REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR1738/13

In the matter between:

MULALO ALBERT RAGIMANA	**Applicant**
And	
MINISTER OF POLICE	**First Respondent**
NATIONAL COMMISSIONER OF THE SAPS	**Second Respondent**
THE SOUTH AFRICAN POLICE SERVICES	**Third Respondent**
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**Fourth Respondent**
COMMISSIONER PRINCE KEKANA *N.O.*	**Fifth Respondent**

Heard: **23 January 2015**

Delivered: **03 March 2015**

JUDGMENT

MALAN AJ

Introduction

[1] This is an application to review and set aside an arbitration award handed down by the Fifth Respondent under the auspices of the Fourth Respondent.

[2] In the arbitration award that is the subject of this review application the Fifth Respondent held that the dismissal of the Applicant by the Third Respondent was both procedurally and substantively fair.

[3] The Applicant was, prior to his dismissal, a senior police officer with the rank of Colonel employed in the legal advisory section of the Third Respondent.

[4] The review grounds advanced by the Applicant, as clarified with Applicant's representative in the course of argument before the Court, fall into two broad categories. The first category relates to certain so called *points in limine* raised by the Applicant at the arbitration proceedings and the second grouping of review grounds relate to criticism of the Fifth Respondent's findings in relation to substantive fairness and particularly the finding that there was a substantively fair reason for the dismissal of the Applicant. It was also clarified in argument that the first grouping of review grounds only potentially impact on the procedural fairness of the Applicant's dismissal.

The Review grounds relating to the *points in limine*

[5] In relation to the first so called *point in limine* that was raised at the arbitration proceedings, the gist of the argument presented to this Court is that the period of more than a year between the commission of the alleged disciplinary offence that resulted in the dismissal and the completion of the disciplinary proceedings was such an excessive delay that it rendered the subsequent dismissal procedurally unfair. The argument for purposes of the review application then appears to be that the Fifth Respondent should have held the dismissal of the Applicant to have been procedurally unfair as a result of the delay in instituting and completing disciplinary proceedings.

[6] The contention which the Court was invited to accept, to the effect that the delay in instituting and completing disciplinary process is unexplained, is not entirely consistent with the facts as they appear from the papers before the Court. The factual circumstances surrounding the delay are mostly uncontroversial to the extent that the Applicant is not in a position to gainsay the First to Third Respondent's version of why and how the delay occurred.

[7] It is apparent that the matter never truly became dormant over the approximately one year period that it took to bring to disciplinary finality and that there was always some activity over the period to try to bring the matter to a close. Although the delay may be the subject of legitimate criticism there were some circumstances that contributed substantially to the delay, such as the recusal of successive nominated chairpersons of the disciplinary enquiry that fell outside the employer's powers to prevent. It in any event does not appear that the delay in any way compromised the Applicant's ability to mount a defence to the disciplinary allegations nor did it materially prejudice him in any other way. The fact that there was some inconsistency detected with his travel claim became known to the Applicant very soon after the claim was first lodged and he became aware within a few months that the matter was under investigation. Although the investigation did not proceed with any degree of haste the period over which it was instituted, continued to finality and the fact that it was then followed up with disciplinary action after the investigation was concluded does not suggest that there was ever a waiver of the right to take disciplinary action. The Applicant was also not materially prejudiced by the delay insofar as he remained in employment on full remuneration and benefits and was not suspended.

[8] Although the handling of this matter most certainly does not represent a model of speed and efficiently, the view adopted by the Fifth Respondent in regard to the delay represents a decision that a reasonable decision-maker could have come to. The view that the delay although substantial, was sufficiently explained and, that the overall circumstances were such that no real procedural unfairness to the Applicant resulted, does not appear unreasonable or irrational in the circumstances.

[9] The further *point in limine* that relates to the splitting of disciplinary charges is also of no particular consequence as it is apparent from the record of the arbitration proceedings that the Applicant at all times knew what the core allegations against him were and what he needed to answer to. There is no indication in the arbitration

award or the record that the core allegations of attempting to act dishonestly and in fact fraudulently in terms of a specific travel claim was considered to be either more or less serious as a result of being described in several separate and somewhat repetitious paragraphs in the "charge sheet". The requirement of fairness in relation to the Applicant being made aware of the charges was therefore met in the circumstances and the style and format adopted by the drafters of the allegations, even if it could have been more compact, did not result in any procedural unfairness.

[10] In terms of the Fifth Respondent's assessment of the *points in limine* as raised in the arbitration this Court is of the view that his decision making reflects at least that of a reasonable decision maker and therefore, in accordance with the review test enunciated by Supreme Court of Appeal in the matter of *Herhold v Nedbank Limited (congress of SA Trade Unions as amicus curiae)* (2013) 34 ILJ 2795 (SCA) and the Labour Appeal Court in the subsequent judgment in the matter of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC), cannot be interfered with by this Court. It follows that the review application must, to this extent, fail.

<u>The Review grounds relating to substantive fairness</u>

[11] In relation to the issue of substantive fairness, the Applicant's representative has urged this Court to accept that the burden of proof was not discharged by the First to Fourth Respondent in the course of the arbitration proceedings and that in the circumstances a dismissible offence was not proven. The Court pauses at this point to again point out that it is not sufficient, for purposes of meeting the applicable review test, for the Court to be persuaded to disagree with the factual findings made in the arbitration award under scrutiny. The Court may only interfere if it concludes that the ultimate decision and outcome of the relevant award reflects a decision and/or outcome which a reasonable decision maker could not arrive at. The Court should not be tempted to simply impose its own views in relation to whether the award is correct or not as this would be tantamount to dealing with the matter as an appeal.

[12] In the present matter the arbitration record reveals that it was common cause that the Applicant was entitled to submit a travel claim for expenses incurred for accommodation in Cape Town for the 23rd and 24th of May 2011 totalling no more than R1 000.00 (one thousand rand). The claim was clearly intended to be re-

imbursive in nature and therefore presupposed that the Applicant had first disbursed his own funds for accommodation for the two nights in question and that he incurred the expense for purposes of executing his duties as a police officer. It was further common cause that a claim was received by a chief accounting clerk Ms Maxine Kock ("Ms Kock") of the Third Respondent reflecting a claim in favour of the Applicant in the amount of R990.00 (nine hundred and ninety rand) in relation to an amount supposedly incurred by the Applicant for accommodation at the Vineyard Hotel and Spa on 23 and 24 May 2011.

[13] In attempting to discredit the evidence of Ms Kock much was made by the Applicant's representative of the fact that Ms Kock made two statements in separate affidavits in relation to the delivery of the relevant accommodation claim to her. The first statement records that she received the claim from the Applicant and the second statement goes further to state that she did not receive the claim directly but found the claim form on her desk. The Court was urged by the Applicant's representative to consider this as a contradiction which is fatal to the credibility of Ms Kock's evidence and which should have resulted in the Fifth Respondent rejecting her evidence.

[14] The contention that the two statements by Ms Kock contradict each other does not, with respect, appear to be correct. The first statement does not exclude the possibility that the document in question was received indirectly and makes no specific reference to the manner in which the claim was delivered or received. The second statement is simply more specific than the first statement and elaborates on the first statement without contradicting it. The Court is therefore satisfied that the content of the two statements in question do not serve to discredit Ms Kock's evidence in any way.

[15] Even if the Court were wrong regard to Ms Kock's evidence it would with respect make little difference to the reasonableness of the ultimate factual assessment in the matter as it appears to have been common cause that a travel claim relating to accommodation at the Vineyard Hotel and Spa was submitted to Ms Kock in the Applicant's name, that the Applicant had in fact never stayed at the Vineyard Hotel and Spa at any time and furthermore that the Applicant came and retrieved the claim in question from Ms Kock and submitted a new claim. All the factual elements of significance in Ms Kock's evidence were therefore in any event common cause.

[16] It furthermore appears to be common cause that the Applicant then submitted a travel claim which reflected that he had supposedly resided at a guest house called Costa Del Sol on the dates in question.

[17] The owner of Costa Del Sol, a Mr Lalu, gave evidence at the arbitration proceedings which evidence is reflected in the arbitration record before the Court. Mr Lalu explained that the Applicant had not stayed at Costa del Sol on the dates in question. According to Mr Lalu, the Applicant had in fact booked and paid to come and stay at Cost del Sol at a later stage but had asked that the invoice be backdated to reflect that he stayed at the guesthouse on 23 and 24 May 2011. According to Mr Lalu he acceded to the request to backdate the invoice. Mr Lalu's evidence indicates that he attached little significance to the backdating of the invoice as he was not aware of the reason for the request but he however, also testified that he was asked by the Applicant on several occasions to confirm, if asked, that the Applicant had in fact resided there on 23 and 24 May 2011.

[18] It is noticeable from the record that in the cross examination of Mr Lalu much is made of peripheral issues such as the fact that a draft statement was provided to him by the investigating officer. No specific factual versions were however, put to Lalu to either contest or confirm his evidence that the Applicant did not stay at Costa del Sol on the relevant dates. Although it was put to the Court from the bar that the Applicant had in fact stayed at Costa Del Sol on 23 and 24 May 2011 no such version was ever put to Mr Lalu.

[19] In the view of this Court, the Fifth Respondent's decision to accept Mr Lalu's evidence in the absence of any specific version or direct evidence from the Applicant regarding the events of 23 ad 24 May 2011 is at the very least a decision that a reasonable decision maker would come to.

[20] The submission advanced to this Court to the effect that the evidence in relation to Costa Del Sol accommodation issue was not relevant to the charges against the Applicant (which only made direct reference to the Vineyard Hotel and Spa) and should have been disregarded by the Fifth Respondent is not persuasive. It must have been readily apparent at all times that the import of the evidence relating to Costa del Sol was that such evidence suggests strongly that the Applicant attempted to cover his tracks in relation to the attempted fraudulent travel claim in relation to the

Vineyard Hotel and Spa with a further falsehood by pretending that he had incurred a legitimate accommodation expense in relation to Costa del Sol. If Mr Lalu's evidence is accepted, it is apparent that the Applicant wanted to place himself in a position to argue that he had a valid accommodation claim for the dates in question albeit in relation to a different accommodation provider. The payment of an amount to Costa del Sol and the request to backdate the invoice to reflect use of accommodation by the Applicant on the 23rd and 24 of May 2011, coupled with a request to Mr Lalu to lie about the issue, could have no other logical implication. The evidence of Mr Lalu was therefore relevant to the assessment of the probabilities that the Applicant was in fact responsible for the fraudulent accommodation claim relating to the Vineyard Hotel and Spa.

[21] The Applicant's failure to give evidence at the arbitration to explain what had in fact happened on the relevant dates in 2011 was, in the circumstances, always likely to be fatal to his case.

[22] This Court is in respectful agreement with the submission of Counsel for the First to Third Respondents that although the burden to prove a fair reason for dismissal may have resided with the employer party initially clearly the evidentiary burden had shifted to the Applicant during the course of arbitration proceedings. To have held otherwise would in the view of this Court have been rationally unjustifiable and the view adopted of the matter by the Fifth Respondent, is with respect the view that any rational decision maker would have come to in the circumstances. For the Applicant to have succeeded in the matter, it would have been necessary for an arbitrator or this Court to arrive at a speculative and unjustified conclusion to the effect that parties unknown had constructed an elaborate Machiavellian scheme to incriminate the Applicant. The evidence as reflected in the record of the arbitration proceedings provides no basis whatsoever for such a conclusion. There simply appears to be no logical reason why anybody other than the Applicant would have handed in the initial fraudulent travel claim as the Applicant would have benefitted directly if the claim had been paid.

[23] It furthermore seems inconceivable that Mr Lalu, somewhat to his own potential personal detriment and for no conceivable reason, would voluntarily step forward and admit that he had backdated an invoice at the request of the Applicant and furthermore explain that the Applicant had asked him to falsely confirm that he had

resided at his guest house. It furthermore seems even more inconceivable that if the Applicant had in fact stayed at Costa Del Sol, he would not have instructed his legal representative at the arbitration to put this as a clear version to Mr Lalu in cross examination.

[24] The Applicant's decision not to give evidence to explain exactly where he was and what he did on the days in question and his failure to at least attempt to advance some explanation of how and why the fraudulent claim in his name in relation to the Vineyard Hotel and Spa appeared left the Fifth Respondent with no reasonable alternative but to accept the evidence against the Applicant.

[25] The issue of the appropriateness of the dismissal sanction applied by the Fifth Respondent was raised at a point in argument before this Court, as this Court understands it, with particular reference to whether the rules in relation to travel claims were sufficiently clear to justify the dismissal sanction in this instance. This proposition requires brief comment. It is the view of this Court that it is self-evident that a senior police officer must at all times maintain the highest level of integrity and honesty in the execution of his or her duties. The nature of police work and the prevalence of corruption and dishonesty in society demands that any departure by a senior police officer from the highest standards of honesty and integrity be visited with summary dismissal. It would be entirely inimical to the public interest in the maintenance of law and order, to allow for any degree of deviation from this principle. The First to Third Respondents, and indeed the South African public, are entitled to expect no less. In the circumstances of this matter, it is apparent that the rule which was breached is not only a rule relating to travel claims. If the factual findings of the Fifth Respondent are to be accepted then the Applicant breached rules of honesty and integrity which should be clear to any police officer without any specific explanation or recordal of such rules in writing.

[26] It follows that the Court is not persuaded that there is any merit also in the attempt to review the findings of the Fifth Respondent in relation to substantive fairness, which findings seem to be entirely consistent with the evidence placed in front of him in the arbitration proceedings.

[27] In light of the findings that the Court has arrived at in relation to the application itself the issue which remains to be considered is the costs of this application. This Court

has over time shown an understandable reluctance to impose the financial burden of cost orders on individual litigants. The awarding of costs however remains a discretion which this Court must exercise in fairness to all parties. The Court has on a previous occasion not hesitated to order the First to Fourth Respondents to pay the Applicant's costs in relation to the condonation and postponement of the matter to the extent that the actions of the First to Fourth Respondent caused the Applicant to incur unnecessary legal costs in this regard. In the circumstances of this matter, the Court is however, in relation to the review application itself, not persuaded that the Applicant has acted in good faith in pursuing the matter. The Court must in this regard take cognisance of the fact that the review application is entirely without merit and has resulted in the First to Fourth Respondents, and indirectly the South African taxpayer, incurring the cost of opposing the application. The decision of the Applicant to pursue this matter further before this Court despite his failure to provide any direct evidence at the arbitration proceedings appears particularly unreasonable in the circumstances. It is fair that the Applicant must in the circumstances be fixed with the consequences of his actions. It is also necessary, from a policy perspective, that litigants should be actively discouraged from burdening this Court with applications of this nature.

[28] The Court accordingly orders as follows:

1 The review application is dismissed.

2 The Applicant is ordered to pay the First to Fourth Respondent's costs in relation to the review application.

Malan AJ

Acting Judge of the Labour Court of South Africa

<u>APPEARANCES</u>

For the Applicant: M A Maoba

Instructed by: Maoba Attorneys

For the Respondent: Adv. D Mtsweni

Instructed by: State Attorney