

SOUTH AFRICA / JUDGMENT

Notisi v South African Police Service and Others (JA31/2022) [2023] ZALAC 33; [2024] 4 BLLR 380 (LAC); (2024) 45 ILJ 986 (LAC) (14 December 2023)

[2023] ZALAC 33

COURT

Labour Appeal Court

BEFORE

Molahlehi ADJP, Savage AJA, Gqamana AJA

CASE / FILE NUMBER

JA31/2022

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FLYNOTES:

LABOUR – Dismissal – Reinstatement – Police
colonel charged with misconduct and dismissed – Labour Court finding against reinstatement – Bar of intolerability is high one not easily reached – Evidentiary burden heightened where dismissed employee has been exonerated of all charges –
To punish appellant with unemployment without him having been found guilty of any wrongdoing was grossly unfair and unwarranted
– Appellant had been employed for 28 years, had attained the rank of Colonel and was the Head of Springs Criminal Investigation Services with approximately 63 detectives serving under him – Appeal upheld.
IN
THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG
Reportable
case no: JA31/2022
In

the matter between:

SIYAKUDUMISA
NOTISI
Appellant
And
SOUTH
AFRICAN POLICE SERVICE
First Respondent
SAFETY
AND SECURITY SECTORAL
BARGAINING
COUNCIL
Second Respondent
TREVOR
WILKES N.O. Third
Respondent
Heard: 23
May 2023
Delivered: 14
December 2023
Coram: Molahlehi
ADJP, Savage
AJA et Gqamana AJA

Summary:

The issues on appeal concern the findings of the review court concerning the fairness of the dismissal and reinstatement of the employee in terms of section 193(2) of the Labour Relations Act. The employee, was charged and dismissed for misconduct relating to the alleged interference with the administration of justice. The arbitrator found the dismissal to be substantively unfair but declined to reinstate him. On review the Labour Court upheld the unfairness of the dismissal but declined to reinstate the employee. This court on appeal unanimously agreed with the finding that the dismissal was substantively unfair. There was no agreement, however, on the reinstatement. In the first judgment of the minority this court held that the reinstatement was inappropriate or intolerable in the circumstances of the case. The majority disagreed with the minority on the issue of reinstatement and found that the SAPS failed to provide evidence to support the contention that reinstatement was either inappropriate or intolerable. In other, words, the majority found that consequent the

finding of substantive unfair of the dismissal the appropriate relief for the employee was reinstatement.

JUDGMENT

GQAMANA, AJA

Introduction

- [1] This appeal is against the judgment and order of the Labour Court (per Lagrange J). The court a quo held that the appellant's dismissal was substantively unfair, but despite such finding, it declined to order the reinstatement remedy, instead it granted the appellant 12 months' compensation. The appeal is against the remedy. The first respondent, the South African Police Service (SAPS) cross appeals against the findings that the dismissal was substantively unfair. The appeal is with the leave of the court a quo.
- [2] The appellant, Mr Siyakudumisa Notisi, was employed by the SAPS as a Colonel. He was stationed at Springs Police Station as a head of Springs Criminal Investigation Section (CIS). He was charged with two charges of misconduct, namely perjury and interference with the administration of justice. The perjury charge arose from the appellant's testimony at the Regional Court that Lwazi Ndlangamandla (an accused person in that court) was a police informer. On the second charge, it was alleged that the appellant instructed a court orderly to leave the court without just cause.
- [3] The appellant was found guilty of both charges by the internal disciplinary enquiry and was dismissed on 24 May 2016. Aggrieved with his dismissal, he referred an unfair dismissal dispute to the second respondent, the Safety and Security Sectoral Bargaining Council (the SSSBC).
- [4] After unsuccessful conciliation the dispute was arbitrated by the third respondent, Mr Trevor Wilkes (the arbitrator). The arbitrator in his award dated 6 June 2018, criticised the appellant and found him a poor and evasive witness. However, despite his criticism, he found that, on the totality of the evidence the SAPS did not prove on the balance of probabilities that the appellant was guilty of the charges. As a result, the arbitrator concluded that the dismissal was substantively unfair. Because of such findings the arbitrator deemed it unnecessary to consider the appropriateness of the dismissal sanction. The arbitrator ordered reinstatement together with back pay in the amount of R1 246 955.25.
- [5] Disenchanted with such award, the SAPS launched a review application in the Labour Court. The review application was based on the grounds that the arbitrator misconstrued and ignored the inconsistencies in the appellant's evidence and therefore the award was unreasonable. Further it was the SAPS' contention that the reinstatement remedy was inappropriate because the trust relationship between it and the appellant is irretrievably broken down.

- [6] The SAPS was partially successful in its review application in that, the court a quo reviewed and set aside the award. It upheld the finding by the arbitrator that the dismissal was substantively unfair. However, on the reinstatement remedy the court a quo held that, had the arbitrator taken into account the provisions of section 193(2)(b) and (c) of the Labour Relations Act[1] (the LRA), he would have found it impossible to avoid the conclusion that the trust relationship was seriously damaged, or alternatively that, the appellant's conduct was incompatible with his functional role. Therefore, the arbitrator ought to have found that reinstatement was not an appropriate remedy and accordingly his findings on the remedy was one that no reasonable arbitrator would have reached in the circumstances. In light thereof, the court a quo reviewed and set aside the award in respect of the reinstatement remedy and substituted it with the maximum compensation of twelve months' remuneration.
- [7] The two issues that arise from this appeal are: firstly, whether the appellant's dismissal was substantively unfair. Secondly, whether reinstatement is an appropriate remedy having regard to the surrounding facts and circumstances of this case.
- [8] I am mindful that the issue of substantive unfairness of the appellant's dismissal arises from the cross appeal by the SAPS, but for practical purposes I will deal with this issue first.

Substantive unfairness

- [9] Counsel for SAPS argued that there were inconsistencies in the appellant's evidence taken together with that of his witnesses as to whether Ndlangamandla was an informer. On the other hand, the version by the SAPS was consistent that there was no proof that Ndlangamandla was registered as an informer in terms of the National Instruction 2/2001. The argument was that because there were two mutual destructive versions on this issue, the arbitrator failed to follow the approach set out in Stellenbosch Farmers' Winery Group Ltd. and Another v Martell and Cie SA and Others[2] to resolve such factual dispute.
- [10] In advancing its submission the SAPS placed reliance in National Union of Mineworkers and Another v CCMA and Others[3] where this Court held that:

'[A] resolution of factual disputes is at the core of the commissioner's task in arbitrating a dispute between parties. For compelling reason, the same technique to be employed by a Court is to be employed by the commissioner when faced with irreconcilable versions, as was set out in [Stellenbosch Farmers Winery] ...

In failing to approach the evidence in such manner, with no resolution of the factual disputes before him, the commissioner quite clearly arrived at a decision which was unreasonable.'

- [11] I disagree with the SAPS that there was a factual dispute on the issue of whether Ndlangamandla was an informer or not. The National Instruction 2/2001 makes a distinction between an informer and an occasional informer. There are stricter measures with the registration, keeping of files and payments to informer(s) as compared to occasional informer(s). An occasional informer provides information relating to criminal activities occasionally without compensation.
- [12] The entire case presented by SAPS through its witnesses was that Ndlangamandla was not registered as an informer and there was no operational file or administration file kept for him. The purpose of an operational file is to keep records of the useful information obtained from an informer and the administration file is for processing of payments to be made to an informer. Because of the absence of same, an inference must be drawn that he was not an informer. The appellant and his witnesses testified that Ndlangamandla was an occasional informer hence there was no operational file kept for him. There were inconsistencies on how he was recruited and who was his handler but the common theme in their evidence was that Ndlangamandla provided useful information to the police about criminal activities and he was not paid in exchange for such information. None of the SAPS' witnesses testified as a fact that Ndlangamandla was not an occasional informer. The high watermark case of the SAPS case is that, because he was not registered and no operational file existed in relation to him, it is questionable that he was an informer.
- [13] It was common cause that the appellant gave evidence under oath in the Regional Court that Ndlangamandla was a police informer. However, the onus rests with the SAPS to prove that such evidence was false, meaning that Ndlangamandla was not a police informer. In his evidence at the Regional Court, the appellant was not specific that Ndlangamandla was an occasional informer. In terms of paragraph 5(2) of the National Instruction 2/2001, it is not necessary to keep an operational file for an occasional informer. According to the evidence of Maphalle who was Ndlangamandla's handler, he used his pocket book to keep the information received from the latter. He mentioned the Daveyton case and the truck hijackings as a few examples of the useful information received from Ndlangamandla.
- [14] In light of the evidence before the arbitrator there was no dispute of fact which required to be resolved in the manner set out in Stellenbosch Farmers Winery. The SAPS failed to prove on a balance of probabilities that Notisi was guilty of perjury or that Ndlangamandla was not an occasional informer.
- [15] In addition, the evidence before the arbitrator did not support a

conclusion

that Notisi had interfered with the administration of justice in having instructed a court orderly to leave the court without just cause. The magistrate in her evidence confirmed as much. Consequently, the findings by the court a quo on review that the appellant's dismissal was substantively unfair were unassailable and therefore the cross appeal must fail.

Reinstatement relief

[16] This then takes me to the second issue of the appropriate remedy. The arbitrator in his award ordered reinstatement with backpay. The court a quo substituted it with 12 months' compensation on the basis that, had the arbitrator considered the appellant's failure to convey Ndlangamandla's plea explanation to Van Wyk and his response to the information that his team members were implicated in the murder incidents, he would have found it impossible not to conclude that the appellant's trustworthiness was seriously damaged, alternatively, the appellant's conduct was incompatible with his functional role. Therefore, reinstatement as a remedy was inappropriate.

[17] Counsel for the appellant submitted that, in terms of section 193(2) reinstatement is the primary remedy when a dismissal has been found to be substantively unfair.[4] It was argued that because the appellant was exonerated on all the charges, the court a quo ought not to have interfered with the arbitrator's order of reinstatement.

[18] It was also submitted that the appellant has a long and unblemished service with the SAPS. The appellant also relied on the evidence of Brigadier Ndlovu and Brigadier Gweshube, both of them gave positive evidence about the appellant's work performance. Their evidence was that since the appellant's deployment to the

Gauteng Province in 2011, cases involving car and truck hijackings have substantially reduced.

[19] On the other hand, counsel for SAPS argued in support of the findings by the court a quo that, reinstatement was not an appropriate remedy. In support of its submissions emphasis was placed on the following factors:

19.1 the appellant's failure to convey to the investigating officer, Van Wyk, the content of Ndlangamandla's

plea of guilty which implicated another suspect, Sipho Radebe;

19.2 the appellant's failure to take any steps against his team members who were implicated in serious crimes of murder and kidnapping in Dukuza;

19.3 the appellant's involvement in the mitigation of sentence on behalf of Ndlangamandla who was convicted of serious crimes of unlawful possession of stolen vehicles and more importantly his failure to disclose to the Magistrate that Ndlangamandla had pending serious criminal cases;

19.4 the fact that the appellant was found to be a poor and evasive witness by the arbitrator during the arbitration hearing; and

19.5 appellant's association with poor characters although he was a senior police officer.

[20] As a precursor, section 193(2) of the LRA provides that:

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

- (a) the employee does not wish to be reinstated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonable practicable for the employer to reinstate or re-employ the employee ...'
- [21] Sub-section (a) has no application in this appeal and only sub-sections (b) and (c) are in my view relevant.
- [22] Recently the Constitutional Court in *Booi v Amathole District Municipality and Others*[5] held that:

[39] The primacy of the remedy of reinstatement is no coincidence. It is the product of a deliberate policy choice adopted by the Legislature. This choice, and its centrality to our laws governing labour disputes, is articulated in the following extract taken from the explanatory memorandum attached to the Draft Labour Relations Bill: "A major change introduced by the draft Bill concerns adjudicative structures. In the absence of private agreements, a system of compulsory arbitration is introduced for the determination of disputes concerning dismissal for misconduct and incapacity.... The main objective of the revised system is to achieve reinstatement as the primary remedy. This objective is based on the desire not only to protect the rights of the individual worker, but to achieve the objects of industrial peace and reduce exorbitant costs. It is premised on the assumption that unless a credible, legitimate alternative process is provided for determining unfair dismissal disputes, workers will resort to industrial action in response to dismissal.... Without reinstatement as a primary remedy, the draft Bill's prohibition of strikes in support of dismissal disputes loses its legitimacy.

[40] It is accordingly no surprise that the language, the context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And, my approach to section 193 (2) (b) is fortified by the jurisprudence of the Labour Appeal Court and Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.

...

[42] I hasten to add that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all the charges. In this context, what ought to ring true are the words of the Labour Court in *Amalgamated Pharmaceuticals*, that in a constitutional democracy in which the right to fair labour practices is entrenched, "[t]o punish ... [individuals] ... with unemployment, even if this is accompanied by some

compensation, without finding them guilty of any wrongdoing is grossly unfair”. Similarly, we ought to be guided by what this Court said in Billiton: “[i]f [the conduct] did not justify dismissal ... it [is] difficult to understand why, as the same time, it could nevertheless provide a ground to prevent reinstatement”. It should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal.’ (Footnotes omitted.)

[23] Where an employee has been exonerated of all the charges, the evidentiary burden to establish intolerability is heightened. The employer must provide reasons and tangible evidence to show intolerability.[6]

[24] The Constitutional Court in *Booi* (supra) held that:

“It should take more to meet the high threshold of intolerability than for the employer to simply reproduce verbatim, the same evidence

which has been rejected as insufficient to justify dismissal.”[7]

[25] The SAPS in anticipation of the third respondent’s decision that the dismissal is unfair and concerning the question of appropriateness of reinstatement, led the evidence of Major-General Basson, the Deputy Provincial Commissioner at Human Resources Management (HRM). The nub of her evidence is that, in terms of section 205(3) of the Constitution of the Republic of South Africa, 1996, the SAPS has an obligation to prevent, investigate crime and to protect members of the public. It executes such mandate through its police officers like the appellant who are required to be ethically

beyond reproach. The appellant’s failure to disclose to the Magistrate pending cases against Ndlangamandla compromised the SAPS’ duty to combat crime and to ensure that those suspected of committing crimes are brought to justice.

[26] Furthermore, she testified that the appellant’s failure to disclose the content of the plea of Ndlangamandla and to act on it, also compromised efficiency of the SAPS in investigating crime. It is common cause that, Ndlangamandla in his plea implicated and mentioned the involvement of one Sipho Radebe in theft of motor-vehicles on more than three occasions. Ndlangamandla pleaded and admitted that, he received those stolen vehicles from Sipho Radebe and he knew that the latter was not the owner of the said motor-vehicles. He also admitted that he drove those stolen vehicles to an address in Daveyton on instructions of Sipho Radebe to hide them at the aforementioned address. According to Major-General

Basson, the appellant, as a member of SAPS and the head of detectives had an obligation to investigate such crime or at the least to convey that information to Warrant Officer Van Wyk, who was the investigating officer in the criminal cases against Ndlangamandla.

The appellant admitted in his evidence that he did not disclose the content of the plea to Warrant Officer Van Wyk, nor did he

investigate such information. His explanation for not acting on such information was rejected by the arbitrator.

[27] In addition, Major-General Basson gave evidence that the appellant's failure to investigate his team members, (i.e. Constable Maphalle and Madondo, his informers Ndlangamandla and Vilakazi) whom he knew were implicated in the commission of serious crimes of murder is another factor that militates against reinstatement. The appellant admitted that he was informed of the murder incidents but, he did not investigate it because he did not believe his members could be involved in the commission of such serious crimes.

[28] The undisputed evidence led at the arbitration about the murder incidents was that, the appellants team members mentioned above, were instructed by him to conduct an investigation and to look for certain suspects at Dukuza. The appellant was not with them when they conducted the investigation and looked for such suspects. In the course of the investigation, one suspect was tortured by his team members using a "tube method" and as a result thereof he was suffocated and died. Because the other suspects had observed what had occurred, the appellant's team members decided to shoot and kill the remaining suspects in order to destroy evidence. The remaining suspects were shot using an R5 rifle which was issued to Constable Maphalle. Two of the suspects died and one miraculously survived shooting. Worse of it, the appellant's team members decided to cut off the head of one of the suspects that they had shot, in order to create an impression that his death was related to the fight between the mine workers. The bodies of those suspects were dumped in the open field near mines at Carltonville. It was common cause that Constable Maphalle, and Ndlangamandla were convicted of the aforementioned murder offences and were sentenced to three life imprisonment, while Vilakazi was indemnified from prosecution because he turned and became a state witness in accordance with the provisions of section 204 of the Criminal Procedure Act.[8]

[29] In argument at the Labour Court and again before us, the SAPS submitted that the fact that the negative credibility findings made by the arbitrator against the appellant is a relevant factor for consideration in the enquiry on the appropriateness of reinstatement relief. I disagree with that. The appellant's conduct as a witness in the arbitration proceedings is not a relevant factor in the enquiry in terms of section 193(2)(b). Unlike in *Maepe v CCMA*, [9] although negative credibility findings were made against the appellant, there was no finding by the arbitrator that he lied under oath.

[30] This Court in *Dunwell Property Services cc v Sibande and others* [10] held that:

"31 ... In order to determine whether or not an unfairly dismissal employee should be reinstated, as contemplated in section 193 (2) of the LRA, the overwhelming consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment."

- [31] The breakdown of trust or intolerability in an employment environment, especially a government employer like SAPS, must not be viewed from collegiality perceptions, but rather on the broader image of the SAPS and in this case, the public expectations on how members of the SAPS should conduct themselves. All members of the SAPS must command respect and confidence from the members of the public.
- [32] As already indicated above, the SAPS has a duty under section 205(3) of the Constitution to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law. For the execution of such mandate the SAPS depends on the police. Section 13(3) of the South African Police Service Act[11] provides that '[a] member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.
- [33] The police have a duty to investigate criminal conduct and to bring perpetrators thereof to justice. It is crystal clear that the constitutional and statutory mandate of members of the police is an important mandate which should reasonably result in the trust of the police by members of the public. And where such trust is established,
- it would be easy for the police to achieve its tasks.
- [34] In my view the appellant's failure to convey the content of Ndlangamandla's plea explanation to the investigating officer evinced a complete dereliction of his functional role as a policeman, to investigate crime. His excuse that he paid no regard to the content of the plea explanation was correctly rejected by the arbitrator. It was common cause that the investigating officer was not in court and was unaware of the content of such plea explanation. It was also common cause that one Sipho Rabede was implicated as a suspect in the commission of crime. The appellant as the head of detectives and a senior officer, was not only expected, but was required to either investigate the information disclosed from the plea explanation or convey it to Warrant Officer Van Wyk, the investigating officer of that case.
- [35] In addition, the appellant's failure to investigate his team members who were implicated in the egregious and cruel murder and kidnapping incidents is another factor which weighs heavily against his reinstatement. It was common cause that the murder and kidnapping incidents occurred on 17 April 2015 and the appellant became aware of them on 5 May 2015. Although he was aware of such incidents and that his team members were implicated therein, but he did not investigate them. The fact that later on, the appellant assisted the IPID in the arrest of his team members is in my view inconsequential. The main point is that the appellant failed to do his functional role, that is, to investigate crime.

[36] It is common cause that two of the appellant's team members, i.e. Constable Maphalle and Ndlangamandla were convicted of the aforementioned three murder counts and also for kidnapping, and were sentenced to three life imprisonment. Despite their conviction and lengthy sentence of imprisonment, the appellant continued to associate himself with them, in that he called them as his witnesses in the arbitration hearings.

[37] If one has regard to all these factors cumulatively, it will not be fair to expect the SAPS to continue an employment relationship with the appellant. The circumstances surrounding the appellant's

dismissal, militate against the reinstatement relief. Therefore, the findings by the court a quo that the reinstatement remedy was not an appropriate remedy is unassailable.

[38] On the issue of costs, interests of justice dictates that there should be no order as to costs.

[39] In the result I would propose that the appeal and the cross appeal be dismissed with no order as to costs.

SAVAGE AJA

[40] I have have had the benefit of reading the judgment of my colleague and agree that the Labour Court correctly dismissed the application to review and set aside the arbitrator's finding that the appellant's dismissal was substantively unfair. It is in respect of the issue of remedy that I am regrettably unable to agree as in my view, the appeal should succeed in that respect with the result that the appellant is retrospectively reinstated into his employment with the SAPS.

[41] At the time of his dismissal by SAPS on 24 May 2016 the appellant had been employed for 28 years, had attained the rank of Colonel and was the Head of Springs Criminal Investigation Services with approximately 63 detectives serving under him.

[42] At the arbitration hearing, three witnesses testified on sanction. Major General Janet Basson, the Deputy Provincial Commissioner for human resource management, testified for SAPS that as a result of the misconduct found to have been committed by the appellant, the trust relationship with the appellant had broken down irretrievably and that his reinstatement was intolerable.

[43] Two senior police officials testified for the appellant in relation to the issue of sanction. Brigadier John Ndlovu, the head of provincial detectives, testified that the appellant reported to him and that the Springs police station had benefitted from the performance of the appellant as branch commander, with complaints having greatly reduced since the appellant was stationed there, to the extent that he no longer needed to visit the previously poorly performing station. He had no difficulty working with the appellant although he accepted that if found guilty of the misconduct alleged, the appellant ought not to remain in the employment of SAPS. The arbitrator accepted the evidence of Brigadier Ndlovu as that "expected of an objective, police officer called by the applicant, very high-level".

[44] Brigadier Thembeke Gwebushe, testified for the appellant as the cluster commander to whom he reported. She stated that the performance of the Springs police station had dramatically improved since the appellant was stationed there and that she had no difficulties with trusting him in the event of his reinstatement. The arbitrator accepted Brigadier Gwebushe's evidence as objective with the "cross examination put to her that the applicant ought to have reported awareness of involvement of his team members to be speculative as there was no clear evidence of any extent to which the applicant was indeed aware of this at the time and what other official action had been taken by members of the respondent".

[45] Yet, despite this finding, the arbitrator considered the appellant evasive during cross-examination, uncooperative in certain aspects and found that:

'87. He was not able to give any plausible explanation, why the information regarding the serious activities of hijacking, and the modus operandi employed by the perpetrators was not immediately reported to more senior level, and he was not able to explain why several allegations levelled at witnesses that had testified at arbitration, were not confronted in regard to those aspects of their testimony which, during his evidence in chief and under cross examination had placed in material dispute.'

[46] Nevertheless, the arbitrator noted that the appellant sought to be reinstated, and found that SAPS had not shown that the trust relationship with the appellant had broken down or that a working relationship with him would be intolerable as provided for in section 193(2) of the LRA. This was so since his superiors, with whom he worked, had no concerns around trust and expressed clearly that his performance had been good. The arbitrator stated that "(e)vidence tended regarding the alleged involvement of the applicant in further offences relating to murders after the release of Mr Ndlangamandla became no more than speculation". It was therefore found to be just and equitable that the appellant be reinstated.

Labour Court

[47] On review, the Labour Court set aside only the reinstatement of the appellant and ordered that he be paid compensation, given his failure to convey the information contained in Mr Ndlangamandla's plea

explanation to the investigating officer, Mr Van Wyk, that stolen vehicles had been received from Mr Sipho Radebe of Tsakane; and his conduct in not investigating serious allegations of murder and attempted murder by a registered informer, Mr Vilakazi, Mr Ndlangamandla and Mr Mpahalle and Mr Madondo, two police officers who were members of his team.

- [48] In relation to the failure to provide information to Mr Van Wyk, the Court found the appellant's conduct "inexplicable", "astonishing", "irreconcilable" and "completely at odds with the supportive role he should have played as a senior officer...even if he was not personally involved with the investigation of the crimes Van Wyk was conducting". This was found to be destructive of the trust that SAPS was entitled to have of him and "starkly at odds with his functional role, as a senior officer supervising a team of investigators."
- [49] As to the murder allegations, the Court took issue with the appellant's failure to investigate the allegations or advise Mr Muhlangu of admissions made by Mr Vilakazi during a phone call, and only when members of IPID arrived at the police station that the appellant assisted in the arrest of Mr Maphalle and Mr Madondo. The Court noted that had he acted sooner "it is very likely action would have been taken to call them in for questioning before Vilakazi made his statement in exchange for indemnity". It was found to be an "even more egregious dereliction of his responsibility to share information relevant to the investigation of a serious incident of suspected crime with Muhlangu". The result was that the appellant's trustworthiness was found to have been seriously damaged, or at least his conduct incompatible with his functional role, and that the arbitrator ought to have found that reinstatement was not an appropriate remedy in the circumstances in that no reasonable arbitrator would have reinstated the appellant in the circumstances.

Discussion

- [50] The decision whether to reinstate an employee whose dismissal has been found to be substantively unfair involves the exercise of a discretion by the arbitrator having regard to the provisions of sections 193(1) and (2) of the LRA.
- [51] When the exercise of this discretion is challenged on review, the Labour Court is required to consider if the arbitrator properly took into account all the facts and circumstances in coming to its decision, and whether the decision
- reached is judicially correct.[12] A decision to order the reinstatement, re-employment or compensation of an employee in terms of section 193(1), and a determination in terms of section 193(2) whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or not reasonably practical is one to be taken by the decision-maker based on conceptions of fairness having regard to all the circumstances.[13]
- [52] The Labour Court deprived the appellant of reinstatement for alleged misconduct of which he had not been charged or disciplined without evidence as to why this was so when the misconduct alleged was committed prior to the dismissal of the appellant. Furthermore, at arbitration, the evidence of SAPS was not that it was as a result of the misconduct in respect of which he had not been charged or disciplined that the trust relationship had broken down and that continued employment had become intolerable. The evidence was rather that the trust relationship had been impacted as a result of the misconduct which he had been found to have committed at the disciplinary hearing.

- [53] The consequence of the failure to charge the appellant with the misconduct which ultimately led to his dismissal was that the substance of the allegations belatedly raised were not properly tested or determined. As a result, it was not possible to assess the seriousness of the appellant's failure to inform Mr Van Wyk of the allegations concerning Mr Radebe within the context of the facts and the appellant's police duties generally. It was a relevant consideration that there was no evidence that the appellant had intended to withhold the information or prevent an investigation of Mr Radebe, nor was there any evidence as to the use of police investigative resources generally and which leads are prioritised in an investigative process and which are not. The reality of police work and the environment in which it takes place was relevant to such a determination so as to decide whether the appellant's omission to inform Mr Van Wyk of the information received amounted to serious misconduct or not. There was also no evidence which indicated the importance attached to the appellant obtaining a guilty plea from Mr Ndlangamandla in circumstances in which it would otherwise have been unlikely to have obtained such conviction given that the complainant had left the country. Given that regard was not had by the Labour Court to such considerations, the finding that the appellant's behaviour was irreconcilable and completely at odds with his role as a senior officer, that it was inexplicable and astonishing simply did not accord with the evidence nor did it reflect an appropriate consideration of all relevant circumstances by the Court.
- [54] Similar difficulties arise in relation to the appellant's response to information received concerning the murders and attempted murder committed by his colleagues and two informers. From the evidence before the arbitrator it is apparent that the appellant received information regarding the commission of these crimes from a captain in the SAPS from Duduza. It followed that SAPS was aware of the crimes committed when the appellant first heard of them.
- [55] The appellant was in the Eastern Cape with his colleagues and Mr Ndlangamandla when he spoke to the informer, Mr Vilakazi. He immediately asked his colleagues what they knew of the crimes committed and was informed by them that they were not aware of them and that they had been at home at the time that the crimes occurred. The appellant testified that Mr Vilakazi then told him that if they don't know about the matter "me I don't know as well". The appellant said he phoned Mr Muhlangu for a case to be opened and also that Brigadier Gwebushe instructed that a case be opened regarding the matter. This occurred and the matter was transferred to SAPS Duduza for investigation. A week later IPID came to the SAPS office, apparently proceeding faster with the investigation than the SAPS investigation team. The appellant was asked to arrest Mr Maphalle and Mr Madondo by a General in head office, which he duly did having traced Mr Maphalle who, with Mr Ndlangamandla had disappeared.
- [56] In the review proceedings SAPS took issue with the appellant's failure to ask Mr Vilakazi to present himself to the investigating officer, with a week passing between Mr Vilakazi having informed the

appellant who had been involved in the crimes and Mr Vilakazi having been involved in the pointing out that led to the discovery of the bodies. Further, that it was only when IPID requested his assistance with the arrest of the three men that the appellant ensured they were arrested. SAPS also took the view that the appellant could have probed Mr Maphalle and Mr Madondo himself and informed the investigating officer of the information received by him. As a result, it was contended that the appellant compromised the administration, discipline or efficiency of SAPS as an institution of state.

[57] The arbitrator found that there was no clear evidence as to the chronology of events and at what point in time the appellant was aware of facts, nor what official action had been taken by SAPS within such chronology. This led him to find that the case advanced was “speculative”. Yet, the Labour Court overlooked these difficulties, did not determine the timeline of events relevant to the matter and found that had the appellant acted sooner “it is very likely” that action would have been taken to call the culprits in for questioning before Mr Vilakazi “made his statement in exchange for indemnity”. The Court took issue with the appellant’s failure to tell Mr Muhlangu timeously of his conversation with Mr Vilakazi, which was considered to be an “egregious dereliction of his responsibility”. Within the context of a dismissal for misconduct, an arbitrator is tasked with hearing and assessing evidence to determine the relevant facts relating to the misconduct. The Court’s findings overlook the fact that the belated presentation of the evidence on allegations of misconduct in respect of which the appellant had not been charged or disciplined meant that the appropriate determination of the relevant issues was both difficult and compromised. The evidence tendered in the manner it was indicated at least that one other police officer was aware of the crimes committed before the appellant was,; that the appellant attempted to find out facts relevant to the matter from the culprits; that he was in the Eastern Cape when he heard of the crimes; that he was aware that a SAPS investigation into the matter had commenced; and that he soon thereafter assisted in the arrest of his colleagues,

one of whom had fled. There is no indication that the appellant attempted to prevent or delay an investigation into the matter, nor that he committed misconduct in failing to commence an investigation into the matter or that he engaged in any delay which prejudiced the investigation or the convictions which followed.

[58] In *Booi*,^[14] the Constitutional Court emphasised the primacy of remedy of reinstatement in the LRA as a deliberate policy choice adopted by the legislature. It recognised that this choice, reflected in section 193(2)(b), which aims inter alia to protect the rights of the individual worker and achieve industrial peace, dictates “that the bar of intolerability is a high one. The term “intolerable” implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour”. A finding of intolerability is not to be easily reached, and “the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability”.

- [59] The Court stressed that the “evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all the charges”. [15] Reliance was placed on the decision of this Court in *Amalgamated Pharmaceuticals Limited v Grobler N.O and Others* [16] in which it was recognised that in a constitutional democracy in which the right to fair labour practices is entrenched, “[t]o punish ... [individuals]...with unemployment, even if this is accompanied by some compensation, without finding them guilty of any wrongdoing is grossly unfair”.
- [60] The Labour Court erred in failing to recognise not only that the bar of intolerability is a high one not easily reached, with the employer required to provide weighty reasons with tangible evidence to prove it, but that such evidentiary burden is heightened where the dismissed employee has been exonerated of all the charges. The appellant, who had 28 years’ service, was not found guilty of any wrongdoing. There was no reason why he was not charged or disciplined in respect of the further misconduct alleged on which SAPS sought to rely belatedly so as to justify his dismissal; and there was no indication that those allegations were of such a serious nature as to justify his dismissal. To punish the appellant in such circumstances with unemployment without him having been found guilty of any wrongdoing was grossly unfair and unwarranted. The fact that he may not have shown himself to be an exemplary witness does not alter this fact when the onus rests on the employer to prove the fairness of the dismissal.
- [61] The Labour Court failed to have regard to all of the relevant facts and circumstances in the matter and erred in reaching the decision that it did. For these reasons, the appeal must succeed. I share my colleague’s view that the cross-appeal must fail for the reasons he advances. There is no reason in law or fairness why an order of costs should be made in the matter.

Order

[62] In the result, the following order is made:

1. The appeal is upheld.
2. The cross-appeal is dismissed.
3. The order of the Labour Court is set aside and replaced as follows:

“1. The review application is dismissed with no order as to costs.”

Savage, AJA

Molahlehi, ADJP agrees.

Appearances:

For the Appellant: Mr

L M Maake

Instructed by

Malale Nthapeleng Attorneys

For the Respondent: Ms

N Nyembe

Instructed by The

State Attorney

[1] No. 66 of 1995, as amended.

[2] 2003 (1) SA 11 (SCA).

[3]

[2017] ZALAC 73; [2018] 3 BLLR 267 (LAC) paras 12-13.

[4] Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others (2008) 29 ILJ 2507 (CC), [2008] 12 BLLR 1129 (CC).

[5]

[2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC) paras 39-40 and 42.

[6] Booysen v Safety and Security Sectoral Bargaining Council and Others [2021] 7 BLLR 659 (LAC) para [12].

[7] Booi (supra) at para 42.

[8] Criminal Procedure Act 51 of 1977.

[9] Maepe v Commission for Conciliation, Mediation and Arbitration and Another [2008] ZALAC 2; [2008] 8 BLLR 723 (LAC), (2008) 29 ILJ 218 9 (LAC).

[10] [2012] 2 BLLR 131 (LAC).

[11] Act 68 of 1995.

[12] Kemp t/a Centralmed v Rawlins (2009) 30 ILJ 2677 (LAC) at paras 55 – 56. See too: Toyota SA Motors (Pty) Ltd v Commission For Conciliation, Mediation And Arbitration and Others [2023] ZALAC 5; (2023) 44 ILJ 1038 (LAC); [2023] 5 BLLR 385 (LAC) at paras 20-21.

[13] Kemp (supra) at paras 22-23 in relation to an order of compensation.

[14] Booi v Amathole District Municipality and Others [2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC) paras 39-40 and 42.

[15] Booi (supra) at para 42.

[16]

[2004] 6 BLLR 537 (LC) at para 13.

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