

SOUTH AFRICA / JUDGMENT

South African Police Service v Hoza and Others (PR 07/2017) [2018] ZALCPE 38 (7 December 2018)

[2018] ZALCPE 38

COURT

Labour Court Port Elizabeth

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

PR 07/2017

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IN

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

Case

no: PR 07/2017

In

the matter between:

SOUTH
AFRICAN POLICE SERVICE
Applicant
and
MZILOWO
MAXWELL
HOZA
First Respondent
POLICE,
PRISONS AND CIVIL RIGHTS UNION Second
Respondent
SAFETY
AND SECURITY SECTORAL
BARGAINING
COUNCIL
Third
Respondent
NALEDI
BURWANA-BISIWE N.O
Fourth Respondent

Heard: 13 June 2018
Delivered: 07 December 2018

JUDGMENT

TLHOTLHALEMAJE, J.

- [1] The third respondent (Hoza), a former Sergeant in the employ of the applicant (SAPS) was dismissed on account of a variety of acts of misconduct on 19 March 2015. The fourth respondent (Commissioner) in an arbitration award issued on 16 November 2016 found the dismissal of Hoza to be substantively unfair, and had ordered his reinstatement, together with payment of back-pay. Aggrieved with the arbitration award, SAPS seeks an order to review and set it aside. Hoza as assisted by the second respondent (POPCRU) opposed the review application.
- [2] It is common cause that the review application was launched some two weeks outside the statutory time periods. The deponent to the founding affidavit in respect of the review, Warrant Officer Thobani Jalimeni, averred that the delay was occasioned by the internal workings and protocols within SAPS, and his involvement in arbitration proceedings in respect of other matters.
- [3] This Court enjoys a discretion when deciding whether to grant condonation in circumstances where the review application was filed late. Having had regard to the period of two weeks delay, which in my view is not excessive, the extensive and acceptable explanation proffered for that delay, the reasonable prospects of success on the merits in the main application; the prejudice that the parties would suffer should condonation be granted or refused, and the interests of justice, it is deemed appropriate that the late filing of the review application should be condoned.

The review:

- [4] In summary, the charges that led to the dismissal of Hoza following an internal disciplinary enquiry are:
- 1) Using a SAPS vehicle without permission;
 - 2) Damaging SAPS' vehicle following an accident;
 - 3) Falsely stating that at the time that the accident took place he was chasing a suspect;
 - 4) Providing transport to a member of the community in a state vehicle without completing the prescribed indemnity forms;
 - 5) Failing to make entries in his book or diary regarding the alleged duties performed by him;
 - 6) Reckless and/or negligent driving.

- [5] Following Hoza's dismissal, an alleged unfair dismissal dispute was referred to the third respondent (SSSBC). When conciliation failed, the dispute came before the Commissioner for arbitration.
- [6] It was common cause that Hoza was based at the Fort Brown Police Station in the Eastern Cape. He was also a POPCRU shop steward. A state vehicle used by him was involved in an accident in the early hours (at about 01h44) of 1 September 2013. The vehicle overturned somewhere outside of the Makhanda (Grahamstown) jurisdiction. At the arbitration proceedings, SAPS called upon seven witnesses to testify on its behalf. The essence of the witnesses' testimony was that Hoza called his colleague, Constable Skepe to advise him of the accident after it had occurred. Skepe had attended to the accident scene where he had assessed Hoza's condition, picked the latter's firearm from the accident scene, handed it over to him, and saw him off into an ambulance that took him to a hospital to attend to his injuries. At the accident scene was also another person who had been a passenger in the state vehicle when the accident took place, and Skepe took him home.
- [7] Sergeant Mkontwana was also called by Hoza after the accident happened. Upon his arrival at the accident scene, Hoza told him that he was in pursuit of a suspect in another vehicle when the accident took place.
- [8] Warrant Officer Hlwempu was the Station Commander at Fort Brown Police Station at the time of the incident. His testimony was that he was not aware of any rhino poaching operation planned for the weekend that Hoza alleged he was involved in when the accident happened. Having investigated the matter and consulted the OB entries at the station, he had discovered that Hoza had made an entry at 20h30 on 31 August 2013 to book himself to be involved in a rhino poaching operation. Such an operation however had not been sanctioned and his view was that Hoza had used the state vehicle without authority and for an unauthorised event. The use of the state vehicle had impacted on the station's fuel budget.
- [9] Hoza's testimony was essentially that he was authorised to use the vehicle as it was issued to him in April 2013. He had booked himself for duty on 31 August 2013 at 20h00 to conduct rhino poaching and stock theft operations, which were in line with the station event matrix for between 3 and 31 August 2013.
- [10] At the time that the accident took place, he was in pursuit of a suspect having been tipped off by a source. Having looked for the suspect without success, he then decided to drive back from Makhanda to his base. Along the way he picked up a stranger who was hitchhiking. The stranger turned out to be someone known to him from his residential area in Peddie and he gave him a lift. His contention was that he was unaware of any obligation to complete indemnity forms before giving persons a lift in a state vehicle. The accident took place when a vehicle driving in the opposite direction crashed into his vehicle. He had denied that he had had said that the accident took place whilst he was in pursuit of a suspect in another vehicle. He had also lost his trip and pocket books, together with the vehicle log book at the

scene of the accident.

The award:

- [11] The Commissioner found that despite the fact that Hoza was a shop steward, the fact that POPCRU was not informed of the intention to discipline him did not give rise to procedural unfairness.
- [12] Regarding the substantive fairness of the dismissal, the Commissioner in regards to the second charge (causing damage to the vehicle) and sixth (reckless and negligent driving), found that SAPS had not established that Hoza had intentionally or negligently used the vehicle or caused damage to it. This conclusion came about on the basis of a report presented at the hearing that showed that the vehicle was moving at 39km at the time of impact or before the accident.
- [13] In regards to the failure to make entries in the pocket book or diary regarding the trip or alleged duties performed, the Commissioner found that Hoza could not be found guilty of that charge in the absence of those books that got lost at the scene of the accident, and further since Hoza had in any event made an entry in the OB at the police station before he took the vehicle.
- [14] In respect of the allegation that Hoza gave false information regarding events surrounding the accident, the Commissioner accepted Hoza's denials that he had not informed Mkontwana that he was chasing a suspect at the time of the accident, and the report in regards to the speed of the vehicle at the time of the accident supported Hoza's version that he could not have been speeding in pursuit of a suspect at the time of the accident.
- [15] In regards to the charge related to giving members of the public a lift in the state vehicle without completing the indemnity forms, the Commissioner found that no evidence was led by SAPS to show what the rule was in that regard; how employees were made aware of the rules; and how those rules were enforced. Since Skepe had himself given the very same member of the public a lift after the accident and took him to Hoza's residence at the police station without completing the indemnity form, there was no basis for the charge.
- [16] In regards to whether Hoza had the required permission to use the vehicle, the Commissioner effectively accepted Hlwempu's evidence that no rhino poaching operation was planned for the period in question, and that Hoza had no authority to use the state vehicle. In considering whether the sanction of dismissal was appropriate, the Commissioner took into account whether SAPS had applied discipline consistently in the light of the evidence of Colonel Sayed-Cassim, who had presided over another enquiry involving similar transgressions against another employee, Menze. In the latter case, Menze, despite driving a state vehicle whilst under the influence of alcohol, and causing damage to a state vehicle, was issued with a sanction of a fine of R1 400 for five of the charges, and suspended dismissal.

- [17] The Commissioner took into account that SAPS had argued that the two cases were distinguishable on the basis that Menze had pleaded guilty and shown remorse. The Commissioner was nonetheless not convinced by SAPS' arguments, and found that given the cumulative effect of guilt findings on the six charges, the totality of the evidence, and Hoza's clean record, the sanction of dismissal was not appropriate. Furthermore, the Commissioner reasoned that since Hoza's former Commander had moved to another police station, there was an opportunity for the trust relationship between SAPS and Hoza to be rebuilt. To that end, Hoza was to be reinstated at any station of SAPS' choosing. Further in the light of Hoza's 'unclean hands', minimal back-pay was to be ordered to enable him to 'ready himself to take up his posting and attend work'.
- [18] As a parting shot, the Commissioner commented that the 'incident should serve as a lesson and deterrent to Hoza and others on the forms and levels of what should be acceptable conduct in the workplace.'

The grounds of review and evaluation:

- [19] SAPS seeks to have the award reviewed on a variety of grounds, central of which is that the Commissioner misdirected herself in regards to the appropriateness of the sanction, failed to afford the parties a fair trial, made contradictory findings, did not fully determine the matter, and failed to resolve disputed facts.
- [20] The test on review has been re-hashed in this Court and the Labour Appeal Court. In simple terms, an arbitration award is reviewable if the impugned decision reached by the Commissioner is one that no other reasonable decision maker could have reached in the light of the material placed before him or her[1]. Furthermore, it is now trite that if the Commissioner misconstrues the nature of the inquiry and that has an impact on the outcome of the arbitration, this would constitute a reviewable irregularity.
- [21] I have had regard to the submissions made on behalf of the parties, the record, and the pleadings, and I have no hesitation in concluding that the Commissioner misconstrued the nature of the enquiry, which ultimately had an impact on the outcome of the arbitration, thus constituting a reviewable outcome. It follows that the award cannot by any stretch of imagination be sustainable based on the following observations and conclusions;

21.1 Once the Commissioner had accepted Hlwempu's version that there was no rhino poaching or other operations sanctioned for the weekend, and further that Hoza had no authority to use the vehicle, in my view, that should have been the end of the matter, because everything else and the ancillary charges flowed from that primary misconduct.

21.2 The question therefore was whether a sanction of dismissal was appropriate in circumstances where the primary offence (i.e., unauthorised use of state vehicle) was established by SAPS. Before the Commissioner were the following facts;

- a) Hoza had without authority, taken a vehicle for his own private use, with a conjured excuse that he was in pursuit of a suspect in an operation that was not sanctioned, or alternatively, that he was going to be involved in an operation, which his station commander had no knowledge of.
- b) In the course of utilising the vehicle, he had without authority and contrary to SAPS' rules, picked up a member of the public. The fact that Skepe removed that member of the public from the accident scene in a state vehicle cannot be equated with Hoza's conduct of picking up that individual on the way, which effectively was in perpetuation of his initial misconduct of taking the vehicle without permission.
- c) The finding by the Commissioner that Hoza could not have known of the rules regarding the picking up of members of the public on the road whilst utilising state vehicles, or that no such evidence was produced, or that it was not known how these rules were made known or enforced to employees is indeed extraordinary.
- d) Surely members of the SAPS cannot be allowed to willy-nilly use state assets as 'charity taxis' to pick up members of the public on the road especially when they are on duty. It does not need rules for police officers to know that they cannot use state vehicles for unofficial purposes, including giving strangers a lift when they are not in any discernible danger. Those vehicles are meant for a specific purpose, i.e. to enable officers to carry out their official duties.
- e) It needs to be stated in this case that one of the reasons that Hlwempu as station commissioner was concerned with Hoza's conduct was that it had amongst other things, impacted on the police station's quest to contain its fuel budget. The concern however does not end there. It is worth repeating that it is completely unacceptable for police officers or public servants for that matter to use and abuse state assets as if they were their own personal properties. It is the hapless tax payer that is continually burdened by the costs of such abuse, whilst at the same time not getting value for money. That culture of impunity can only be countenanced by misguided reinstatement orders such as in this case, with a meaningless message that offenders have learnt their lessons from their misconduct. This approach can neither be correct nor reasonable.
- f) Having used a state vehicle without authority and thereafter picking a member of the public, Hoza was then involved in an accident, thus causing damage to the vehicle which had overturned. Whether the accident or the damage to the vehicle was as a consequence of wilfulness or negligence on his part is of no relevance. The fact remains that he had no authority in the first place to use the vehicle.
- g) The Commissioner's justification for reinstating Hoza is equally unsustainable. The mere fact that Menze got a lighter sanction does not imply that equal mercy should have been shown to Hoza. There were no objective facts placed before the Commissioner for her to justify why she had rejected SAPS' contentions that the two cases were distinguishable, as Menze had owned up and shown remorse for his misdemeanours. On the contrary, Hoza

had refused to own up, had concocted an implausible version to cover up his gross misconduct, and there was no evidence that he had shown any form of contrition for his conduct. If anything, his concocted version of events coupled with the dire consequences of his misconduct served as aggravating factors.

- h) It is further not for a Commissioner to conclude that a trust relationship is redeemable simply because a superior that a dismissed employee had initially reported to was moved to another department or station. A trust relationship is between an employer and an employee, and not between an employee and his/or her supervisor.
- i) If the nature of the misconduct is so gross as in this case, it does not even require any evidence that a trust relationship is broken down or not, as it cannot be expected of an employer to retain a delinquent employee in its employ. That breakdown in a trust relationship naturally flows from the gross nature of the misconduct itself[2]
- j) The Commissioner correctly pointed out that acceptable levels of conduct are expected of police officers. Police officers as their title indicates, are there to uphold and enforce the laws of the land and to ensure that citizens generally abide by those laws. If police officers themselves disobey laws by using state assets at their will, how it is possible that they can be said to be setting good examples for ordinary citizens.

[22] It therefore follows from the above that the contentions made on behalf of Hoza in opposing this application are without merit. It is correct that a Commissioner can only consider the reasons that led to a dismissal. This is what the provisions of section 188(2) of the LRA dictates. In this case, the chairperson of the enquiry had inter alia recorded that Hoza's Commander had not given him permission to book out the vehicle. The Commissioner equally made that finding. As already indicated, that should have been the end of the enquiry as other charges flowed from that initial conduct. How it can be said that the Commissioner's conclusions on sanction are sound and reasonable given the overall considerations and circumstances of this case is beyond comprehension. In the end, the Commissioner's decision does not fall within a band of reasonableness.

[23] In the light of the material placed before the Court and the conclusions reached in this judgment, it follows that no purpose would be served by remitting this matter back to the SSSBC, and the Court is well placed to substitute the Commissioner's award with its own order.

[24] I have further had regard to the requirements of law and fairness in considering costs, and even though I am of the view that the defence of the award was misplaced, an order of costs would be unwarranted. Accordingly, the following order is made;

Order:

1. The late filing of the review application is condoned.

2. The arbitration award issued by the fourth respondent under case number PSS6692-14/15 dated 16 November 2016 is reviewed, set aside and substituted with an order that;

‘The dismissal of Mr Mzilowo Maxwell Hoza was fair’

3. There is no order as to costs.

E. Tlhotlhamajje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Thys

Instructed by:

State Attorney, Hanli Glanvill

For the First Respondent: M Grobler

Instructed by:

Schoeman Oosthuizen Inc

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] 12 BLLR 1097 (CC); Gold Fields Mining SA (Pty) Ltd v CCMA and Other [2014] 1 BLLR 20 (LAC)

[2] Impala Platinum Ltd v Jansen & Others (2017) 38 ILJ 896 (LAC).

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Prepared on 11 October 2026 · Esheria