



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2105/13

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

SAFETY & SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

JACKSON MTHUKWANE

Second Respondent

POPCRU

Third Respondent

CAPTAIN C MOTSOENENG

Fourth Respondent

Heard: 13 January 2016

Delivered: 27 January 2016

JUDGMENT

MADDERN AJ

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the Second Respondent ("the Commissioner") of 15 July 2015 under

Case No. PSSS31/12/30. In issuing the arbitration award, the Second Respondent acted under the auspices as a Commissioner appointed by the First Respondent, the Safety & Security Sectoral Bargaining Council ("the Bargaining Council").

- [2] The application for review is brought in terms of Section 158(1)(g) of the Labour Relations Act¹ (the "LRA") read together with Section 145 of the LRA which application was filed before this Court on 3 October 2013. The Application is opposed only by the Fourth Respondent.

Preliminary Matters

- [3] The application was filed twenty one (21) days late and the Applicant seeks condonation for the late filing. The Fourth Respondent opposes condonation for the late filing of the application.
- [4] The Applicant has in a further Notice of Motion applied for the condonation for the late delivery of the arbitration record in terms of Rule 7A(6) (insofar as this may be necessary) and for the withdrawing of an amended Notice in terms of Rule 7A(8)(a).
- [5] The Fourth Respondent raises issues regarding the late filing of the record and further contends that there has not been proper compliance with Rule 7A(8) in that a supplementary affidavit was filed without a notice contemplated by Rule 7A(8). It is further contended by the Fourth Respondent that the supplementary affidavit was served and filed before compliance by the Applicant in terms of Rule 7A(6). These issues are raised by the Fourth Respondent in his opposing affidavit in respect of which the Fourth Respondent applies for condonation for the late filing of the opposing affidavit insofar as this may be necessary having regard to this Court's determination of the actions of the Applicant in relation to Rule 7A(6) and Rule 7A(8). The Applicant's representative Advocate Mosam confirmed that the Applicant does not take issue with the late

¹ Act 66 of 1995 as amended

filing of the Fourth Respondent's answering affidavit. The Fourth Respondent has not filed any affidavit specifically in answer to the Application for Condonation and the late delivery of the arbitration record in terms of Rule 7A(6) nor in relation to the withdrawing of the Rule 7A(8) notice.

- [6] The Fourth Respondent further contends that the Applicant's replying affidavit filed pursuant to the provisions of Rule 7A(10) is out of time in that it was filed on 5 January 2014.
- [7] Having considered the Application for Condonation for the late filing of the application which was twenty one (21) days out of time, the delay, while significant, is not excessive and given the explanation tendered, is condoned.
- [8] In relation to the Applicant's compliance with Rule 7A(6), it is quite apparent that the record was filed with the Registrar of the Court on 7 January 2014 and due to a problem encountered with the State Attorney's messenger, was then only filed on the Fourth Respondent on 22 January 2014. This delay has been explained and once again condonation is granted.
- [9] In relation to the Applicant's compliance with Rule 7A(8), the Fourth Respondent contends that the supplementary affidavit filed on 17 January 2014 should have been accompanied by a notice as stipulated in Rule 7A(8)(a). In this context it is quite apparent from the Application for Condonation filed by the Applicant, that it was the Fourth Respondent's attorneys' contention that the affidavit on its own, without an accompanying notice, did not satisfy the requirements of Rule 7A(8)(a). The representatives for the Applicant, the State Attorney, failed to appreciate the point and the parties proceeded to litigate by way of correspondence with each other in relation to the issue. The omission by the Applicant in relation to the requirements of Rule 7A(8)(a) is not material to the dispute and is condoned

- [10] The Rule 7A(9) opposing and Rule 7A(10) replying affidavits were both out of time. No condonation is required in the light of the provisions of the Practice Manual² as neither party has filed the Notice of Objection envisaged.
- [11] The Fourth Respondent, as a final preliminary point, raises the delay by the Applicant in filing its heads of argument in response to the directive issued by the Registrar of this Court on 9 June 2014. The Applicant's heads of argument were only filed on 9 July 2015. In relation to the filing of the heads of argument the Fourth Respondent proffers a number of factual averments in the confines of the Fourth Respondent's heads of argument filed on 21 July 2015. It is unnecessary to deal with the factual averments outlined by the Fourth Respondent save to acknowledge that the Court file reflects a directive by the Registrar for the filing of heads of argument on 12 June 2014. The Court file further reflects filing by the Applicant and Fourth Respondent of heads of argument some 12 months later. This issue, coupled with the general conduct of the parties referred to above, will be dealt with further in the context of costs after consideration of the merits of the review application. Mr du Toit, for the Fourth Respondent, confirmed that in respect of the various delays associated with the preliminary matters raised, any prejudice to the Fourth Respondent may be addressed by the appropriate order as to costs.

Background Facts

- [12] The Fourth Respondent was employed by the Applicant from 10 March 1987 until his dismissal on 23 February 2012 with the rank of Captain.
- [13] Following a domestic dispute between the Fourth Respondent and his wife, representatives of the Applicant attended at the residence of the Fourth Respondent to obtain possession of certain firearms which the Fourth Respondent's wife had indicated were in the Fourth Respondent's

² Paragraph 11.4

possession. The Fourth Respondent when requested to do so, handed to the said representatives of the Applicant a 9mm firearm and a shotgun with registration number M2129 ("the rifle").

- [14] The Fourth Respondent was charged as follows :

"Charge 1

In terms of Section 40 of the South African Police Service Act, 1995 (Act No 68 of 1995), read with the South African Police Service Discipline Regulations, 2006 you are hereby charged with misconduct, in that you allegedly contravened Regulation 20(Z) of the said regulations, at or near Vanderbijlpark during 2011-01-21 at about 16h00 in that you committed common law offence to wit possession of unlicensed firearm 7,62 mm rifle with serial number M2129 : Bren Arms."

- [15] In respect of the charge the Applicant was found guilty following a disciplinary enquiry and was dismissed on 23 February 2012. The Appeal failed and the Applicant then lodged a claim of unfair dismissal with the Bargaining Council.

- [16] On 15 July 2013 the Commissioner issued an arbitration award in terms of which it was determined that the dismissal of the Fourth Respondent was substantively unfair and the Commissioner further ordered :

"The South African Police Service is ordered to reinstate the applicant with effect from 23 February 2012 on the same terms and conditions as those that prevailed before his dismissal. The applicant is directed to report for duty on or before 01 August 2013 at his last place of work before he was dismissed.

The respondent is further ordered to pay to the applicant back pay as from 23 February 2012 to 31 July 2013 taking into account all salary increments."

- [17] It is in respect of this award that the Applicant has filed this application for review.

Grounds for Review

[18] In substance, the Applicant contends that the Commissioner's award is reviewable on the basis that it is unreasonable in that the Commissioner committed a reviewable irregularity by failing to properly apply his mind to certain identified allegedly relevant evidence and/or considerations and thereby arrived at a conclusion which no reasonable decision maker could have reached in the circumstances. While the Applicant baldly lists other grounds of review in its Founding Affidavit, the grounds are not substantiated further although the Applicant, in its supplementary affidavit, contends further that the Commissioner's award is reviewable on the basis that the Commissioner misconceived the nature of the enquiry.

[19] The crux of the Applicant's contention for review is that the Commissioner "erred in finding that the Fourth Respondent was in lawful possession of the rifle," and that in doing so the Commissioner failed to take into account the evidence of Brigadier Jan Scheepers ("Scheepers") in which regard it is contended that Scheepers testified:

- “1. That no member was allowed to go home with a rifle and that a member of the SAPS was only allowed to be in possession of a firearm if the said firearm was recorded on the SAP108.
2. That every six months, an inspection is held to determine the SAPS equipment a member is in possession of in terms of the SAP108; and
3. That he conducted several inspections with the Fourth Respondent and the Fourth Respondent never produced the rifle for inspection.”

[20] The Applicant further contends that the Commissioner failed to take into consideration the Firearms Control Act, No.60 of 2000 in terms of which the contention is that the Fourth Respondent was in possession of a State owned firearm without a permit authorizing such possession. The Applicant further contends that in aggravation, the Commissioner failed to take into account that the Fourth Respondent, as an Officer, should be

aware of the provisions of the Firearms Control Act as he exercises certain duties in relation thereto in respect of his subordinates.

Evaluation

- [21] The Commissioner correctly determined the onus in terms of Section 192(2) of the LRA³ required the employer, the Applicant to prove that the dismissal is fair. After considering the evidence, the Commissioner concluded that the Applicant had failed to prove, on a balance of probabilities, that the Fourth Respondent was guilty of the misconduct for which he was dismissed.
- [22] The Commissioner summarized the Fourth Respondent's version as follows:⁴ The rifle had been issued to him on 10 March 1987 at Koeberg Training College in Cape Town after he had successfully completed his training.⁵ In May 1987 the Fourth Respondent was then deployed with the Riot and Stability Unit in Vanderbijlpark and utilized the rifle during his normal duties in this Unit. He further stated that members of this Unit were allowed to go home with the rifle issued to them. He further indicated that at this time salaries were paid in cash and an inspection of the rifle was done before a member could receive his salary. It was his further evidence that his rifle had been inspected by an Inspector Potgieter in 2003.
- [23] The Applicant introduced the evidence of three witnesses. The first two witnesses did not advance the case of the Applicant in the context of whether the Fourth Respondent's possession of the rifle was unlawful or not. Lieutenant Colonel Khasuli ("Khasuli") specifically conceded that she was not in the position to *"say whether this firearm that we are talking about was unlawfully in the possession of the Applicant or not."*⁶ Sector

³ Section 192(2) provides : *"If the existence of the dismissal is established, the employer must prove that the dismissal is unfair."*

⁴ Indexed bundle pages 21 and 22, paragraphs 18 to 24 of Arbitration Award.

⁵ Indexed bundle page 20, paragraph 14 of Arbitration Award.

⁶ Record page 21 (indexed 24) lines 21 – 25 and page 22 (indexed 25) line 1

Commander Marius Verwey (“Verwey”) also indicated, in a question directed specifically to him as to whether the shotgun M2129 was unlawfully in the possession of the Applicant that - *“I could not testify about because I do not have the access to the ownership of the firearm and to whether it was in the Captain’s name or not.”*⁷ Verwey further when questioned about the Fourth Respondent’s version that the rifle had been given to the Fourth Respondent at Koeberg, confirmed that he had never questioned the Fourth Respondent about such version, however he confirmed that the Fourth Respondent had proffered this as an explanation for his possession of the firearm.⁸

[24] For the Applicant it is contended that :

*“The evidence demonstrates that the Fourth Respondent was in possession of an unlicensed firearm and reference is made to the evidence of Khasuli and Verwey in support of the contention.”*⁹

In support the Applicant refers to the record of the evidence of Khasuli and Verwey.¹⁰ This is misplaced. The evidence referred to in this context relates solely to the possession of the firearm which the Fourth Respondent does not deny. This evidence did not advance the enquiry before the Commissioner as to whether such possession was lawful or not.

[25] In respect of the third and final witness introduced by the Applicant, the Commissioner confirms in his award that the evidence of Scheepers was, *inter alia*, that :

“1. He, Scheepers inspected the Fourth Respondent’s SAP 108 file a document in which all state issued equipment is recorded and had found that the rifle was never recorded on the Applicant’s SAP 108.

⁷ Record page 40 (indexed 43) lines 20 - 22

⁸ Record page 41 (indexed 44) lines 1 - 8

⁹ Applicant’s Heads of Argument paragraph 22.2.

¹⁰ Record page 9 (indexed 12) lines 20 – 24, page 11 (indexed 14) lines 8 – 12, lines 21 to 22; evidence of Verwey page 34 (indexed 37) lines 24 to 25; page 35 (indexed 38) lines 1 - 10

2. *That no member was allowed to go home with a rifle.*
3. *Once the firearm was recorded on SAP 108 then the member had permission to possess it.*
4. *Every six months an inspection is held on all the equipment in a member's possession and this is then compared with the equipment listed on the SAP 108.*
5. *He had conducted several inspections and the Fourth Respondent had never produced the rifle for inspection."*

[26] In evaluating the evidence of the Applicant's witnesses against the version proffered by the Fourth Respondent, the Commissioner found that the Respondent's witnesses could not "*dispute the Applicant's version.*" ¹¹

[27] The Commissioner specifically found that the Applicant's witnesses could not deny "*the fact that during the 80's Police officials were allowed to take their rifles home.*"¹²

[28] The Commissioner further made reference to the evidence of Scheepers who had confirmed that the Riot and Stability Unit had operated differently from other police units and that he, Scheepers, was not involved in the Riot and Stability Unit.¹³

[29] After considering the probabilities, the Commissioner then concluded that the Fourth Respondent was placed in lawful possession when the rifle had been issued to him in Koeberg and the Commissioner posed the question as to when the Fourth Respondent ceased to be in lawful possession of the rifle. In answer to this, the Commissioner concluded that the Applicant's witnesses did not dispute that the rifle had been lawfully issued in Koeberg and, consequently, the Applicant had failed to

¹¹ Paragraph 18 of the award "*the Applicant testified that the rifle was issued to him in March 1987 at Koeberg during his training and that when he later worked with the rifle during riots in Vanderbijlpark he was allowed as were other members to take their rifles home for protection.*"

¹² Indexed bundle page 22 paragraph 19

¹³ Indexed bundle page 22 paragraph 19

establish that what amounted to lawful possession of the rifle had at some stage become unlawful. In this context, the Commissioner specifically dealt with the current policy as testified by Scheepers. The Commissioner found that there was no evidence that possession of the rifle had been lawfully revoked by the Applicant.¹⁴

[30] Insofar as the contention by the Applicant that the Commissioner failed to take into account the Firearms Control Act, it bears mention that the Applicant was not charged for an offence relating to possession of a firearm without a permit. Quite apart from this, at no stage did the provisions of the Act¹⁵ form part of the Applicant's case before the First Respondent either in evidence or in closing argument. On review this Court is not inclined to consider facts or argument not introduced before the Commissioner.¹⁶

[31] Advocate Mosam, for the Applicant, argued that the Applicant was in effect the custodian of the Firearms Control Act and bore responsibility to ensure that firearms were controlled pursuant to its provisions. As indicated, this was not the case presented to the Commissioner and quite apart from this, whatever obligations the Applicant may or may not have pursuant to the provisions of the Firearms Control Act, there appears to be no reason why these obligations may not be discharged independently of the obligations of the Applicant as an employer to comply with the

¹⁴ Indexed bundle page 22 paragraphs 22 and 24

¹⁵ Firearms Control Act No.60 of 2000

¹⁶ The Court in *Albany Bakeries Ltd v Van Wyk and Others* (2005) 26 ILJ 2142 (LAC) made it clear that it was prohibited for a review application to raise on review a case never placed before the arbitrator.

And in *Rambar Construction (Pty) Ltd t/a Rixi Taxi v Commissioner for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1911 (LC) the Court held:

"From this it is clear that the Commissioner was not presented with the evidence that would support the Applicant's case at the arbitration. Having looked at Cromhout's concessions above, it really baffles my mind how the Commissioner can be criticized for failing to take into account any of the material evidence when that was not presented before her by Cromhout as he himself acknowledged. The Applicant sought to introduce new evidence via a rescission application. By doing so it is clear to me that the Applicant sought to have a 'second bite of the cherry...'"

See also in this regard *Xorile v CCMA & Others* (JR 2345/2011) [2014] ZALCJHB 512 (8 December 2014)

provisions of the Labour Relations Act. In a similar vein, the Applicant contends that the Commissioner ignored the evidence of Scheepers who had testified that the rifle had gone missing from the Evaton Police Station a few years before the rifle was found in the possession of the Fourth Respondent and that he, Scheepers, had given instructions that a docket be opened against the Fourth Respondent for the illegal possession of a firearm and had instructed that the Fourth Respondent be arrested on that charge. Scheepers further testified that this was done.¹⁷ Consequently, whatever actions or processes were obliged to be implemented or followed pursuant to the provisions of the Firearms Control Act these are and were independent of the Applicant's obligations pursuant to the Labour Relations Act.

- [32] It is so that the firearm was not disputed as a State owned firearm and it was further common cause that the firearm did not appear on the SAPS 108.¹⁸ Advocate Mosam argued that it is the SAPS 108 which extends the right to the SAPS member to possess the firearm. In other words if the firearm is not reflected on the SAPS 108 then, *ipso facto*, the possession is unlawful and in support of this Advocate Mosam made reference to the evidence of Scheepers.¹⁹ It appears from the evidence of Khasuli²⁰ and from Verwey's evidence²¹ that the 108 refers to an internal SAPS inventory/register system. I say "appears" as the origin and the precise provisions of the "SAPS108" were not canvassed in the evidence before the Commissioner. The regulation or Standing Order, if it exists in documentary form, was also not introduced by the Applicant into evidence. Given the onus resting upon the Applicant, the Applicant was obliged, in my view, to establish clearly in evidence what the provisions of

¹⁷ Record page 52 line 25 to page 53 line 8

¹⁸ Record (evidence of Scheepers) page 49 (indexed 52) lines 4 - 18

¹⁹ Record (evidence of Scheepers) page 51 (indexed 54) lines 15 - 21

²⁰ Record page 29 (indexed 32) lines 7 to 8 and lines 19 to 23

²¹ Record page 37 (indexed 40) lines 15 to 21

the SAP108 were. Do the provisions of SAP108 provide for the extension of the right to possess the equipment referred to in the Section 108 register or is the register solely an inventory system? Allied to this is the timing. When did the regulation or Standing Order in relation to SAP108 come into being? The Commissioner concluded that the Applicant's witnesses had only testified in relation to the "current" policy and the Commissioner reflects his finding as follows :

*"23. The respondent's witnesses claimed that the current policy is that police officials are not allowed to take any rifle or long shot gun home. Scheepers testified that the rifle was not on the list of equipment recorded on his SAP 108. The applicant had the rifle since 1987 and this supports Scheeper's evidence that members of the Riot and Stability Unit had their own regulation."*²²

[33] However, Scheepers also testified that :

*"There is no member in the SAPS that can have a long firearm on the SAPS108 because that, all the long firearms, that is including your R, the old times, the R1s, your R5s and the shotguns. All those firearms is on the SER, it is a state account. So it does not belong to a member. It is a station police, a police station's property. It cannot be taken home by a member."*²³

It is quite apparent from this testimony that the current policy of the SAPS may well differ from whatever the previous policy may or may not have been.

[34] Scheepers concedes in cross examination :

"Mr Mokoena: So the Applicant will then be correct to say that the Mossberg firearm was given to him in 1987. That you cannot deny.

Mr Scheepers: I cannot testify on the correctness of that statement. I was not in SAPS even.

²² Indexed pleading bundle page 22 paragraph 23

²³ Record, evidence of Scheepers page 53 (paginated 56) lines 17 to 22

Mr Mokoena: So my say is, with regard to the applicant, applicant say that in 1987, that was when this firearm was handed to him. In that time, you were not in the South African Police.

Mr Scheepers: That is correct, yes.

Mr Mokoena: So you cannot dispute that.

Mr Scheepers: I cannot, I cannot dispute that.

Mr Mokoena: Okay. So I am putting it to you that the applicant was given this firearm while in Koeberg in 1987. What is your response?

*Mr Scheepers: cannot respond on that. Like I said, it might be true, it might not be true. I cannot, because I was not even in the organization at that stage.*²⁴

[35] Whilst not specifically outlined by the Commissioner in his award, Scheepers also testified that :

*"... I never investigated the purpose why this member had this firearm, but I will not recommend from my side a dismissal maybe just a fine. Maybe a suspended dismissal is another option."*²⁵

[36] In determining whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach²⁶ the appropriate approach to be adopted by this Court is one which avoids a fragmented or piecemeal analysis of each of the arbitrator's findings.²⁷

²⁴ Record, Scheepers evidence page 59 (indexed page 61) lines 20 to page 59 (paginated 62) line 10

²⁵ Record page 80 lines 7 - 11

²⁶ *Sidumo v Rustenburg Mines Limited & Others* 2007 (12) BLLR 1097 CC (at para 110)

²⁷ *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others* 2014 (1) BLLR 20 (LAC) and *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* 2015(4) BLLR 394 (LAC)

- [37] There is, on the totality of all the evidence before the Commissioner, in my view, no merit in the application for a review of the Commissioner's award. It is quite apparent from the Commissioner's award that he considered the evidence of Scheepers which the Applicant contends he ignored. The Commissioner, in concluding that the Applicant's witnesses could not dispute the Fourth Respondent's version as to how he came to be issued with and be in possession of the rifle, is a conclusion which is entirely reasonable.
- [38] If regard is had to the Fourth Respondent's award, there is also no merit in the contention that he "*misconceived the nature of the enquiry*".
- [39] In the premises the application is dismissed.
- [40] Insofar as costs are concerned, as alluded to in the context of the preliminary matters, the Fourth Respondent contended that the award of costs on the attorney and client scale is warranted on the basis that the Applicant has acted "unreasonably" and in gross disregard of the Rules and Practice Directives of the above Honourable Court and has acted in "bad faith". While the Applicant disputes this, what is evident from the conduct of this matter is that the Applicant has introduced two applications for condonation in relation to various of its aspects of non-compliance with the Rules of this Court. The Applicant also took in excess of a year to file its heads of argument and has not in its general conduct of the review, given that it is *dominus litis*, respected the fact that a review application is by its nature an urgent application.²⁸
- [41] It also bears mention that the record is incomplete. The evidence of the Fourth Respondent has not been transcribed, presumably as the evidence was given in Sotho. Were it not for the fact that all three of the Applicant's witnesses do not dispute the Fourth Respondent's version that he was issued with the rifle in 1987 and the circumstances relating

²⁸ Practice Manual, paragraph 11.2.7

thereto, it may well have been necessary to postpone the review application to secure that portion of the record.

Consequently, I make the following Order:

Order:

1. The Application is dismissed.
2. The Applicant, the South African Police Services, is ordered to reinstate the Fourth Respondent with effect from 23 February 2012 on the same terms and conditions as those which prevailed before his dismissal. The Applicant is directed to report for duty within fourteen (14) days of date of this Judgment at his place of work prior to his dismissal ("date of reinstatement").
3. The Applicant is ordered to pay the Fourth Respondent back pay from 23 February 2012 to date of reinstatement taking into account all salary increments.
4. The Applicant is ordered to pay the Fourth Respondent's costs on the attorney and own client scale.

MADDERN AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Du Toit of Chantell Timm Attorneys

For the Respondent: Adv Mosam

Instructed by: The State Attorney, Johannesburg

LABOUR COURT