

SOUTH AFRICA / JUDGMENT

Potterill and Others v Minister of Safety and Security and Another (JA 47/2003) [2007] ZALAC 22 (29 June 2007) [2007] ZALAC 22

COURT
Labour Appeal Court

BEFORE
Jappie, Zondo, Musi

CASE / FILE NUMBER
JA 47/2003

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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA HELD AT BRAAMFONTEIN
JOHANNESBURG

CASE NO: JA 47/2003

IN THE MATTER BETWEEN

C F POTTERILL AND FIFTEEN OTHERS APPELLANTS

AND

THE MINISTER OF SAFETY AND SECURITY FIRST RESPONDENT

THE NATIONAL COMMISSIONER: SOUTH SECOND RESPONDENT

AFRICAN POLICE SERVICE

JUDGMENT

JAPPIE AJA

- [1] This is an appeal against a judgment of Pauw AJ, sitting in the Labour Court, in which judgment he reviewed and set aside an arbitration award made in favour of the appellants by an arbitrator, one Mr J.J. Malan. Pauw AJ made two further orders, namely, an order condoning the late filing of the application to review the arbitrator's award and an order dismissing an application by the appellants to have the arbitrator's award made an order of court. It is unnecessary to consider these two further orders as they are not relevant for the determination of the issue raised in the appeal. The arbitration was a private arbitration.

- [2] The appellants are all chaplains employed in the South African Police Service. The first respondent is the Minister of Safety and Security. The second respondent is the National Commissioner for the South African Police Service.
- [3] The appellants had been in the service of the South African Police Service for some time when a dispute arose as to whether or not they were entitled, as part of their conditions of service, to apply for, or, to participate in, a subsidised motor vehicle scheme to which members of the Police Service above a certain rank were entitled. The event which gave rise to the dispute occurred

in 1999 when the National Commissioner of the South African Police Service withdrew an authorization for the implementation of a subsidised motor vehicle scheme which had been given previously.

- [4] It is common cause that each of the appellants took up his employment with the South African Police Service pursuant to a letter of appointment. Each letter of appointment referred to the supply of a state motor vehicle to each of the appellants. The reference to the motor vehicle as it appears in the letter of appointment of the first appellant reads as follows:-

“U word voorsien van ‘n staatsvoortuig in die vorm van ‘n sedan motor vir

amptelike gebruik.”

The letters of appointment of the other appellants, in reference to the use of a motor vehicle, contain a statement similar to the one as that set out in the letter of appointment of the first appellant.

- [5] Each letter of appointment expressly stated that the service conditions of each of the appellants were to be regulated by the provisions of the South African Police Act, Act 7 of 1958 (“the Police Act”) and the regulations promulgated under that Act. In the letter of appointment of the first appellant the position is stated as follows:-

“ U diensvoorwaardes word beheer deur die bepalings van die Polisie Wet, Wet 7 van 1958 en die regulasies ingevolge die Wet uitgevaardig.”

- [6] After appointment the appellants participated in the motor vehicle scheme and continued to do so up until 1999. On the 12th April 1999 the National Commissioner of Police introduced a new subsidised motor vehicle scheme for all ranks from superintendent and higher. However, on the 12th November 1999, the then National Commissioner had a change of mind and withdrew his authorisation scheme. The communication of the withdrawal of the authorisation of the subsidised motor vehicle scheme read as follows:-

“2. Die versakaafing van ‘n gesubsidieerde voertuig aan ‘n werknemer is ‘n werksfasiliteit wat sodanige werknemer in staat stel om noodsaaklike en goedgekeurde reise in daardie gevalle te onderneem waar die gebruik van ander beskikbare vervoer nie practise of ekonomiese is nie. Deelname aan die gesubsidieerde motovervoerskema is nie ‘n diensvoorwaarde nie, maar ‘n werksfasiliteit wat nie as ‘n reg vertolk kan word nie.

3. As gevolg van die beperkte aantal voertuie wat verkry kon word deur deelname aan die skema sal dit nie in belang of tot voordeel van die diens wees, inaggenome die finansiële implikasies, om voertuie ingevolge die skema toe te ken nie. Daar is besluit dat die begrootte fondse vir die genoemdeskema beter aangewend kan word om ander hulp- bronne en werksfasiliteite vir die diens as ‘n geheel te voorsien. Gevolglik is besluit dat geen gesubsidieerde voertuie gedurende die huidige finansiële jaar toegeken sal word nie. Verdere deelname aan die skema sal jaarliks oorweeg word.”
- [7] After the withdrawal of the authorisation the South African Police Service refused to entertain any application for a subsidised motor vehicle. All the appellants wanted to continue participating in the subsidised motor vehicle scheme on the same terms that existed prior to November 1999. The appellants now claim that they are all entitled to continue to participate in the subsidised motor vehicle scheme and that their entitlement to do so stems from the fact that each of their letters of appointment expressly stated that they would be provided with a state motor vehicle in the form of a sedan motor vehicle for official use. They contend that this was a term of their employment contract.
- [8] The position of the South African Police Service is that the letters of appointment did not make transport for official use a service benefit, but that the South African Police Service would provide transport in the form of a sedan motor vehicle as a work facility. The South African Police Service maintained that it retained the discretion to vary or suspend this facility in appropriate circumstances.
- [9] The parties agreed to refer the dispute to private arbitration. Mr J.J Malan, a senior law lecturer, was appointed as arbitrator. In terms of the agreement referring the matter to arbitration, the arbitrator was required to rule on the following-;
- “(a) whether the employer (South African Police Service) was obliged to allow the appellants, being employees of the South African Police Service, to participate in a subsidised motor vehicle scheme, as revised from time to time, because participation in the scheme was a term of the appellants’ employment with the South African Police Service; and*
- (b) to decide in each individual case, if participation in the motor vehicle scheme was a term of the appellants’ employment contract, the employer’s refusal to permit each appellant to participate in a motor vehicle scheme whether this constituted an unfair labour practice and if so, to make a suitable award.”

- [10] At a meeting convened between the parties prior to the arbitration proceedings it was agreed, inter alia, that the evidence that would be presented would consist not only of the oral evidence given but would also include such facts as set out in the affidavits of various deponents whom the parties deem relevant. The status and the contents of certain documents, compiled into bundles, were agreed upon and such documents were received as evidence which would form part of the record.
- [11] The arbitration proceedings took place over several days and culminated in the arbitrator delivering a written award. The arbitrator found in favour of the appellants and he issued the following award:-

“1.Skadevergoeding aan elke van die 16 appliakante vir die gelede skade soos ooreengekom tussen die partye...

Skadevergoeding word belastingvry toegestaan.....

1.3 Rente a tempore morae teen 15.5% ingevolge die Wet op die Voorgeskrewe Rentekoers, 55 van 1975, soos gewysig.....

2. Spesifieke nakoming van alkeen van die dienskontrakte van die sestion gegriefde werknemers en in die vervoerbeding, naamlik dat die werkgewer gelas word om die applikante toe to laat om, indien hulle, hul vorderingreg tot ‘n keuse ten gunste van gesubsidieerde vervoer sou wou uitoefen, aansoek te doen om gesubsidieerde voertuie en dat die werkgewer hierdi aansoeke ooreenkomstig die geldene vereistes sal oorweeg. Asook spesifieke nakoming van die dienskontrak in die sin dat sou ‘n applicant sy/haar vorderingsreg tot ‘n keuse uitoefen ten gunste van ‘n staatsvoertuig, in plaas van gesubsidieerde vervoer, die werkgewer bevel word on sodanig voertuig vir alleengebruik vir amptelike werk aan hom of haar toe te ken.

The total sum that the South African Police Service was ordered to pay to the appellants in terms of paragraph 1 of the award was R960 277.

- [12] The appellants applied to the Labour Court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 to have the arbitration award made an order of court. The respondents opposed the application and simultaneously applied for the review and the setting aside of the arbitration award. As the two applications were interlinked they were heard simultaneously by Pauw AJ.
- [13] The basis of the respondents’ opposition to having the arbitration award made an order of court was that the award was fatally defective. The alleged defects of the award were set out in the review application.

[14] Although the parties had agreed that the arbitrator's award would be final and binding, the respondents contended that they were nevertheless entitled in terms of section 33(1)(b) of the Arbitration Act No 42 of 1965 to have the award reviewed and set aside. The gravamen of the respondents' contention for having the award reviewed and set aside was that the arbitrator had committed gross irregularities in the conduct to the arbitration proceeding and that he had exceeded his powers.

[15] With regard to the first ground of complaint the respondents contended that the arbitrator committed gross irregularities by:-

allowing into evidence inadmissible evidence and material and considering the same in making his award;

by negating the current law with regard to the standardised contents of the appellants' service contracts;

by not applying his mind to the matter before him, and

by making an arbitration award which, in view of the reasons advanced for it, was unreasonable and unjustifiable.

Of course the ground of review mentioned in 4 above does not apply as it is not contained in section 33 of the Arbitration Act.

1. that the arbitrator had disregarded the current law with regard to the interpretation and contents of the appellants' service contracts and service provisions;
2. that the arbitrator did not apply his mind to the matter before him as he was legally obliged to do.
3. that the award was unreasonable and\ or not justifiable in terms of the reasons supplied therefore; and
4. that the arbitrator went further than the dispute referred to him and with which he was seized.

[17] The Court a quo approached the matter on the footing that the claim of the appellants could only stem from the terms of their employment contract and the interpretation to be given to the relevant regulations which govern the provision of transportation for the individual appellants. The arbitrator had concluded that the appellants had a contractual right to a subsidised motor vehicle as a service benefit. The Court a quo was critical of this conclusion and found that the arbitrator had committed several gross irregularities. In particular, the Court a quo held that the arbitrator had allowed into evidence inadmissible material and had relied on the same to justify his award. It held that he had failed to apply his mind to the relevant facts and the prevailing current law and regulations. In addition, it was of the view that the arbitrator had exceeded his powers. The Court a quo came to the conclusion that the arbitration award was to be reviewed and to be set aside. It, accordingly, set it aside.

[18] The appellants applied for and were granted leave to appeal. Before this Court the appellants have argued that the Court a quo erred in setting aside the arbitrators award. It was argued that the Court a quo had erred in the following respects:-

1. in finding that the policy of the South African Police Service as set out in the relevant circulars was equivalent to legislation and regulations. Therefore, the change in policy (on the 12th November 1999) constituted a supervening impossibility of performance on the part of the South African Police Service.
2. in finding that the arbitrator's interpretation of the stipulation as it appears in the various letters of appointment in regard to the provision of subsidised transport for official use was in conflict with the provision of regulation 23(5) promulgated in terms of the Police Act;
3. in holding that the appellants had not suffered any "damage";
4. in holding that the probabilities were abundantly against the existence of consensus pertaining to the participation of the appellants in a subsidised transport scheme as contended for by the appellants; and
5. in finding that the arbitrator's award for specific performance was untenable.

[19] The appellants have presented detailed and full argument on each of the grounds enumerated above. In my view it is only necessary to consider the issue raised in respect of 2 above as a finding against the appellants on this issue would be decisive of the appeal.

[20] It is clear that nowhere in the award does the arbitrator make reference to regulation 23(5) promulgated in terms of the Police Act. This regulation is headed "Subsidised and Government- owned Motor Transport". It reads as follows:-

" if the Commissioner is satisfied that the interest of the State will be best served thereby, he may, notwithstanding any provisions to the contrary in this regulation, require a member whose duties necessitate frequent or regular travelling on official duty –

to utilize such Government- owned motor transport as may be deemed necessary for the efficient performance of his duties; or

to maintain subsidised motor transport for official purposes if the use of government- owned motor transport is impractical or inadvisable."

The letters of appointment of appellants expressly state that each appellant's employment was subject to the provisions of the South African Police Act and any amendment thereto and to the regulations that were promulgated in terms of that Act. It, therefore, follows that the provisions of subsidised transport to each of the appellants in terms of their letters of appointment was subject to regulations 23(5).

- [21] In my view, the plain meaning of the words in the regulation is that the Commissioner has a discretion to be exercised in the best interest of the State, either to require a member of the police service to utilise a government-owned motor vehicle or to maintain a subsidised motor vehicle for official purposes if use of government owned motor vehicle is found to be impracticable and inadvisable.
- [22] The National Commissioner was, therefore, entitled to withdraw the subsidised motor vehicle scheme on the 12th November 1999 provided that he was satisfied that the interest of the state would best be served by the withdrawal of the scheme. It has not been shown that it could never have been in the interest of the state for the National Commissioner to withdraw the scheme. With the withdrawal of the scheme any claim by the appellants to participate therein fell away.
- [23] In this regard the appellants have argued that neither the Police Act nor the regulation promulgated in terms of thereof prohibited the Commissioner from concluding individual contracts of employment with each of the appellants and for the Commissioner to have specifically made reference to regulation 23(5) as a term of their contracts of employment. As each individual appellant contracted separately with the South African Police Service and no mention is made of regulation 23(5) the withdrawal of the transport subsidy and/or transport scheme as it pertained to each individual appellant, be it due to the redistribution of funds or the failure to budget therefor, constitutes a breach of their contracts of employment. This argument ignores the express provision in the letters of appointment which state that the conditions of service of each individual appellant were subject to the Police Act and the regulations promulgated thereunder.
- [24] Section 33(1)(b) of the Arbitration Act 42 of 1965 provides that a Court may set aside an award where “an arbitration tribunal committed any gross irregularity in the conduct of the proceedings or has exceeded its powers;”. In coming to his conclusion that the appellants had a right, stemming from their contracts of employment, to participate in a subsidised motor vehicle scheme the arbitrator no doubt relied on the contents of the letters of appointment. It is apparent that the arbitrator disregarded that part of the letter which expressly stated that the service conditions were subject to the Police Act and the regulations promulgated there under. He made no reference to this and appears to have completely disregarded it in making his award. This aspect of the award is referred to in paragraph 52 of the judgment of the Court a quo in my view the reasoning of the Court a quo on this point is correct and is decisive for the outcome of the appeal.
- [25] The provisions of the Police Act and the regulations promulgated there under are fundamental to an understanding and determination of the appellants’ conditions of service.

[26] In my view for the arbitrator to have ignored the provisions of regulation 23(5) when considering this matter constituted a gross irregularity. It prevented a fair determination of the issues and the Court a quo correctly concluded that the arbitration award fell to be reviewed and to be set aside. Having come to this conclusion, it is unnecessary to determine the other remaining grounds of appeal raised and argued by the appellants.

In the result I make the following order-:

The appeal is dismissed

The appellants are ordered to pay the respondents costs of appeal jointly and severally, the one paying the others to be absolved.

Jappie AJA

I agree

Zondo JP

Musi AJA

On behalf of the appellants: Adv IC Prinsloo

Instructed by

Geldenhuis Attorneys

Centurion

On behalf of the respondent: Adv MM Osthuizen

State Attorney

Pretoria

Judgment handed down on the 29th June 2007

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