



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1439/15

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

R M MASHIGO

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

JACKSON MTHUKWANE N.O.

Third Respondent

Heard: 16 February 2017

Delivered: 22 June 2017

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an arbitration award (as varied) under case number PSSS 341-12/13. The third respondent (the Arbitrator)

found that the dismissal of the first respondent (Mashigo) was substantively unfair. Retrospective reinstatement was ordered, with the amount of back pay varied on the 18 June 2015.

- [2] Mashigo began his employment with the South African Police Service (SAPS) on the 17 April 1991 and was a Warrant Officer. He was charged in 2011 with the following charges:

“Charge 1:

In terms of section 40 of the South African Police Act, 1995 (Act) No 68 of 1995) read with the South African Police Services Discipline Regulations, 2006, you are hereby charged with misconduct, allegedly contravened Regulation 20 (z) of the said regulations at or near Diepsloot during 2010-09-24 in that you committed a common law or statutory offence of assault on a public person (Advocate Ntshane).

Charge 2:

In terms of section 40 of the South African Police Act, 1995 (Act) No 68 of 1995), read with the South African Police Service Discipline Regulations, 2006, you are hereby charged with misconduct, allegedly contravened Regulation 20 (z) of the said regulations at or near Diepsloot during 2010-09-24 in that you committed a common law or statutory offence of attempted murder when you shot a public person (Mr. James Sefumba) with a firearm.

Charge 3:

In terms of section 40 of the South African Police Act, 1995 (Act) No 68 of 1995), read with the South African Police Service Discipline Regulations, 2006, you are hereby charged with misconduct, allegedly contravened Regulation 20 (z) of the said regulations at or near Diepsloot during 2010-09-24 in that you committed a common law or statutory offence of attempted murder (Mr. Mvuselelo Goso) with a firearm.”

- [3] He was subsequently dismissed having been found guilty on all charges. The applicant did not pursue the assault charge at arbitration (although the Arbitrator made findings thereon). The version of Mashigo is recorded as follows by the Arbitrator:

"20....On the 24 September 2010 he went to Diepsloot to drop off witnesses in a case that he was investigating. He drove down Stability street and saw two pedestrians standing inside the road. He could not pass and he stopped the vehicle. He told the two pedestrians to move out of the way and at that stage he was still seated on the driver's seat. The two pedestrians ignored him. He climbed out of the vehicle and told them again to move out of the way and the woman, who later becomes known to him as Benedicta, told him he was disturbing her.

21. Ntsane intervened and told him not to speak to his sister but should speak to him. Ntsane thereafter slapped him across the face and he slapped him back. They started to fight and his colleague came and separated them. Benedicta left the scene to go to the tavern/tuck shop nearby. People walked out of the tavern to where his vehicle was parked. A man arrived at the scene and he was wearing a striped shirt. He stated that he took out his firearm and cocked it and pointed it downwards. He started to retreat but Ntsane and the man kept on moving towards him. Whilst he was retreating, he felt someone grabbing him from behind. A struggle ensued between him and the man. During the struggle several shots went off from his firearm.

22. The person grabbed him with both hands around the chest area. His colleague ran to the driver's side of the vehicle. The people from the tavern started picking up bricks. He shot two warning shots into the ground and thereafter ran to the vehicle. After he shot the warning shots the crowd dispersed. His colleague drove off in high speed. He only realised later that evening that some people were injured. The investigation revealed that five empty cartridges were found at the scene

and only four were matched to his firearm. He stated that he was not aware who fired the other shot. He stated that he was unfairly dismissed and the relief he sought was reinstatement.”

- [4] Having summarised the evidence he considered material at the arbitration the Arbitrator found as follows:

“33. I find that insufficient evidence was placed before me for me to come to the conclusion that the applicant had the intention to attempt to kill James and Mvuselelo. As far as the assault charge against the applicant was concerned, I find that his version is preferred to that of Ntsane and Benedicta. I find that Ntsane and Benedicta to have not been reliable witnesses. They contradicted themselves on material aspects. For instance, Benedicta testified that the applicant pointed his firearm on the head of Ntsane. Ntsane in his evidence in chief did not mention that aspect. I find that the applicant was also not guilty of assaulting Ntsane.

34. My conclusion is that the respondent has failed to prove on a balance of probabilities that the dismissal of the applicant was substantively fair. The applicant sought reinstatement for his unfair dismissal.”

- [5] The applicant seeks the review of the Award *inter alia* on the following grounds set out in its supplementary affidavit. First, that the Arbitrator misconstrued the nature of the enquiry before him and therefore reached an unreasonable result in particular that:

“He misconstrued the nature of the proceedings in that he failed to consider whether or not the First Respondent contravened a rule or standard regulating conduct in, or of relevance to, the workplace. Had he appreciated the true nature of the enquiry he would have referred to the South African Police Code of Conduct (“Code of Good Practice”) which

sets out the rule regulating conduct with the workplace and considered whether the First Respondent knew and had contravened it. He merely states the stipulations of Schedule 8 of the Code of Good Conduct in his award and fails to apply it or that he did nothing beyond mentioning the provisions of schedule of the Code of Good Practice.

Accordingly, the arbitrator was required to measure up the employee's conduct against nothing else but the standards set out in Code of Conduct. As appears from the Award and the record of the proceedings, the arbitrator completely failed to appreciate and understand that part of the enquiry. In consequence of which he arrived at a decision which no reasonable decision maker would have arrived at..”

- [6] Another ground cited by the applicant is that the Arbitrator failed to have regard to the applicable legal principles in his assessment of the evidence submitting that:

“The arbitrator found that after an argument ensued between the First Respondent and Benedicta and Advocate Ntsoane, the First Respondent pulled out his firearm, cocked it and pointed it downwards. Two people were shot in the process. In finding that the First Respondent had no intention to attempt to kill them, the arbitrator failed to appreciate that the conduct of the First Respondent contravened the South African Police Discipline Regulations, 2006. The First Respondent ought to have foreseen the possibility that he could kill one of the bystanders but had recklessly nonetheless fired shots.”

- [7] Further, the applicant submits that the Arbitrator reached a conclusion not supported by evidence in paragraph 31 of his Award. It avers that finding that the bullet ricocheted from the ground and entered James' body at the lower back and exited much higher in the chest cannot be supported by the material before the Arbitrator.

Evaluation

- [8] Section 40 of the SAPS Act reads as follows: “Disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct, whether such misconduct was committed within or outside the borders of the Republic.” Clause 20 of the Regulations provides that a member of the SAPS (z) of the 2006 SAPS Regulations provides that a person will be guilty of misconduct if he or she amongst other things “commits any common law or statutory offence.” Mashigo was not in uniform at the time of the incident, nor was his car marked.
- [9] The record of the proceedings reflects that the disciplinary charges were drawn up in terms of Regulation 12(2) and 12(3) of the SAPS Disciplinary Regulations (2006) which deal with serious misconduct. The 2006 Disciplinary Regulations of the SAPS were considered by the Supreme Court of Appeal in *Provincial Commissioner, Gauteng: SA Police Service and another v Mnguni*¹ as follows:

“The regulations in terms of which the disciplinary and appeal procedures that led to the dismissal of the respondent were conducted were promulgated by the Minister for Safety & Security pursuant to the provisions of s 24(1)(f) of the SA Police Service Act 68 of 1995. The section empowers the minister to make regulations regarding 'labour relations, including matters regarding suspension, dismissal and grievances'. The regulations are a product of an agreement reached between the National Commissioner of SAPS, as employer, and all the unions admitted to the Safety & Security Sectoral Bargaining Council (regulation 2). Their purpose is set out in regulation 3, and is, inter alia, to support constructive labour relations in the police service, to ensure that supervisors and employees share a common understanding of misconduct and discipline, to provide a user-friendly framework in the

¹ (2013) 34 ILJ 1107 (SCA)

application of discipline, and to prevent possible arbitrary actions by supervisors towards employees in the event of misconduct. Clearly, therefore, the disciplinary and appeal procedures that culminated in the respondent's dismissal, including the dismissal itself, involve employment relations, which are expressly regulated by s 23 of the Constitution and s 185 of the LRA."

[10] This Court has considered the purpose of Regulation 20(z). In *SA Police Service and another v Van der Merwe NO and others*² the Court per Molahlehi J stated:

"[17] The regulation seeks to raise the standard of conduct of police officers outside their employment and to bring it into the employment relationship even when that conduct had nothing do with employment issues. In my view what the regulation seeks to do is to set a standard of conduct outside the employment relationship. The standard set by the regulation in general is that police officers would not engage in conduct or activities that —

- (a) would ordinarily not be expected of a police officer; that is unbecoming, disgraceful and/or improper in the eyes of both the state as the employer and the public;
- (b) undermines the confidence of the public in the police;
- (c) projects a member as being unfit to be a police officer.

[18] There can be no doubt that regulation of criminal conduct that falls outside the employment relationship is not only reasonable but necessary for failure to do so could lead to both the breakdown in confidence in the police and may lead to hostility and resentment towards the police service. The essence of a rule that regulates conduct that falls outside the employment relationship is to protect the interest of the state as the employer. In other words, the regulation imposes a duty on police officers even in their private lives to conform to the ethical duties imposed upon

² (2013) 34 ILJ 1579 (LC)

them, the position they occupy as police officers. The interest which the regulation seeks to protect can be found in one of the objectives set out in the SA Police Service Act 68 of 1995 which is to 'ensure co-operation between the Service and communities it serves'."

- [11] I am in agreement with the applicant that the award evinces little comprehension of the employment relations context of the charges against Mashigo and in particular, the standard of conduct required to be upheld by members of the SAPS in the communities they serve. It would seem to me that given this context, the Arbitrator was bound to premise his enquiry into the attempted murder charges on a consideration as to whether Mashigo, acting as he did among members of the community, could be found to have had acted with *dolus eventualis*. This legal concept was explained in the matter of *Director of Public Prosecutions, Gauteng v Pistorius* ³

"[26] In cases of murder there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element

³ 2016 (2) SA 317 (SCA)

has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

- [12] There is no indication on the face of the Award that the Arbitrator sought to apply this legal concept or to examine the evidence and make a finding on the civil standard of proof, with it in mind. He referred to 'intent' when finding that Mashigo was not guilty of the charge of attempted murder without further ado. Further, his conclusion on the attempted murder charge in respect to James, appears to have been premised on his theory on ballistic matters. No expert witness was called to testify at the arbitration. The Arbitrator records the following in his award:

"31. James testified that the bullet entered his lower back and exited on his chest, just below the left nipple. The applicant objected to the admission of the J88 as the doctor who completed it was not going to be called. It is my view that it was probable that the bullet ricocheted from the ground and entered James body at the lower back and existed much higher in the chest area. The applicant is far taller than James and if he shot him in the manner in which Ntsane testified then the bullet would have entered his body in a downward position and not upwards, as was the case in this matter. If one accepts this version, then the applicant's version, is reasonably, possibly true that he shot warning shots into the ground and the bullet ricocheted and hit James. This scenario would contradict Ntsane's version that the applicant shot directly at James and the bullet hit him on the back."

[13] The above reasoning, pivotal to the result of the Award, amounts to speculation unsupported by any evidence.⁴ This defect, and in addition, the Arbitrator's failure to understand the nature of the dispute he had to arbitrate, renders the Award reviewable. I am not of the view that the Award should be substituted by this Court. I do not consider it apposite to make a costs order given that the first respondent, an individual, has understandably defended the review of an award in his favour. I make the following order:

Order:

1. The award under case number PSSS 341-12/13 as varied on 18 June 2015, is reviewed and set aside.
2. The dispute is remitted to the Second respondent for arbitration anew before an arbitrator other than Third Respondent.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

⁴ See *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at paragraph 13.

For the Applicant : V.P. Ngutshana

Instructed by : The State Attorney: Johannesburg

For the First Respondent : Hein Gerber

Instructed by : Bester Rhoodie Attorneys

LABOUR COURT