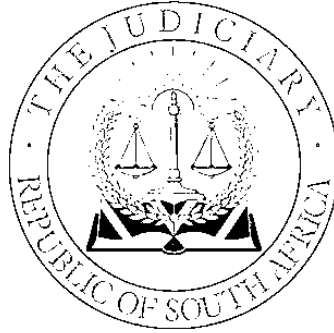




THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Not Reportable

Case no: C338/15

IVAN MYERS

Applicant

and

THE NATIONAL COMMISSIONER

First Respondent

OF THE SOUTH AFRICAN POLICE SERVICES

THE PROVINCIAL COMMISSIONER

Second Respondent

OF THE SOUTH AFRICAN POLICE SERVICES:

WESTERN CAPE

Heard: 3 September 2015

Delivered: 17 November 2015

Summary: Employer ordered to reinstate employee – employer contending employee could not be reinstated as position no longer in existence because of restructuring – reinstatement aimed at placing employee in the position he or she would have been but for the unfair dismissal - once an employee has established a particular benefit or promotion was plausibly within his grasp had he not been unfairly dismissed and this is not rebutted, reinstatement, in fairness, should include these enhancements to his remuneration or rank, retrospectively.

JUDGMENT

WHITCHER J

- [1] This is an application by Lieutenant-Colonel Myers, ('the applicant') that the National Commissioner of Police ('the Commissioner') and the Provincial Commissioner of Police ('the Provincial Commissioner') be compelled to comply with the declaratory order of Steenkamp, J in the Labour Court and the final order of the Labour Appeal Court in this matter.
- [2] In effect, and in the main, the applicant seeks to compel the respondents to absorb him in *the higher graded level 12* post of commander of the Cape Town Dog Unit (Maitland) retrospectively from the first day of the month following the upgrade of the post.
- [3] The applicant prays that, in the event that the respondents do not comply, an order is sought that they be held in contempt of court.

Background

- [4] The matter has a long history in which both parties have won temporary victories only to suffer a reversal of fortune on review or appeal. The matter before this court is essentially to decide whether the effect of earlier court judgments was that the applicant should be "reinstated" at the grade of the post he occupied when he was dismissed or at a higher one, retrospectively.
- [5] The applicant was the commander of the dog unit, situated in Maitland, Cape Town, in the Western Cape. The post was at a level 10 grade. In July 2007, he was dismissed from the SAPS for communicating with the press without permission about the poor conditions under which SAPS dogs were kenneled.
- [6] He referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC). On 3 September 2008, a Commissioner of the SSSBC dismissed his application. The applicant successfully reviewed this decision and on 13 January 2009 the Labour Court ordered that the matter be remitted *de novo* to the SSSBC to be heard again.
- [7] The Commissioner applied for leave to appeal, was refused and then petitioned the Labour Appeal Court for same. Leave to appeal was granted and the matter was heard on 11 November 2010. The majority of the LAC bench upheld the appeal.

- [8] The applicant then successfully petitioned the Supreme Court of Appeal for special leave to appeal. The matter was heard on 5 November 2012. The full bench of the SCA found the applicant's dismissal to be unfair and upheld the appeal with costs. It ordered that the Commissioner reinstate the applicant to the position he held before his dismissal. Reinstatement was further to operate with retrospective effect to the date of dismissal.
- [9] The Commissioner failed to give effect to this order by requiring the applicant to report for duty instead at Ravensmead police station. This was outside his area of specialisation and without being a commander of any unit.
- [10] In 2013, the applicant filed for contempt of the SCA's order in the Labour Court. In the Provincial Commissioner's answering affidavit, he claimed that another dog unit had been amalgamated with the one formerly commanded by the applicant. This occurred in November 2007, four months after the applicant's dismissal. After the amalgamation of units, a restructuring took place and on 29 June 2009 the applicant's former post of dog unit commander was formally upgraded to level 12. According to the Provincial Commissioner, the level 10 position that the applicant occupied at the time of his dismissal was therefore non-existent and the applicant could thus not be appointed to this new post.
- [11] These facts did not surface during the litigation that took place in the LAC in November 2010 or the SCA in November 2012. The applicant contends that they are reasons contrived to frustrate full compliance with the SCA's order.
- [12] The applicant sought an order of contempt of court. On 28 January 2014, Steenkamp J, declined to make a contempt order but, in essence, interpreted the SCA's order for the Commissioner. In doing so, he implicitly rejected the argument that the original post the applicant occupied was abolished. In this he was, with respect, completely right. The post the applicant occupied before his dismissal was simply extended to a larger geographical area and greater responsibilities were added to it. For this reason Steenkamp J specifically ordered that the applicant be "reinstated into the *restructured* post of commander of the Cape Town Dog Unit at Maitland at the *current salary* that that post attracts coupled with *retrospective backpay*" (emphasis added).

[13] The Commissioner appealed this decision in the LAC advancing the argument that it would be impractical to reinstate the applicant since his grade 10 post was abolished and the new post created was at grade 12. A transcript of the proceedings shows the judges of the LAC were less than impressed with these arguments and seen as taking a semantic, literalist and overly bureaucratic approach to giving effect to the SCA's order. They also took issue with the new facts regarding abolishment of the post being supplied.

[14] On 10 April 2015, the LAC's final word on the matter was this:

"[7] When the Supreme Court of Appeal made its decision to reinstate [the applicant], it would have been mindful of the possible remedies set out in s 193 of the Act as would the parties. For this reason, it was at the hearing before the SCA, which took place in 2012, that is, many years after the restructuring process had taken place, that appellants, if they had so wished, should have argued that reinstatement was an inappropriate order because the relevant post had been abolished. There is nothing on the papers, neither in the judgment of the SCA, to indicate whether such arguments were raised before the SCA. Suffice it to say that the order of the SCA was clear: appellants were to reinstate the respondent to his former position. There was no qualification made to the order nor can one be implied.

[8] When the appellants restructured the organisation of the SAPS and abolished the Maitland Dog Unit and replaced it with the Cape Town Dog Unit they must have known that, were the respondent to have been successful in his litigation, appellants would have been required to place him in his former position or one of a similar nature. That someone was appointed to be the Commander of the Cape Town Dog Unit illustrates, firstly, that there was such a post and, secondly, that it was appellants who risked the possibility that successful litigation by the respondent would place them in a difficult position regarding reinstatement"

[9] Be that as it may, the order of the Supreme Court of Appeal is clear. The opportunity to have raised objections to the granting of the order

passed when the order was granted. No further appeal was prosecuted in the Constitutional Court

[10] In the circumstances the appellants are obliged to reinstate [applicant]. It is a legal duty which flows from a clear and unequivocal order of the Supreme Court of Appeal."

[15] On 5 May 2015, the applicant was required to report to the Cape Town Dog Unit as commander, but at post level 10. The Commissioner submits that this constituted full compliance with the preceding court orders.

[16] The applicant, in turn, contends that compliance with the SCA's order means he should be reinstated to the post at its current grade, after restructuring.

[17] The Commissioner avers that upgrading of posts is regulated by the SAPS' Employment Regulations promulgated under the South African Police Services Act 68 of 1995 and that none of the preceding court orders escape these provisions. In terms of Regulation 30, the Commissioner possesses the discretion to deal with a situation where a post is upgraded in a number of ways, only one of which includes continuing to employ the incumbent. The Commissioner states that the applicant seeks to deprive the Commissioner of this discretion by interpreting reinstatement to effectively promote the applicant to colonel.

[18] The applicant's reply to this is that the post of Dog Unit Commander is an existing post, which has been re-graded and funded. After the LAC's latest judgment in the matter, the Commissioner did indeed place the applicant into this post. The Commissioner is compelled to absorb the applicant into this grade 12 post, retrospective to the date on which, but for his unfair dismissal, the post was upgraded.

[19] The applicant contends further that the Provincial Commissioner's decision to subject him to discipline for not reporting to Ravensmead police station and also appointing a Colonel Visser to the disputed post sustains the contention that SAPS leadership were deliberately defying orders of the SCA and the LAC. It is trite that in application proceedings where a dispute of fact emerges on the papers, the version of the respondent is to be accepted unless it is patently improbable. The respondents' explanation for subjecting the applicant to

discipline is weak but not fanciful. The explanation regarding Colonel's Visser's erroneous yet quickly reversed appointment to the disputed post also does not support the inference of wilful defiance.

Analysis

[20] Since the SCA judgment the Commissioner has misunderstood the true scope of the relief of reinstatement, despite having two courts nudge it in the right direction. The applicant was unfairly dismissed. But for this action he would have occupied the very post that was re-graded when two dog units amalgamated. Had the applicant not been unfairly dismissed, the Commissioner possessed the powers, in terms of regulation 30 (8), to have enhanced the applicant's grade in those circumstances. While it is not a certainty the Commissioner would have elected to continue to employ the applicant in the upgraded post this was by no means unlikely.

[21] The respondents tried to suggest that the SAPS Employment Regulations prevented an upgraded post from being filled unless that post was advertised. This has no merit if one reads regulation 30 (8). The National Commissioner may continue to employ an incumbent in the higher graded post without advertising if:

- a) the incumbent already performs the duties of the post;
- b) the incumbent has received a satisfactory rating in his or her most recent performance assessment;
- c) it will be in the interest of the Service.

[22] In this case, the very least, in fairness, that one could expect from an employer wishing to resist the restoration of the full *status quo ante* for an act of unfair dismissal, is a demonstration in the appropriate forum that the reinstated employee was unlikely to have achieved the contested benefits or advancement that his dismissal prevented him or her from seeking. In my view, to expect an employee to always demonstrate a contractual or statutory right to an entitlement, over and above being taken back into employ, could defeat fully restoring the *status quo ante*.

[23] In a sense this is as much a question of evidence as legal doctrine. The respondents have placed nothing before the SCA, LAC and, indeed, this court indicating that the applicant would not have benefited, as a specialist incumbent, from the fact that his post was upgraded while he should have been in it. As Steenkamp J correctly ordered, the SCA judgment meant that the applicant should be reinstated into the *restructured* position. This can only but mean at grade 12.

[24] The fact that the Commissioner had other options open to him other than upgrading the applicant together with the post should, for policy reasons, signify very little. As the LAC stated, it was the SAPS who, after a restructuring risked the possibility that successful litigation would place them in a difficult position regarding reinstatement. The Commissioner's discretion to fill the upgraded post was thus limited by the order of reinstatement to the restructured post. This limitation is the wages of the 'sin' of an unfair dismissal of an employee from a post upgraded in his absence.

[25] I agree with Mr Nortje, counsel for the applicant, that *Equity Aviation Services (Pty) Ltd v CCMA and Others*¹ is authority for the idea that reinstatement is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. Once an employee has established a particular benefit or promotion was plausibly within his grasp had he not been unfairly dismissed and this is not rebutted, reinstatement, in fairness, should include these enhancements to his remuneration or rank.

[26] In any event, the Commissioner indeed elected, albeit spurred by the recent rulings of the Labour Court and LAC, to place the applicant in the upgraded post of Cape Town Dog Unit commander without advertising the position. The discretion the Commissioner enjoys to retain such an employee at his previous grade is removed by the imperative language of SAPS Employment Regulation 30 (9). This states that:

- a) the absorption of the incumbent employee in the higher graded post as provided for under sub-regulation (8), *must* take effect on the first day of the month following the month during which

¹ [2008] CC 16.

the National Commissioner approved the absorption; and the salary level of the employee must be adjusted on the first day of the month following the month during which the National Commissioner approved the absorption; and

- b) the salary of the employee *must* be adjusted to the minimum notch of the higher salary level with effect from the date referred to in subparagraph (a).

[27] In this case, the date of retrospective adjustment of salary must, I believe, shift even further back to the date that the post was formally upgraded. As stated above, this is how the applicant is most fairly placed back into the position he would, in all likelihood have been, but for his unfair treatment.

[28] As also alluded to above, I am not convinced that a case is made for the present non-compliance with the various court orders being wilful and male fide. Nevertheless I do intend to place the respondents under time frames to fully implement the court orders mentioned above, as set out in the order below. In addition, I believe the sword of a future contempt order hanging over their heads is in order as any further delay in fully 'reinstating' the applicant would strongly suggest *male fides* and thus require the court's more robust intervention. The issues have now been fully ventilated and space for misinterpretation of the SCA's judgment as explained by Steenkamp, J is now well and truly over.

[29] The applicant pleaded that the post in issue was formally upgraded to level 12 from 1 July 2009. At the hearing of this application on 3 September 2015, the applicant's counsel accepted the respondent's plea that the upgrade of the post was only implemented in phase two of the restructuring at the beginning of March 2011.

Order

[30] In light of all the findings above the Order of this Court is as follows:

- (1) The first and second respondent are compelled to fully comply with the SCA order, the declaratory order of Steenkamp J in the Labour Court and the final order of the LAC.

- (2) Specifically this means, appointing the applicant to the lowest notch at salary level 12 with the associated increase in rank to colonel.
- (3) The applicant must be paid the difference in salary between the lowest notch on salary level 12 and salary level 10, retrospective from the first day of the month following the upgrading of the post to level 12, that is, 1 March 2011.
- (4) Paragraphs 1 – 3 of the Order above are to be complied with within 14 days of the order of this court.
- (5) The first and second respondent are to pay the costs of this application, including the costs of counsel.

Whitcher J
Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv J Nortje instructed by
Heidi Van der Meulen
Attorneys

For the Respondents:

Adv E A De Villiers-Jansen instructed
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