

SOUTH AFRICA / JUDGMENT

South African Police Service and Another v Van der Merwe NO and Others (JR 998/09) [2012] ZALCJHB 132; [2013] 3 BLLR 320 (LC); (2013) 34 ILJ 1579 (LC) (8 November 2012)

[2012] ZALCJHB 132

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

JR 998/09

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case number: JR 998/09

In the matter between:

THE SOUTH AFRICAN POLICE SERVICEFirst Applicant

MINISTER OF SAFETY AND SECURITYSecond Applicant

And

SCHALK VAN DER MERWE NOFirst Respondent

SSSBSCSecond Respondent

W PATONThird Respondent

SOUTH AFRICAN POLICE SERVICEFourth Respondent

Heard: 25 October 2012

Delivered: 08 November 2012

Summary: Review application – application of rule 20 (z) of SAPS Regulations. Commissioner finding that SAPS could not dismiss employee unless found guilty by a criminal court.

judgment

Molahlehi J

Introduction

This is an application to review and set aside the arbitration award, made by the first respondent under case number PSSS 432 – 07/08. The applicant seeks to review the first respondent's (the arbitrator) finding that the dismissal of the third respondent, Inspector Paton, was substantively unfair and ordered that he be re-employed. For ease of reference Inspector Paton will in this judgment be referred to as "the employee."

Background facts

The employee who was prior to his dismissal employed as the inspector at Local Criminal Centre (LRC), was dismissed for misconduct concerning allegations of assault on a colleague, Captain Kgotle and defrauding a friend. The facts relating to the allegation of fraud are straight forward and common cause. The employee was accused of having withdrawn money from the credit card of Mr Van Der Westhuizen a family friend.

The employee withdrew the money from the credit card during the preparation of the funeral of the children of Mr Van Der Westhuizen (hereinafter referred to as "Marius.") The children were allegedly shot by Marius who was also a police officer in front of his wife, Charlotte Van Westhuizen (hereinafter referred to as "Charlotte"). After shooting the children Marius attempted at taking his life. At that stage Charlotte's family was based in the Cape Town and the employee and his wife were based in Bloemfontein.

Soon after the shooting Charlotte's father contacted the employee and informed him about the incident. Without any delay employee together with his wife drove to Cape Town. During the course of the week before the funeral Charlotte accompanied by employee went to an ATM machine to withdraw money for the purposes of paying the electricity bill and buying groceries. At the ATM machine it would appear as a result of trauma, Charlotte struggled with withdrawing the money. She was then assisted by the employee after she gave him the credit card which belonged to Marius. She gave him the pin number of the card.

During the course of that week closer to the day of the funeral the employee went into Charlotte's bedroom and took out of her purse the credit card. He testified during the arbitration hearing that he took the credit card because when he left his home in Bloemfontein rushing to Cape Town after hearing about the tragic incident he did not take any formal clothing with him. He says he needed formal clothing for the day of the funeral, in particular a jacket and shoes. Once he had the credit card he proceeded to purchase the things he needed including a generator machine worth more than R2000,00.

The employee testified that he had intended to pay back the money he had taken from the credit. He indeed paid the money back into the account and in fact paid more than he had taken.

On discovering that money had been withdrawn from his credit card, Marius pressed charges against Charlotte and the employee. The matter came before the magistrate court on a number of occasions but was finally withdrawn.

It would appear that after the dropping of the criminal charges against the inspector the applicant instituted a disciplinary hearing where he was charged with both the assault of Captain Kgotle a fellow employee and the fraudulent use of the credit card of Marius. The evidence presented during the arbitration hearing showed that the employee used the credit card to purchase clothing and a generator using Marius's credit card.

I do not deem it necessary to dwell into the details about the incident of the alleged assault. The assault charge concerned the allegations that the employee had indicated to Captain Kgotle that he would "bliksem" him and pressed his fingers repeatedly against his head and told him that he was "kaffer kaptein." As a result of that action by employee the spectacles of Mr Kgotle is said to have fallen down.

The arbitration award

As stated earlier the arbitrator found the dismissal of the employee to have been unfair and ordered that he be re-employed. The Commissioner does not indicate as to why the primary remedy of reinstatement was not applicable after making the finding as he did. In arriving at the decision as he did the Commissioner found that if the charges were properly formulated he would have found against employee. He suggest that the proper formulation that may have resulted in the confirmation of the dismissal ought to have been that the employee was involved in fighting at the workplace or assaulted another employee and the second being that dishonesty outside the workplace. The Commissioner says that if that was the case he would have found the conduct to have destroyed the trust relationship and would as a result in the finding against the employee. The Commissioner arrived at the conclusion as he did, based on his interpretation of regulation 20 (z) of the SAPS Regulations which is read as follows:

"An employee will be guilty of misconduct if he or she, amongst other things, commits any common law, or statutory offence."

Evaluation

It is apparent from the reading of the arbitration award that the Commissioner, accepted the contention of the employee that the provisions of the regulation would come into effect only once he was found guilty by the criminal court of having committed the common law criminal offence. The Commissioner found that the employee was not guilty of both the offences of assault and fraud because in the former charge the prosecutor had declined to prosecute and in respect of the latter the matter had not been tried by the criminal court. In this respect the Commissioner observed:

"5.5 If one takes the argument one step further one must take into account the common law and now constitutional, presumption of innocence. Put simply, the applicant would be presumed innocent of a statutory or common law offence until found guilty in a court of law.

The Commissioner further interpreted the regulation to mean that the "misconduct is committing of an offence and not the offence itself. In other words the misconduct is been found guilty of the crime by a court of law."

And at paragraph 5.12. The Commissioner says:

"In short then, the applicant has never been found guilty of having committed a common law offence. It follows then that he could not be dismissed fairly for such misconduct."

As concerning the substance of the charge of fraud the Commissioner found that:

"5.14 I can remark that I was rather unimpressed with the applicant's version relating to the alleged fraud. He described himself as a criminal expert, but then expected everyone to believe he did not realise he was possibly executing an act for which a court could find him guilty of committing fraud or at least forgery. He claims not to have known that Mr Van der Westhuizen was the owner of the account, but then says he bought a generator out of spite for the same person. If the applicant was, correctly charged and found guilty on these facts, I have little doubt that I would have found against him."

The Commissioner is correct to say that it is not every criminal offence that a member of the SAPS will be charged or found guilty of. It is in those instances where a member commits criminal acts or statutory offences which are of a serious nature and that destroys the employment relationship for which he or she may be charged with and or dismissed for. It seems to me, that what regulation 20(z) envisages is conduct or action by a member that carries with it dishonesty, breach of trust placed on the member as public officer and serious criminal conduct warranting termination of the employment relationship.

It is clear that the charge of fraud which was proffered against the employee fell outside workplace and was not committed in the course and scope of his employment. It is however, this kind of conduct which is envisaged in regulation 20(z) of the SAPS regulations. The regulation was clearly intended to stretch the standard of behaviour expected on members beyond simple work related misconduct or criminal offences. In other words the regulation encompasses both criminal conduct and statutory offences that falls within the employment relationship and those that do not. The analysis in the present instance focuses on the conduct that falls outside the employment relationship as that is what happened in the present instance.

The regulation seeks to raise the standard of conduct of police officers outside their employment and to bring it into the employment relationship even when that conduct had nothing to do with the employment issues. In my view what the regulation seeks to do is to set standard of conduct outside the employment relationship. The standard set by the regulation in general that police officers would not engage in conduct or activities that:

would ordinarily not be expected of a police officer; that is unbecoming, disgraceful and or improper in the eyes of both the State as the employer and the public.

undermines the confidence of the public in the police.

project a member as being unfit to be a police officer.

[18] There can be no doubt that failure to regulate criminal conduct that falls outside the employment relationship is not only reasonable but necessary for failure to do so could lead to both the breakdown in the confidence on the police and may lead to hostility and resentment towards the police service. The essence of a rule that regulate conduct that falls outside the employment relationship is to protect the interest of the State as the employer. In other words the regulation imposes a duty on police officers even in their private lives to conform to the ethical duties imposed upon them, the position they occupy as police officers. The interest which the regulation seeks to protect can be found in one of the objectives set out in the South African Police Service Act where it is stated that:

“c. ensure co-operation between the services and communities it serves.”

[19] In my view the Commissioner in dealing with the charges which had been proffered against the employee adopted a highly technical approach which is inconsistent with the objective of the Labour Relations Act which requires Commissioners to deal with the merits of disputes before them and with minimum legal formalities. Because of his failure to deal with the substance of the dispute the Commissioner failed to adopt a fair and a balanced approach in resolving the dispute between the parties. In *CUSA v Tao Ying Metal Industries and Other*,¹ the Constitutional Court held that:

“ [65] Consistent with the objectives of the LRA, 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, commissioners 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.”

[20] The finding of the Commissioner that the employee could only in terms of regulation 20(z) of the SAPS Regulations be dismissed once he was found guilty by the criminal court is not only at odds with our legal system but is also grossly unreasonable and thus fails the test set out in *Sidumo*.² It is trite that proof in civil matters such as labour dispute is lower than that in criminal matters. In civil matters proof is on the balance of probabilities whereas in criminal law is beyond reasonable doubt.

[21] In my view, for the above reasons alone the Commissioner ought to have found that the dismissal of employee was fair and that the conduct of defrauding a friend in circumstances where the friend was vulnerable because of the death in the family was intolerable and unforgivable. There is no doubt that the conduct of employee is not one to be expected of a police officer as it is unbecoming, disgraceful and improper in the eyes of both the State as the employer and the public and has the risk of undermining the confidence of the public in the police service. And more importantly the conduct has projected the employee as being unfit to be a police officer. Thus, to expect the SAPS to keep a person like him in its employ is unfair and unreasonable.

[22] It follows from the above analysis that the applicant has made out a case warranting interference with the arbitration award. I do not deem it necessary to deal with the issue of the assault.

[23] On the facts and the circumstances of this case I find the opposition to the review to have been unreasonable and unwarranted and therefore find that cost should follow the results.

[24] In the premises the following order is made:

The arbitration award made under case number PSSS 432-07/08 and dated 26 March 2009 is reviewed and set aside.

The arbitration award is substituted with an order to the effect that the dismissal of Inspector Paton was for a fair reason and thus the claim of unfair dismissal is dismissed.

The third respondent is to pay the costs of the applicant.

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv F Boda instructed by the State Attorney Bloemfontein.

For the Third Respondent: Adv W Van Aswagen, instructing Attorneys unknown.

1 [2009] 1 BLLR 1 (CC).

2 Sidumo and another v Rustenburg Platinum Mines Ltd and others (2007) 28 ILJ 2405 (CC).

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