 24 (CC)

⁴ *Herholdt* at para 14

[49] What this means, the SCA explained, was that the concept of a gross irregularity in the conduct of arbitration proceedings is not confined to a situation where an arbitrator misconceives the nature of the enquiry, but extends to those instances where the result is unreasonable.

[50] The second reason why *Herholdt* is significant concerns the endorsement of the approach which “*borrow*s” the substantive content of the grounds of review in section 145(2)(a) of the LRA from the “*corresponding provisions*” of the Arbitration Act 42 of 1965. In this regard the following statement appears from the judgment of the SCA in *Herholdt*:-

“The height of the bar set by the provisions of Section 145(2)(a) of the LRA is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions of the Arbitration Act 42 of 1965. The general principle is that a ‘gross irregularity’ concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a ‘gross irregularity’ is committed where decision makers misconceive the whole nature of the enquiry and as a result misconceives their mandate or duties in conducting the enquiry. Where the arbitrator’s mandate is conferred by statute, then,

subject to any limitations imposed by the statute, he exercises exclusive jurisdiction over questions of fact and law”.⁵

[51] In sum, the approach of the SCA to gross irregularities is that they can provide a basis for judicial review in a number of scenarios, two of which have been jurisprudentially sketched out. First, where there is evidence of the misconception of the whole nature of the enquiry by the arbitrator and secondly where the result of the award is unreasonable. I do not understand the *Herholdt* judgment as being conclusive of the instances where an arbitrator can be said to have committed a gross irregularity.

[52] Some questions, however, remain. For instance, to be reviewable, should the misconception of the nature of the enquiry result in a denial of a fair trial? Is it possible for an arbitrator to misconceive the nature of the enquiry but nevertheless arrive at a reasonable result? I believe these questions are not yet settled and our quest for answers must continue. Nevertheless, I intend confining the scope of this judgment to only two grounds of review, which I believe have been established on the papers.

(i) Misconceiving the nature of the enquiry

⁵ *Herholdt v Nedbank* at para 10.

[53] In *Herholdt*, the SCA did not expatiate the meaning of “misconceiving the nature of the enquiry” as a ground of review under Section 145(2) of the LRA. But it hinted that the meaning could be derived from cases which have interpreted that phrase in the context of the Arbitration Act, which provides for private arbitrations. In any event, the substantive content of the review ground based on misconceiving the nature of the enquiry appears relatively well settled and indeed based on a long judicial history.

[54] The judgment of *Ellis v Morgan; Ellis v Dessai*⁶ dealt with a review by a Superior Court of a decision by a Magistrate and explained the term “gross irregularity in the proceedings” as follows: -

“An irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result, but to the method of a trial, such as, for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”⁷

⁶ 1909 TS 576.

⁷ *Ellis v Morgan; Ellis v Dessai* at 581.

[55] Another early decision which also dealt with a review against a decision of the Magistrate was *Goldfields Investment Ltd. & Another v City Council of Johannesburg & Another*.⁸ In that case Schreiner J, writing a concurring judgment, expanded upon the dictum in *Ellis v Morgan*. He stated that:-

“It is not merely highhanded or arbitrary conduct which is described as a gross irregularity. Conduct which is perfectly well intentioned and bona fide, although mistaken, may also come under the description of a gross irregularity. The pertinent question, in each case, is whether such conduct prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it is a gross irregularity. Gross irregularities could be patent or latent. Latent irregularities would ordinarily be apparent from the reasons provided in support of the decision.”⁹

[56] The formulation of *Ellis v Morgan and Johannesburg Consolidated Investments* has been applied in a long list of labour cases, both under the Labour Relations Act 28 of 1956 (“the old Act”) and the current LRA. The judgment of *Paper Printing Wood & Allied Workers Union v Pienaar LO & Others*¹⁰ confirmed the authority of the previous Labour Appeal Court to judicially review decisions taken by the erstwhile Industrial Court. The

⁸ 1938 TPD 551.

⁹ *Goldfields Investment Ltd. & Another v City Council of Johannesburg & Another* at 560.

¹⁰ 1993 (4) SA 621 (A).

grounds upon which that could be done included the notion of misconception of the whole nature of the enquiry. Decisions of the Labour Appeal Court subsequent to the passing of the current LRA also confirm this. They include the decision of *Toyota SA Motors (Pty) Ltd. v Radebe & Others*.¹¹ In that case the LAC specifically asked the question whether the arbitrator had misconceived the nature of the enquiry in regard to the imposition of a fair sanction. It found that in assessing the question of the first sanction the Commissioner had misconceived the nature of the enquiry and ultimately went on to apply that test to the facts of the case.¹²

[57] More recently, the question of misconception of the enquiry has been considered by the Supreme Court of Appeal in *Telcordia Technologies Inc. v Telkom SA Ltd.*¹³ Although that case dealt with arbitration under the Arbitration Act, its treatment of the law on the circumstances where the ground of review is that an arbitrator misconceived the enquiry is instructive. It clarified that although the standard was developed in a statutory setting, it applies to private arbitration as well. The essential question pertains to whether an arbitrator misunderstood or asked the wrong questions to the extent that the real issue was not tried. Where the

¹¹ 2000 (21) ILJ 340 (LAC).

¹² See too *Stocks Civil Engineering (Pty) Ltd. v RIP N.O. & Another* [2002] ZA LAC 3 (1 February 2002) and *Branford v Metrorail Services (Durban)* (Case No. DA/2002).

answer is yes, a gross irregularity is established and the award reviewable. Many patent irregularities have that effect. The existence of a gross irregularity will depend upon the examination of the reasons given by the arbitrator.

[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 is 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 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

¹³ 2007 (5) BCLR 503 (SCA).

ultimately concerned with the methods – or the process – of the arbitration.

[59] It is now apposite to examine the award against the above legal standard.

The primary issue which the applicant presented for determination by the arbitrator was the issue of his resignation. In particular, the applicant denied that he had resigned or that the employment relationship had come to an end. The basis upon which he said this is apparent from his evidence in the arbitration hearing. He claimed that the pre-conditions for his discharge were not met and on that basis he was entitled to be reinstated to the SAPS. The issue of the agreement subsequently concluded with Engelbrecht was also important. But it is clear from the record that it was a secondary concern.

[60] In order to appreciate the position taken by the applicant, it is necessary to examine the statutory scale of relevance to the SAPS. The appointment and discharge of members of the SAPS is governed by statute. Section 28 of the South African Police Service Act 68 of 1995 gives the powers to appoint members of the SAPS to the National Commissioner.

[61] Section 35 of the SAPS Act permits the National Commissioner to discharge members of the SAPS on account of redundancy, interest of service or appointment to public office. Section 35(b) allows the National

Commissioner to discharge a member *“if, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the service, or will otherwise be in the interest of the service”*.

[62] From the above, it is apparent that a discharge is an official act performed by the National Commissioner or anyone with delegated authority. The SAPS Act must be read together with the regulations for the South African Police Service passed under on 14 February 1964 which have undergone several amendments and most recently under Notice R.254 in Government Gazette 33068 on 1 April 2010.

[63] Regulation 15 deals with “resignations, dismissal and discharges” from the SAPS. The relevant part of the Regulation provides:-

“(1) Subject to the provisions of the [Government Employees Pension Law, 1996] ... a member may be discharged or dismissed from the service

...

(e) on account of voluntary resignation, if he is a member below the rank of commissioned officer who has served for a continuous period of at least three years and has given at least three calendar months’

notice, in writing to the Commissioner for his intention to resign: provided that, subject to the provisions of Regulation 11(1)(b)(iv) a member, other than a commissioned officer, who has not served for a continuous period of at least three years shall not be entitled to resign from the service by giving notice in writing: provided further that, subject to the provisions of sub-regulation (3) and with due regard to the provisions of sub-regulation (2), any member, other than a commissioned officer, may, after written notice of at least thirty days or such shorter period as the Commissioner may determine with the approval of the Commissioner, purchase his discharge for the following amounts:-

R500,00 during the first year of service;

R300,00 during the second year of service;

R200,00 during the third year or any subsequent year of service

...

(6) A certificate of discharge or a certificate of service on the prescribed form shall on discharge be handed over to every member who has served for a continuous period of at least two years. Such certificate shall be signed by the Commissioner or commissioned officer authorized thereof by him. A member whose services are terminated before two years have expired and who desires a certificate of discharge shall apply therefore."

[64] The case presented before the arbitrator was that the applicant had “*bought his discharge*” in terms of Regulation 15 of the SAPS Regulations. The applicable part of the Regulations makes it clear that the purchase of a discharge is subject to the “*approval of the Commissioner*”. In addition, it is clear that a certificate of discharge is to be given to every member “*on discharge*” by the Commissioner. Throughout his evidence, the applicant denied that he had been discharged within the contemplation of the Regulation.

[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 reenlistment 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.

[66] It must be remembered that the applicant had attended the arbitration hearing with his wife who was described by the arbitrator as a person with "*legal knowledge*". The applicant's wife was subsequently excluded from the hearing because the rules of the third respondent would not allow her to represent the applicant. Although this is not per se a failing on the part of the arbitrator, the fact that the applicant was not represented is a factor which should have been taken into account by the arbitrator in relation to the understanding of the true nature of the enquiry. It is also clear from the written submissions of the applicant that the issue of the failure to approve the purchase of the discharge of the applicant remained an essential feature of his case, although much time was devoted to the issue of the agreement with Engelbrecht.

[67] I conclude therefore that the arbitrator committed a gross irregularity in that he misconceived the nature of the enquiry, resulting in the failure to resolve the most pertinent aspect of the applicant's case. This is sufficient to warrant an interference with the arbitration award. Nevertheless I proceed to ask the question of the reasonableness of the result.

(ii) Reasonableness of the outcome

[68] I do not believe that the result of the award is reasonable. I think the conclusion I have reached that the arbitrator misconceived the whole nature of the enquiry disposes of the need to conduct a separate reasonableness enquiry. It seems that only in rare instances can it be said that an award predicated upon the wrong enquiry has nevertheless produced a reasonable outcome.

[69] For the above reasons I would have been disinclined to entertain the issue of the reasonableness of the outcome. However, since in oral argument both parties spent considerable time on the issue of the reasonableness of the result, I must address it.

[70] There are two reasons given by the arbitrator for his award. The first is that the applicant failed to produce a written document evidencing the agreement to reinstate him. The second is that the applicant failed to call Engelbrecht to corroborate his version. These reasons cannot be supported by an objective assessment of the facts which were before the arbitrator. In the first place the applicant produced at least three documents which support his claim that an agreement was indeed concluded with Engelbrecht. The first is the letter of 13 August 2009 written by Engelbrecht, wherein Engelbrecht unequivocally recommends

the re-enlistment of the applicant. The second was a letter from Senior Superintendent Stoltz to the Divisional Commissioner in which the applicant's name was among 50 names submitted for re-enlistment. The third was an email dated 17 June 2010 in which it was recorded that the applicant's absence from work could no longer be regarded as absence without leave. Accordingly the statement by the arbitrator that no documentary evidence was produced by the applicant in support of the claim of an agreement for reinstatement, has no factual foundation.

[71] In relation to the second reason, namely that Engelbrecht was not called, the arbitrator completely overlooked the fact that Taljaardt, who was present when the conversation with Engelbrecht occurred, was in fact called. At that point the evidentiary burden should have shifted to the SAPS. To require the applicant to call Engelbrecht where the version of the applicant was essentially uncontested is equivalent to asking the applicant to prove his case beyond any reasonable doubt, something which has no foundation in arbitration proceedings. It is clear therefore that the conclusion reached by the arbitrator in relation to the existence of the agreement was so unreasonable that no reasonable arbitrator could have arrived at it given the facts which were before him.

[72] The arbitrator also decided that Engelbrecht had no authority to bind the SAPS, even if he concluded the reinstatement agreement with the

applicant. There is no clear foundation for this statement. It is true that the overall power of appointments rests with the National Commissioner. But the power may be delegated. On the evidence which was before the arbitrator it was not clear if such power had in fact been delegated. In any event, in my view the main problem with this finding is 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. The case brought by the applicant was one founded on unfair labour practice. In this respect, the arbitrator did not consider whether in the event an agreement was in fact reached with Engelbrecht, it would nevertheless be unfair to permit the SAPS to resile from such agreement. Certainly the question as to the authority of Engelbrecht would not be decisive in relation to the fairness enquiry. Given that there was no fairness enquiry conducted by the arbitrator at all, in my view it cannot be said that the result is reasonable.

[73] I conclude therefore that the arbitration award fails on both grounds. The arbitrator misconceived the whole nature of the enquiry and delivered an award with a result that is not reasonable on the material which was before him.

RELIEF

[74] During oral argument I debated with both counsel whether to remit the matter back to the third respondent for a hearing before a different arbitrator or whether to substitute the award. The relief sought in the notice of motion is a remittal. Counsel for the SAPS submitted that it would be unfair for this Court to decide the matter, on the issue, which in reality only became clear during oral argument. He submitted that the SAPS could well have produced the relevant evidence to prove that the requirements of Regulation 15 were fulfilled, if the arbitrator had directed himself to the correct enquiry. I agree with these submissions and wish to place additional considerations which I decided not to substitute the award.

[75] My first finding is that the arbitrator misconceived the whole nature of the enquiry and did not enquire into the question whether the employment relationship between the parties in fact terminated. The record before me does not provide a clear account to enable a just conclusion on whether the applicant was ever discharged within the contemplation of Regulation 15. It seems that additional evidence will have to be canvassed before any final determinations are made to that question.

[76] I appreciate of course that the applicant has been out of employment for a substantial period of time. I also take into account that this is not the first time this matter is being debated before this court, having been remitted

on the first occasion by Van Niekerk J. My primary difficulty is that it is not possible on the present record to answer the question whether the provisions of Regulation 15 were fulfilled. It seems that this is an issue that must be addressed at arbitration with new evidence being led and new parties being permitted the opportunity to produce any documents to substantiate their respective cases.

[77] Similarly, in relation to my second reason for the finding, the problem is that the arbitrator did not direct his mind to the question of the fairness of the decision to the extent that an agreement was reached with Engelbrecht. If such agreement was reached as it seems to have been, on the probabilities, it seems to me unfair to permit the SAPS to renege from it on the account of the alleged lack of authority on the part of Engelbrecht. But these are questions which must be dealt with by the bargaining council.

[78] For these reasons, I intend remitting the matter for fresh arbitration proceedings before a Commissioner other than the second respondent.

ORDER

[79] In the circumstances the following order is issued:-

1. The arbitration award dated 14 August 2012 issued by the second respondent acting as arbitrator of the third respondent is hereby reviewed and set aside.
2. The dispute between the applicant and the first respondent is remitted back to the third respondent for a hearing before a Commissioner other than the second respondent.
3. The first respondent shall pay the applicant's costs.

TEMBEKA NGCUKAITOBI

Acting Judge if the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv M Jennings

Instructed by: Deal Attorneys (Pro-Bono)

For the Respondent: Adv SB Nhlapo

Instructed by: State Attorney, Johannesburg