THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1075/16

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION
OBO MYENI AND NKOSI **Applicant**

and

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

COMMISSIONER DENGA MULIMA N.O. **Second Respondent**

DEPARTMENT OF POLICE **Third Respondent**

THE NATIONAL COMMISSIONER SOUTH AFRICAN POLICE SERVICE **Fourth Respondent**

Heard: **17 January 2019**
Delivered: **03 April 2019**

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an opposed review application, brought in terms of section 145 of the Labour Relations Act[1] (the LRA), in which the applicants seek an order to review and set aside the award of the second respondent (the Commissioner), who, acting under the auspices of the first respondent, the Safety and Security

[1] Labour Relations Act 66 of 1995.

Sectoral Bargaining Council (the SSSBC), he held that the applicants' dismissal was substantively fair.

Factual background

[2] I do not intend to repeat the evidence in great detail, it is sufficient for present purposes to record that the applicants were employed by the third respondent as policemen with the rank of warrant officer and sergeant. The applicants were both charged with six counts of misconduct, namely Regulation 20 (z) by committing a common law or statutory offence of corruption or being an accomplice thereto.

[3] The applicants were further charged with defeating the ends of justice in that despite the knowledge of the unlawful possession of vehicles, the applicants failed to take legal action and bribery. Additional charges relating to Regulation 20 (q) by failing to take steps to confiscate the unlawfully possessed vehicles and Regulation 20 (p) by conducting themselves in an unacceptable, disgraceful and improper manner by failing to take action against Mr Kriek and by encouraging him to sell an unlawfully possessed vehicle to avoid being caught, were also imposed. They were both subsequently found guilty and dismissed.

[4] The applicants lodged an appeal which appeal was unsuccessful and aggrieved with the outcome thereof, the applicants referred an unfair dismissal dispute to the SSSBC.

Proceedings at the SSSBC

[5] Evidence in the form of documentary evidence and witnesses were submitted to the Commissioner. In support of its case the respondent relied upon the evidence of Messrs Kriek, DJ Smith, A Van der Westhuizen, G Molobye, E Liebenberg and D Kanti. The applicants did not call any witnesses in support of their defence.

[6] In summary Kriek testified that he sells cars with his fiancé Van der Westhuizen. On 19 August 2010, Kriek received a telephone call from Sergeant Takalo instructing him to return to his plot in Honeydew. Upon arrival, Kriek found five people who all introduced themselves as police officers. The police officers were inspecting vehicles at the plot and he was ultimately accused of selling stolen motor vehicles.

[7] Despite denying selling stolen motor vehicles, Kriek was prepared after he had been approached by policeman to make payment of R100 000.00. Kriek together with a policeman drove to the bank and withdrew the R100 000.00, which money was subsequently handed over. Sergeant Takalo subsequently advised Kriek that he would be confiscating one of the motor vehicles in order to demonstrate to his commanding officer that work had been performed and it was further agreed that Kriek could collect the motor vehicle seven days later.

[8] Sometime later, Kriek was requested to attend at Sergeant Takalo's offices to collect the motor vehicle and was once again requested to make payment of an additional R10 000.00 in order to ensure his safety. Payment was subsequently made. A few months later, Kriek was contacted by Warrant Officer Botha who advised him that one of his motor vehicles had been impounded and that he was to come to the police station. Whilst there, Sergeant Takalo once again demanded an amount of R25 000.00 in order to arrange for the disappearance of the case. Kriek refused and left.

[9] In January 2011, Captain Liebenberg came to Kriek's home, however Kriek evaded Captain Liebenberg by running away as he feared that Sergeant Takalo had returned. Van der Westhuizen subsequently informed Liebenberg of the events that had taken place at the plot which resulted in an identity parade and the applicants subsequently being charged.

[10] In response to the respondent's evidence, Mr Myeni testified that on 19 August 2010, Sergeant Takalo had requested his assistance in tracing suspected stolen motor vehicles at a plot in Honeydew. Whilst inspecting the motor vehicles, Kriek arrived and he was requested to provide the documentation relating to the motor vehicles. As a result thereof, Kriek left the plot alone to

collect the keys and papers. Upon Kriek's return the police opened the remaining motor vehicles and calls were made to Mr Molobye to certify whether the cars had been stolen.

[11] Upon conclusion of their inspection, the police left the plot with one of the motor vehicles a Mazda Soho. Myeni further disputed the evidence of the respondent's witnesses.

[12] Mr Nkosi testified that prior to his dismissal he was working at the Soweto K-9 unit. Nkosi further denied being present at the plot and further denied ever having used the cell phone with number 073 695 0167. Nkosi further argued that someone had used his ID number fraudulently.

The Commissioner's reasons

[13] The Commissioner in his arbitration award inter alia held that the applicants' evidence in many instances defied logic, was incoherent and unbelievable. The Commissioner based the aforementioned on the following:

13.1 The applicants never disputed the submissions made by Kriek and van der Westhuizen that she had driven to the plot in a Toyota Hilux;
13.2 They further did not dispute that upon Kriek's arrival, some of the motor vehicles had already been opened by the policemen;
13.3 The applicants claimed that some of the motor vehicles confiscated by Captain Liebenberg are not the same motor vehicles that they had inspected, however failed to prove this aspect;
13.4 The applicants further did not deny that they had refused to identify themselves when asked by van der Westhuizen to do so;
13.5 The applicants further did not deny having contacted Mr Molobye;
13.6 Mr Myeni was of the view that Kriek could have gone to the bank whilst collecting the papers and keys, which in the Commissioner's reasoning was improbable given the time it took for Kriek to withdraw the monies from the bank;
13.7 The applicants did not dispute the version of Captain Liebenberg; and

13.8 the failure by Mr Nkosi to have challenged the evidence submitted by MTN in which MTN had confirmed that the cell phone with number 073 695 0167 had been present at the plot.

[14] The Commissioner further reasoned that he was of the view that the version of Kriek and van der Westhuizen was more probable in that were Kriek not escorted by the police to collect the papers and motor vehicle keys that he would in all likelihood have absconded. The Commissioner further submitted reasons as to why he accepted the version of the respondent's witnesses and not that of the applicants.

[15] In conclusion the Commissioner held that the disciplinary findings were correct and that the sanction of dismissal was appropriate.

The Review Application

[16] Upon receipt of the arbitration award, the applicants filed a review application in which the applicant inter alia raised that the Commissioner had committed misconduct in relation to the duties of the commissioner as an arbitrator. The Commissioner had further committed a gross irregularity in the conduct of the arbitration proceedings and that he had exceeded his powers.

[17] The essence of the applicants' review application is based on the fact that Myeni had not participated in the various acts of misconduct, however it has been conceded that Myeni was present at the scene on 19 August 2010. Nkosi denies ever having been present at the scene, but fails to provide supporting evidence to corroborate this version.

[18] The applicants have further submitted that the Commissioner had failed to consider the material contradictions particularly in respect of who had accompanied Kriek to collect the motor vehicle keys and papers. The applicants further disputed the motor vehicle that had been used by Kriek to go to the bank. The applicants are of the view that these contradictions ought to have "raised the commissioner's eyebrows as they are demonstrative of a rehearsed version gone wrong." The applicants are further of the view that the

Commissioner had erred in accepting an improbable version in respect of the identity parade and Kriek and van der Westhuizen's failure to identify all persons present on 19 August 2010.

[19] The applicants were further of the view that the Commissioner had ignored relevant and material evidence in that on 19 August 2010, Nkosi was no longer using the cell phone with number 073 695 0167. In conclusion the applicants are of the view that the Commissioner had exceeded his powers in that he had actively assisted the respondent's case by recalling Captain Liebenberg.

[20] In opposition to the aforementioned, the respondent inter alia had submitted that in respect of Myeni, the evidence demonstrates that Myeni had requested Mr Molobye to establish the status of the motor vehicles, that an amount of R100 000.00 had been withdrawn and that Kriek had never been arrested for being in possession of stolen motor vehicles.

[21] In respect of Nkosi, his presence at the plot had been confirmed through his cell phone. Furthermore, that the cell phone had been registered in his name at the dog unit where he was stationed and that the number had also been RICA'd in his name.

[22] The respondent in conclusion submitted that no basis had been established for the reviewing and setting aside of the arbitration award as the applicants have failed to demonstrate any irregularity worthy of consideration within the context of the authorities that are cited in the Heads of Argument.

Analysis

[23] Section 145 of the LRA provides as follows –

> **"145 Review of arbitration awards:**
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> (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award:
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> …..

(2) A defect referred to in subsection (1), means:

(a) that the Commissioner;

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct the arbitration proceedings; or

(iii) exceeded the commissioner's powers."

[24] The general principle is that a gross irregularity should concern the conduct of the proceedings rather than the merits of the decision.[2] When a commissioner fails to have regard to material facts, this may constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner may have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having his/her case fully and fairly determined.[3] A review of a Commission for Conciliation, Mediation and Arbitration (CCMA) award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA.

[25] For a defect in the conduct of the proceedings to amount to a gross irregularity, as contemplated in section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.[4]

[26] Material areas of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, and are only of any consequence if their effect is to render the outcome unreasonable.[5]

[27] My analysis commences with a review of the record and the evidence that was submitted during the arbitration proceedings. In my view what is of significance are the common cause facts. There is no dispute that there was a visit to the plot on 19 August 2010, that Myeni was the driver of the motor vehicle that

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[2] *Herholdt v Nedbank Limited (COSATU as Amicus Curiae)* 2013 (6) SA 224 (SCA) at para 10.
[3] Id fn 2 at para 16.
[4] Id fn 2 at para 25.
[5] Id fn 2

was used to go to the plot. That Kriek was in the business of selling motor vehicles and that the purpose of the inspection was to ascertain whether or not the motor vehicles were stolen. Furthermore, that R100 000.00 had been withdrawn by Kriek during the time that the inspection was taking place and that Myeni had made contact with Mr Molobye. There is further no dispute that the applicants were not identified by Kriek and van der Westhuizen during the identity parade and the cell phone number of Nkosi was also present at the plot, as verified by MTN.

[28] It is trite that the position regarding the review of awards is that a review is permissible if the defect of the proceedings falls within one of the grounds as set out in s145 of the LRA. As stated in the matter of *Herholdt v Nedbank Ltd*[6]:

> "For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to the attached particular facts, are not in and of themselves sufficient for an award to be set aside but are only of any consequence if their effect is to render the outcome unreasonable."

[29] In considering the review submissions by the applicants, I am of the view that the applicants' reasons to have the arbitration award reviewed are not supported by the record or the documentary evidence submitted during the arbitration proceedings.

[30] The applicants have inter alia attempted to rely on the fact that the Commissioner recalled Captain Liebenberg as one of the reasons for the review. In this regard, I have been referred by counsel for the respondent to the case of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[7] in which the Labour Appeal Court, held that:

> "The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that

[6] [2013] 6 *SA* 224 (SCA) at para 25.
[7] [2014] 35 *ILJ* 943 LAC.

an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.[8]

Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator

[8] [2008] *ZACC* 15; 2009 (2) SA 204 CC at paragraphs 64 and 65 where the court held that: *'…commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. An arbitrator must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.'*

understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"[9]

[31] In considering the aforementioned cases in relation to this matter, I am of the view that the Commissioner provided both parties an opportunity to have their say in respect of the dispute. The Commissioner has further identified the dispute he was required to arbitrate and further that he understood the nature of the dispute. Furthermore the arbitration award clearly deals with the substantial merits of the dispute and his decision is therefore reasonable and one that could be reached by another decision maker based on the evidence before him or her.

[32] I am further in agreement with Counsel's submissions that the applicants suffered no prejudice in respect of the recalling of Captain Liebenberg and that it is within the powers of a commissioner to conduct the proceedings in whatever way he deems appropriate, provided that such process is fair and reasonable. Given the questions raised in relation to the registration numbers of the motor vehicles, this aspect required clarification in that the applicants had identified different motor vehicles on the day.

[33] With reference to the remaining review grounds, I am of the view that the applicants have failed to demonstrate that the decision of the Commissioner is not a reasonable one. As aforementioned, of significance are the common cause facts and the impact this has had on the arbitration proceedings as a whole. The Commissioner clearly in terms of his arbitration award has clearly considered all of the evidence that was presented to him and in so doing has not misconceived the issues in that the result is not an unreasonable one.

[34] The Commissioner further assessed the evidence and the credibility of the witnesses and found that the respondents' witnesses' versions were more probable. This is what the Commissioner was required to do. Therefore in conclusion I am of the view that the Commissioner in approaching the evidence in such a manner clearly arrived at a decision which was reasonable.

[9] Id fn 7 at paras 17 to 20.

[35] In regards to costs, even though I am of the view that this review application was ill-considered, upon a consideration of the requirements of law and fairness, I am of the view that each party must be burdened with its own costs.

[36] In the premises, I make the following order:

Order

1. The applicants' review application is dismissed;
2. Each party is to pay its own costs.

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H. Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: T Majang from Majang Inc. Attorneys

For the Respondent: S B Nhlapo

Instructed by: State Attorney, Johannesburg