

SOUTH AFRICA / JUDGMENT

Govender v Provincial Head of Commercial Crime and Others (D04/2021) [2021] ZALCD 74 (2 September 2021)

[2021] ZALCD 74

COURT

Labour Court Durban

BEFORE

Mark Futcher

CASE / FILE NUMBER

D04/2021

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IN

THE LABOUR COURT OF SOUTH AFRICA

Case

no: D04/2021

Reportable

In

the matter between:

Yoganathan
Govender Applicant
and
Provincial
Head of Commercial
Crime First
Respondent
Provincial
Commissioner of SAPS
KZN Second
Respondent
Minister
of
Police Third
Respondent
Heard: 02
September 2021

Delivered:

JUDGMENT

FUTCHER, AJ

Introduction

- [1] This is an Application by the Applicant for an Order directing the Respondents to complete an investigation into allegations against the Applicant in terms of Regulation 8 (1) of the South African Police Services Disciplinary Regulations of 2016 [“the Regulations”], within a period of 30 (THIRTY) days, and in the event that there is sufficient evidence to proceed with the Disciplinary Hearing, that this Court direct that such hearing be held within 7 (SEVEN) days following the completion of that investigation in terms of paragraph 3(a) of the said Regulations.
- [2] The relief further seeks that, in the event that there is no evidence to justify the holding of a Disciplinary Hearing, or in the absence of the Respondents’ compliance with the terms of such Order, that the allegations levelled against the Applicant in terms of the said Regulations, be withdrawn, and that the Applicant be allowed to resume his duties within a period of no more than 10 (TEN) days after such finding is made by the Respondents.
- [3] The Applicant further seeks the costs of this Application.

THE CHRONOLOGY OF EVENTS

- [4] The Applicant was employed as a Warrant Officer in the Commercial Crimes Division in the South African Police Services, working in the Fraud Division.
- [5] On 18 April 2019, the Applicant was issued with a Notice of Alleged Misconduct in terms of the Regulations.
- [6] The allegation made against the Applicant related to an utterance allegedly made by him on 25 March 2019, and it was specifically

proffered by the Respondents that the Applicant had uttered life-threatening words to other members within the Provincial Commercial Crime Investigations Unit.

- [7] Coupled with the Notice to attend the hearing, the Respondent proceeded with an enquiry in terms of Section 102 (1)(b) of the Firearms Control Act 60 of 2000 (“FCA”), in an effort to determine the competency of the Applicant to control and possess a firearm.
- [8] Prior to the issue of the Notice to attend the disciplinary proceedings, and on 10 April 2019, the Applicant had been issued with a Placement Notice advising him that he was to be transferred with immediate effect to the Docket Management Centre at the Montclair precinct of the South African Police Services. Such placement was effected forthwith.

- [9] On 25 April 2019, the Applicant requested further particulars in respect of the alleged misconduct. No such further particulars were received.
- [10] In terms of Regulation 8 of the Regulations governing the SAPS, the following is stated:
- “(1) A supervisor must ensure that the investigation into the allegations of misconduct is completed within thirty (30) calendar days or as soon as practically possible thereafter, and if satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, refer the outcome of the investigation to the employer representative within seven (7) working days to initiate a disciplinary enquiry. The employee must be informed of the alleged misconduct and pending investigation.*
- (2) The employer representative must within fifteen (15) working days, charge the employee with misconduct, by serving a written notice to attend the disciplinary hearing in the form determined by the National Commissioner.”
- [11] On 13 July 2019, the Applicant referred a dispute to the Safety and Security Sectoral Bargaining Council (“SSSBC”) in terms of its unfair labour practice division, which dispute was ultimately withdrawn and not decided by the SSSBC.
- [12] Having had no satisfaction in concluding any of the matters raised by the Applicant, he, through his attorneys, filed this Application on 9 June 2021.
- [13] The Respondents opposed the relief sought and filed an Opposing Affidavit raising, inter alia, the defence of lis pendens on the basis that the matter was before the SSSBC.
- [14] By the time this matter was argued, the matter had been withdrawn from the SSSBC and the point was therefore moot, and not required to be decided by this Court.
- [15] In its opposing affidavit, the Respondents, through their duly appointed deponent, being Police Brigadier, André Wayne Holby (“Holby”), suggested that the matter was at its final stages of determination.
- [16] The Respondents further conceded that there had been a delay but sought to blame this delay on the outbreak of the COVID-19 pandemic.
- [17] Upon the hearing of this matter, on 8 July 2021, the Respondents’ representative indicated that there had been recent developments and sought leave to file a supplementary affidavit in this matter as well as supplementary heads of argument.
- [18] Leave was granted in this regard, and an appropriate Order issued on 8 July 2021, giving direction to the matter and requiring the Respondents to pay the wasted costs occasioned by the adjournment on a party-and-party scale.
- [19] In its replying papers, the Respondents conceded that the lis pendens point had become moot, and abandoned this point.

- [20] The affidavit amplified the reasons for the delay in proceeding with the disciplinary proceedings and once again relied heavily on the unfortunate consequences caused by the various lockdowns occasioned by the onset of the COVID-19 pandemic.
- [21] In the affidavit, the Respondents indicated that a Memorandum of 2 July 2021 had been addressed to the Provincial Head Commercial Crime, as well as the Station Commander, Montclair, recommending that the charges against the Applicant be withdrawn, as a considerable period of time had passed without the taking of any action.
- [22] The contention by the Respondent was that the reason for the withdrawal of the charges was not related to the merits of the matter, but rather to the delays caused. A consideration of the Memorandum reveals that the fault noted by the author thereof was clearly procedural in nature.
- [23] Notwithstanding the above contention, the essence of the dispute before this Court had therefore been resolved, the relief sought by the Applicant being effectively satisfied as a result of the actions of the Respondent.
- [24] Subsequent to this, certain internal processes were followed, and the disciplinary enquiry against the Applicant was subsequently withdrawn on or about 29 July 2021.
- [25] The crisp issue left to consider by this Court therefore relates to the issue of costs.
- [26] This Court may award costs in terms of Section 162 of the Labour Relations Act (“LRA”), which provides as follows:
- “(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.*
- (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
- (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
- (b) the conduct of the parties—
- (i) in proceeding with or defending the matter before the Court; and
- (ii) during the proceedings before the Court.
- (3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.”
- [27] The Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] 39 ILJ 523 (CC) noted, with reference to S162 that:

“The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party’s costs.”

- [28] That Court further quoted, with approval, the decision in *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC), wherein Zondo JP explained the reason for the departure of the ordinary rule where costs would follow the result as follows:

“[19] With regard to costs I have been tempted to award costs against the second respondent because the second appellant has had to come to court to seek to alter the sanction imposed upon the second respondent but, I think that, having obtained a sanction of final written warning which was not his decision but that of the first respondent – he was entitled to come to Court and seek to defend it. Indeed, he was successful in the Court below. The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes. In that way these Courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the Courts for adjudication.”

- [29] This Court, therefore, in considering the question of costs, is bound to consider the requirements of law and fairness in relation to the circumstances before it.

- [30] In this matter it is undisputed that an extraordinary delay took place in regard to the final withdrawal of the allegations against the Applicant and that there was a clear departure from the requirements of Regulation 8 as referred to above.

- [31] The explanation of the Respondents, in relying on the outbreak of the COVID-19 pandemic, is somewhat disappointing in that a simple

analysis of the chronology of the matter reveals that the allegations arose on 18 April 2019, just less than a year before the

implementation of the state of disaster and related COVID-19 disruptions. Quite clearly, this is not a good explanation for the

delay in proceeding against the Applicant.

[32] It seems that, despite several correspondences from the Applicant's attorneys to the Respondents seeking, ultimately, the relief which was sought before this Court, no steps were taken by the Respondents. It was only after the Application, giving rise to this matter, was served and filed on 9 June 2021, that the Respondents applied their collective minds to the issues raised by the Applicant.

[33] The allocation of a date by the Registrar further hastened the Respondents in dealing with this matter, culminating in the filing of its Supplementary Affidavit, wherein it contended that it had effectively acquiesced to the Applicant's request.

[34] The parties in their Heads of Argument so supplemented referred to the case law noted above, and the Respondents' representative

argued that in the circumstances, there should be no Order as to costs.

[35] Conversely, the Applicant's representatives suggested strongly that, but for the steps taken, to bring this matter to Court, the Applicant would not have received the relief, which finally he did.

[36] In weighing up the requirements of law and fairness, it is important to ensure that organs of the State such as the South African Police Service abide their own rules and regulations and give effect to the rights and obligations which such Regulations impose on both the organisation, as well as its employees and servants.

[37] It is neither lawful nor fair for an organ of the State to use its disproportionate resources to defend matters, brought by its

employees on a legitimate basis, to later seek to avoid the consequences of that failure to act in terms of the regulatory framework by which it is bound.

[38] The attention of the Respondents, and particularly its senior officials, was only drawn to this matter once it had been brought before this Court, and in particular, had been set down for hearing.

[39] The conduct of the Respondents' Officials in this regard is regrettable, and although not deserving of a punitive Costs Order, it is the view of this Court that, a Costs Order is appropriate, given the circumstances and the ratio in Dorkin.

Order:

[40] In the result, the following Order is made:

- a. The withdrawal of the Notice in terms of Regulation 8(1) of the South African Police Services Disciplinary Regulations, is confirmed.
- b. The Respondents are ordered, jointly and severally, to pay the costs occasioned by the Applicant in regard to the opposition of the Respondents defence to this matter, on a party-and-party scale.

Mark Futchet

Acting Judge of the Labour Court of

South Africa

APPEARANCES:

For the Applicant: Ms.

D. Dheoduth

Instructed by: T

Giyapersad Incorporated

For the First, Second and Third Respondents: Ms. S. Jikela

Instructed by: State

Attorney

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