



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C626/15

In the matter between:

POPCRU obo MUHAMMAD ALLIE MENIERS

Applicant

and

THE SOUTH AFRICAN POLICE SERVICES

First Respondent

THE BARGAINING COUNCIL (SSSBC)

Second Respondent

LILLIAN GOREDEMA N.O.

Third Respondent

Heard: 22 February 2017

Delivered: 21 April 2017

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number PSSST 210-13/14. The third respondent (the arbitrator) found that the dismissal of

the applicant (Meniers) for being unfit to perform his duties effectively and efficiently was substantively and procedurally fair. There was also an application for condonation before Court for the late prosecution and filing of the review. The review application was filed some 21 days late. Given the delay was not excessive, I will grant condonation and deal with the merits of the review.

- [2] The arbitrator recorded in her Award that the issue to be determined was "...whether the Applicant's dismissal was substantively fair and whether the Board of Enquiry was the correct forum in deciding the dispute."
- [3] Meuniers was employed as a Warrant Officer stationed at Diep River Police Station. He was dismissed in the wake of a recommendation Board of Enquiry held in terms of Regulation 64 of the SAPS that he was not fit to remain in the SAPS. He alleged at arbitration that the dismissal was unfair as he was absent from duty due to illness arising from the course of his duties. The SAPS disputed that the absenteeism was as a result of illness arising from the performance of his duties and maintained that his dismissal was substantively fair as he was found to be unfit to continue his duties.
- [4] Section 34(1) of the SAPS Act states that the National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, inquire into, inter alia, the fitness of a member to remain in the Service of the SAPS on account of indisposition, ill-health, disease or injury. Regulation 64(1)(b) provides as follows:
- "If by reason of the performance of any act or failure to perform an act, or any other conduct or condition, the question arises whether a member is fit for his duties, or is capable to carry them out efficiently, or, taking into consideration the requirements regarding the good order, efficient administration, control or discipline of the force, in in general fit to remain in the force or to retain his rank, the Commissioner, or any officer specially or generally designated thereto by the Commissioner, may convene a board of enquiry with himself as chairman and a member of equal or higher rank than the defendant as investigating official."

- [5] The terms of reference for the Board of Enquiry were to decide if Meniers was fit to remain in the Service as a result of "Continuous absence which results in him being unable to render his contractual employment obligations and make a recommendation as to whether he was fit to remain in the SAPS. The Convening Order stated that "The Board is required to take the provisions of Schedule 8 – Code of Good Practice – Dismissal as issued in terms of the Labour Relations Act Act 66 of 1995 into consideration when exercising its powers."
- [6] The evidence given at the arbitration for the SAPS was in summary that Meniers had taken sick leave exceeding the days allowed in the Basic Conditions of Employment Act from 2010 to 2012. He had initially submitted Doctor's certificates ranging from depression to tonsillitis, bronchitis and diabetes and tension headaches. The Station had tried to accommodate Meniers who initially indicated that he could not do shift work and he was transferred to do deal with crime reports from the members of the public. However, he began to book off sick.
- [7] Meniers was transferred back to shift work and the absenteeism persisted to the extent that he exhausted his sick leave and was asked to apply for temporary incapacity leave this was refused as there was a sense that Meniers was abusing the process. The Station Commander of Mowbray Police Station (Dyers) testified that she was appointed the Chairman of the Regulation 64 Board to consider the Applicant's fitness to remain in the SAPS as most of Applicant's sickness seemed to be of a psychological nature. She submitted a bundle of documents to be considered as evidence. The evidence presented to the Board was that the Meniers was off sick regularly and mostly during night shift. He had exhausted his sick leave and had been off sick regularly since 2004. He had been given opportunities to improve his attendance through Employee Health Wellness interviews three times in January 2011, May 2011 and February 2012. After each interview he had made undertakings to improve and manage his sick leave but failed to do so. He had been sick with diabetes, high blood pressure and kidney problems.

- [8] Dyers testified that he had been given an opportunity to act as a relief Commander in charge of a few Officers but he failed to give any guidance to them as he was regularly absent from duty. Dyers referred to 1999 clinical report which is recorded as follow in the Award”

“As early as 1999 a clinical report was compiled in which the Applicant was assessed as being physically healthy with a history of illnesses which are vague and minor and that he has poor fortitude and will never deliver his best and will always seek refuge from everyday stresses and responsibilities of life in the form of one or other ailments.”

- [9] It seems that it is this reference to a 1999 report that the Arbitrator relies on in the following part of her analysis:

“48. I have also considered the submission made on behalf of the Applicant that he could have been dealt with in terms of Item 11 Schedule 8 of the LRA dismissal due to ill health and incapacity. I find that there was no allegations that the Applicant was indeed ill he utilised sick leave to stay at home when all indications were that he was unhappy being in the force. This finding is fortified by the evidence that the Respondent had bent over backwards to accommodate the Applicant. From the medical certificates submitted and not challenged the Applicant was found to be physically fit but with minor illnesses and lacked the fortitude to deliver his best. I do not think resorting to the LRA in the circumstances would have been appropriate as there were no allegations of incompetence”.

- [10] The arbitrator made no mention of the various medical reports contained in the bundle of documents before her and which she accepted as evidence.. These included certificates from Dr Chris George and Dr A.R. Mohammed in 2012 stating that that Meniers was diagnosed with and treated for major depression, anxiety and panic attacks. Further SAPS documents in their bundle presented at arbitration reflect that Meniers was booked off with major depression as far back as 2004. There is also evidence in the documents that he in addition has uncontrolled diabetes and high blood pressure. The document reflect that he is on medication for all these ailments including his mental health.

- [11] Applicant submits that the arbitrator's reliance on the 1999 report cited by Dyers and her finding on the health of Meniers without the guidance of medical experts amounted to her exceeding her powers and arriving at an unreasonable and/or irrational result. However Meniers and his union did not call any witnesses in regard to his medical conditions.
- [12] Meniers testified at arbitration that he had suffered from post- traumatic stress after he had dislocated his arm while trying to apprehend a robber and had been held hostage. He also testified about how he had felt victimised at the workplace when his Commander who he had confided in about his stress did not keep it confidential. Much of his testimony in regard to his stress at work was not put to the SAPS witnesses by his representative. The documentary evidence at arbitration includes a letter written in 2005 his psychiatrist, Dr George, stating that Meniers suffered from chronic posttraumatic stress disorder and major depressive disorder. He had been treated for episodic depression since 1997.
- [13] The arbitrator, having found the evidence of the SAPS witnesses probable and credible stated in paragraph 51 of her Award as follows:
- “51. The Applicant did not dispute being excessively absent from duty and did not attribute all of his absences to work related stress. I fail to understand how diabetes and bronchitis as illnesses would have anything to do with work induced stress and find his evidence that his illnesses were induced by work related stress improbable and incredible. This is strengthened by the Applicant's promise not to stay away from work if he is given his job back.”
- [14] I am in agreement with submissions on behalf of the applicant that the arbitrator was in no position to draw conclusions regarding Meniers health, and that given the documentary evidence before her the conclusions she did draw were most probably incorrect. However, what this court is to determine is whether the commissioner reached on reasonable decision or discontinued the nature of the enquiry before her.ⁱ
- [15] The applicant submits that other grounds for review are: that the arbitrator failed to consider whether the applicant's conduct could be corrected with counselling

and if needed progressive discipline; that she failed to see the distinction between a Board of Enquiry and a disciplinary hearing; that she failed to comprehend that the Board was obliged to consider Schedule 8 of the LRA as directed in the Convening Order.

- [16] It is evident from the material before the Board and its finding, that consideration was given to the many steps taken to adapt Menier's work duties and corrective measures taken to address the applicant's continued absences. He was represented in his interactions with the Board and was given the opportunity to appeal its findings. The finding by the Arbitrator that the Board was not used to sidestep a disciplinary hearing and was procedurally fair is a reasonable one.
- [17] The provisions of the SAPS Act dealing with Boards of Enquiry and the Regulations promulgated in relation to these were not the subject of challenge by the applicant. Nor was the decision of the Board sought to be reviewed. The course taken by the union and its member was rather to take the dispute to the bargaining council and maintain that the applicant should have been heard by SAPS in a disciplinary forum. It is correct as submitted by the union at the arbitration that the Board did not have the power to dismiss the applicant. However, it had the power to recommend that an employee was not fit to remain a member of the SAPS. The SAPS qua employer accepted that recommendation.
- [18] Meniers testified that he suffered from post-traumatic stress in the wake of a hostage incident and work induced anxiety and stress, but he did not seek the path of medical boarding. Rather, at the enquiry at arbitration he professed he was fit to return to work and would manage his sick leave better. In these circumstances the outcome of the arbitration cannot be considered to be susceptible to review. I will not make a cost order in this matter given the ongoing relationship between the parties. I make the following order:

Order

1. The application for condonation is granted.

2. The review application is dismissed.

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

Applicant: Marais Muller Hendricks Attorneys

First Respondent: M. Ngumbela instructed by the State Attorney

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ⁱ Herholdt V Nedbank LTD (Cosatu as Amicus Cunaee 2013 (34) ILJ 2795 (SCA) at paragraph 25.