



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No. JR 2215/15

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

**SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

COMMISSIONER M H RANTHO N.O.

Second Respondent

PEEHA ROLPH MAKOBELA

Third Respondent

Heard: 07 November 2017

Delivered: 07 November 2017

Edited: 04 December 2017

EX TEMPORE JUDGMENT

BARNES AJ

- [1] This is an application to review and set aside the arbitration award issued by the second respondent, Commissioner Rantho, under the auspices of the first respondent, the Safety and Security Sectoral Bargaining Council, on 11 May 2015. The review application was launched 12 weeks late and is accompanied by an application for condonation. The third respondent's answering affidavit in the condonation application was filed late and there is an application for condonation in respect of that also.
- [2] Mr Mphahlele, who appeared for the applicant, stated that the third respondent's application for condonation came to his attention for the first time in court today. Be that as it may, the answering affidavit was only 10 days late, and the delay is explained by the third respondent's attorney, Ms Motsekuoa, on the basis that she incorrectly assumed that she had a further 10 days after the filing of the third respondent's notice of intention to defend to deliver the answering affidavit. This is, in my view, an acceptable explanation. Given this and the slight delay, I am prepared to grant condonation for the late filing of the third respondent's answering affidavit in the condonation application.
- [3] I turn to consider the application for condonation for the late filing of the review application. The applicant's explanation for lateness is set out in some detail in its founding affidavit in support of its condonation application. What is set out there is a litany of administrative errors and delays which resulted in the late filing of the answering affidavit.
- [4] The third respondent submits that there are periods of time during the delay period that have not been adequately explained. While this is correct and while the explanation is wanting in these respects, I am of the view that it cannot be said that the explanation is wholly inadequate or unreasonable. I am therefore of the view that this is a case where, while the explanation is not satisfactory in every respect, it is sufficiently cogent to warrant the consideration of the prospects of success. I will consider

this aspect below. Before doing so however, it is convenient to deal with deal with two preliminary points taken by the applicant in relation to the third respondent's answering affidavit in the review application. These are firstly, that the deponent to the answering affidavit, Mr Ramashidsa, had no *locus standi* to oppose the review application, and secondly, that the Commissioner of Oaths who commissioned the answering affidavit had an interest in the matter. There is, in my view, no merit in the applicant's first point. The third respondent is a POPCRU member, and Mr Ramashidsa is the POPCRU shop steward who represented him in the arbitration proceedings. Mr Ramashidsa clearly has standing in these circumstances to depose to the answering affidavit in the review application on the third respondent's behalf.

- [5] The applicant's second point, however, does have merit. It was common cause between the parties that Mr Chuene, who commissioned the third respondent's answering affidavit in the review application is the same Mr Chuene who testified in the arbitration proceeding on the third respondent's behalf. As such, he clearly had an interest in the matter and his commissioning of the answering affidavit in the review application was in contravention of Regulation 7.1 of the Regulations Governing the Administration of an Oath or Affirmation published in Government Gazette No R1258 of 21 July 1972. Regulation 7.1 provides, and I quote:

"A Commissioner of Oaths shall not administer an oath or affirmation relating to a matter in which he has an interest."

- [6] Mr Edwards, who appeared for the third respondent, conceded that Mr Chuene's commissioning of the third respondent's answering affidavit contravened Regulation 7.1. Mr Mphahlele, on behalf of the applicant, submitted that the consequence of this was to render the third respondent's answering affidavit *pro non scripto*, and that I ought

accordingly to treat the review application as unopposed. Whether I take the answering affidavit into account or not ultimately makes no difference to my conclusion on the merits. It is therefore not necessary for me to determine what the consequences of the contravention of Regulation 7.1 are insofar as the third respondent's answering affidavit is concerned.

- [7] At a disciplinary enquiry, the third respondent pleaded guilty to two charges of theft and one charge of handing his service pistol to a third party for purposes of committing a crime. He was dismissed. At the arbitration the sole issue before the Commissioner was whether the sanction of dismissal imposed on the third respondent was appropriate in the circumstances. The Commissioner found that it was not and ordered that the third respondent be reinstated and pay the applicant a fine of R500.00 in respect of each of the charges against him.
- [8] The third respondent's case at the arbitration was that he had entered into a settlement agreement with the applicant in terms of which he would plead guilty to the charges against him and pay a fine of R500 in respect of each charge, and in exchange, he would not be dismissed.
- [9] The third respondent contended that his dismissal by the applicant in the face of this settlement agreement was inappropriate and unfair. The question is whether the evidence before the Commissioner bore out the settlement agreement contended for by the third respondent. The Commissioner found that it did. He did so on two bases. First, he found that the evidence of the settlement agreement presented on behalf of the third respondent was not contested by the applicant in the arbitration. This is not correct. The third respondent testified that the settlement agreement was drawn to the attention of the disciplinary enquiry chairperson ("the chairperson") on two occasions. The chairperson however, who testified on behalf of the applicant, strenuously denied this. He was adamant that at no stage during the disciplinary inquiry was any

settlement agreement brought to his attention. The Commissioner failed to have regard to this evidence.

- [10] The other basis for the Commissioner's finding appears at page 7 of his award as follows:

"However, on page 17 of EXHIBIT A, it is evident that the representative of the employer during the disciplinary inquiry recommended that the employee be given a fine of R500 for each count. I find that this is consistent with the version of the applicant, that there was a plea bargaining in existence herein."

- [11] This is indeed a correct reflection of the evidence led at the arbitration. However, what it shows is that far from there being a settlement agreement between the applicant and the third respondent, the applicant's representative merely recommended to the chairperson of the disciplinary enquiry that the third respondent be given a fine as a sanction. The chairperson was still charged with deciding on the appropriate sanction and did so.
- [12] Clearly, had the applicant wished to conclude a settlement agreement with the third respondent, it would simply have done so and there would have been no need to proceed with the enquiry and require the chairperson to make a determination.
- [13] The Commissioner's finding that the evidence before him established that the parties that concluded the settlement agreement was therefore not borne out by the evidence before him.
- [14] This is a case in which the applicant has strong prospects of success, which compensates for its explanation for lateness which, as I have

indicated earlier, is unsatisfactory in certain respects. For these reasons I am inclined to grant the applicant's condonation application.

[15] As set out above, the basis of the Commissioner's award, viz, that the parties had effectively settled the matter at the disciplinary enquiry, was not borne out by the evidence before him. The applicant is correct in its submission that, as such, the award is not one that a reasonable commissioner could have reached. It therefore falls to be reviewed and set aside.

[16] The parties were in agreement that costs in this case should follow the result.

[17] I therefore make the following order:

ORDER

1. Condonation for the late filing of the third respondent's answering affidavit in the condonation application is granted.
2. Condonation for the late filing of the applicant's review application is granted.
3. The arbitration award of the second respondent issued under case number PSSS421/14, dated 11 May 2015, is reviewed and set aside.
4. The matter is remitted to the first respondent for consideration by a Commissioner other than the second respondent.
5. The third respondent is to pay the applicant's costs.

H BARNES
Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv M Mphahlele

Instructed by: The State Attorney

For the Third Respondent: Adv B Edwards

Instructed by: Makgahlela Mashaba Attorneys

LABOUR COURT