IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case number: JA93/2017

In the matter between:

R M MASHIGO **Appellant**

and

SOUTH AFRICAN POLICE SERVICE **First respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **Second respondent**

JACKSON MTHUKWANE N.O. **Third respondent**

Date of hearing: 17 May 2018

Date of judgment: 31 May 2018

Summary:

The appellant employee, a policeman, was dismissed after having been found guilty of assault and the attempted murder of two civilians. At arbitration his dismissal was found to be substantively unfair and he was retrospectively reinstated into his employment. The SAPS succeeded in its application to review the arbitration award, with the award set aside due to defects in the process of such a nature which were found to be of such a nature that the award fell outside of the ambit of reasonableness required. The matter was

remitted back to the bargaining council for a hearing *de novo* before a different arbitrator. On appeal the decision of the Labour Court upheld with no order as to costs.

Coram: Phatshoane ADJP, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment and order of the Labour Court (Rabkin-Naicker J) in terms of which the award of the third respondent (the arbitrator) issued under the auspices of the second respondent, the Safety and Security Sectoral Bargaining Council, was set aside on review and remitted back to the bargaining council for a hearing *de novo* before an arbitrator other than the third respondent, with no order as to costs.

[2] The appellant, Mr R M Mashigo, was employed by the first respondent, the South African Police Service (SAPS) as a policeman on 17 April 1991. At the date of his dismissal he held the rank of Warrant Officer. Following an incident which occurred on 24 September 2010 at approximately 20h30 in Diepsloot, Johannesburg, the appellant was given notice to attend a disciplinary hearing at which he faced eight disciplinary charges. At the conclusion of the hearing, he was found to have:

2.1 contravened regulation 20(z) of the SAPS Discipline Regulations, 2006 by committing "*a common law or statutory offence of assault on a public person (Advocate Ntshane)*";

2.2 contravened regulation 20(z) of the SAPS Discipline Regulations, 2006 by committing "*a common law or statutory offence of attempted murder*" in shooting a public person, Mr James Sefumba, with a firearm; and

2.3 contravened regulation 20(z) of the SAPS Discipline Regulations, 2006 by committing "*a common law or statutory offence of attempted murder*" in shooting a public person, Mr Mvuselo Goso, with a firearm.

[3] Following an unsuccessful internal appeal, the appellant was dismissed from his employment. Aggrieved with his dismissal, he referred an unfair dismissal dispute to the second respondent for determination, contending that his dismissal was both procedurally and substantively unfair. At the ensuing arbitration hearing the SAPS indicated that it no longer persisted with the assault charge and would proceed to prove the substantive fairness of the appellant's dismissal on the two attempted murder charges.

[4] The evidence at arbitration was that the appellant was off duty and was not in uniform when driving with a colleague and two other people in an unmarked SAPS vehicle in Diepsloot. He stopped the vehicle next to a woman who was standing in the road with a relative, Mr Advocate Ntshane. The appellant and his colleague, Mr Jack Mokwala, did not identify themselves as police officers after stopping, although the appellant accepted that he had a duty to do so as a police officer and that he failed to do so. An argument ensued between the appellant and Advocate Ntshane, which culminated in Mr Ntshane being slapped, before the appellant drew his firearm and pointed it at Mr Ntshane. Mr Sefumba and Mr Goso arrived on the scene and the appellant fired several shots from his firearm. The appellant's car, driven by his passenger, then drove into Mr Sefumba, knocking him down, before both Mr Goso and Mr Sefumba were shot with bullets - Mr Goso in his arm and Mr Sefumba in his back.

[5] Although no ballistic evidence was led at the arbitration hearing, the arbitrator accepted the appellant's version that he had fired a warning shot which had ricocheted off the group and hit Mr Sefumba. He found this to be probable given that the appellant was far taller than Mr Sefumba and given the trajectory of the bullet from the ground to the lower back and then on to its exit point in Mr Sefumba's chest, it was probable that the bullet which hit Mr Sefumba had ricocheted off the ground. The arbitrator however also found that no evidence was placed before him that it was the bullets from the

appellant's firearm that had struck either Mr Sefumba or Mr Goso. Given that a cartridge which did not match the appellant's firearm was found on the scene, the arbitrator found that this suggested that the appellant was not the only person firing shots. Since insufficient evidence had been placed before him to allow a conclusion that the appellant had the intention to kill Mr Sefumba or Mr Goso, the requisite intent was found lacking and the dismissal of the appellant was found to be substantively unfair, but procedurally fair. The appellant was retrospectively reinstated into his employment with the SAPS with effect from 31 July 2012.

Judgment of the Labour Court

[6] Dissatisfied with the arbitration award, the SAPS brought an application for its review in the Labour Court. In this application it was contended that the arbitrator had misconstrued the nature of the proceedings before him by failing to consider whether a workplace rule or standard regulating workplace conduct had been breached. As much, it was stated, was evident from the failure to consider whether the SAPS Code of Conduct had been contravened. In addition, it was argued that the arbitrator failed to appreciate that the appellant's conduct had contravened the SAPS Discipline Regulations since he ought to have foreseen the possibility that he could kill one of the bystanders but had recklessly fired the shots nonetheless. The SAPS also took issue with the arbitrator's finding that the bullet ricocheted off the ground before hitting Mr Sefumba, when the evidence did not support such a conclusion.

[7] The Labour Court found that the arbitration award evinced "*little comprehension of the employee relations context*" in relation to both the charges against the appellant and the standard of conduct to be upheld by members of the SAPS in the communities in which they serve. The Court took the view that the arbitrator ought properly to have considered whether the appellant had acted with *dolus eventualis*. Instead, the arbitrator had arrived at a conclusion, insofar as the shooting of Mr Sefumba was concerned, on his own theory of ballistic matters which was speculative and unsupported by the evidence. The Court concluded that "(t)*his defect, and in addition, the*

Arbitrator's failure to understand the nature of the dispute he had to arbitrate, renders the award reviewable." Since it was found to be inappropriate to substitute the decision of the arbitrator, the matter was remitted back to the second respondent for hearing *de novo* before a different arbitrator, with no order as to costs.

Submissions on appeal

[8] It was submitted for the appellant on appeal that the Labour Court erred in finding that the arbitrator did not understand the true nature of the enquiry before him and that he committed a defect in the proceedings which together made the award reviewable. This was so since the arbitration award fell within the band of reasonableness when considered against the material placed before the arbitrator. The arbitrator, it was contended, conducted a proper assessment of the evidence and weighed the probabilities of the different versions. The respondent argued that the review application should not have been dismissed and that since reinstatement is the primary remedy in the Labour Relations Act 66 of 1995 (LRA), the appellant should be retrospectively reinstated into his employment with the SAPS, as determined by the arbitrator.

[9] The SAPS opposed the appeal on the basis that the Labour Court was correct in its decision to review of the arbitration award and remit the matter back to the second respondent for a hearing *de novo* before a different arbitrator. This was so given that the arbitrator failed to appreciate the true nature of the enquiry before him and in doing so the award fell to be reviewed and set aside. In such circumstances, it was submitted that the appeal should be dismissed with the costs, including the costs of two counsel.

Discussion

[10] The Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)*[1] found that arbitration awards of the Commission for Conciliation Mediation and Arbitration (CCMA) constitute administrative

[1] [2007] 12 BLLR 1097 (CC) at para 110.

action, reviewable not under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but in terms of s145 of the LRA; and that s 145 was '*suffused*' by the constitutional standard of reasonableness.

[11] In *CUSA v Tao Ying Metal Industries and others,*[2] O'Regan J stated:

'In Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, five members of this Court firmly held that an arbitration before the CCMA constitutes administrative action within the meaning of section 33 of the Constitution. Section 33 provides that everyone is entitled to administrative action that is "lawful, reasonable and procedurally fair" and in Sidumo, those five members of the Court held that section 145 of the 1995 Labour Relations Act must be read consistently with the provisions of section 33. I remain convinced that this approach is correct. A court, therefore, in considering a review (or an appeal in respect of a review) of the CCMA in terms of the 1995 Labour Relations Act is obliged to interpret its powers in the light of section 33 of the Constitution.'

[12] In *Herholdt v Nedbank Ltd* (*Congress of South African Trade Unions as Amicus Curiae*)[3] the Supreme Court of Appeal stated:

'After Sidumo the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be 'suffused' with the constitutional standard of reasonableness. What this meant simply is that a 'gross irregularity in the conduct of the arbitration proceedings' as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case.'

[13] The Court concluded that:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to

[2] [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ 2461 (CC) at para 121.
[3] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 14.

amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[4]

[14] The Labour Court cannot be faulted for its finding that the arbitration award evinced "*little comprehension of the employee relations context*". The arbitrator was faced with serious allegations of misconduct raised against the appellant. While these allegations had been framed in the language of a criminal charge, the task of the arbitrator in a hearing *de novo* was to determine the fairness of the appellant's dismissal, having regard to the allegations against him and the standard of conduct required of the appellant in the position of police officer. This enquiry was to be undertaken without adherence to undue formalism.[5]

[15] The arbitrator, however, narrowed the focus of his enquiry to whether it had been proved that the appellant had the requisite intent to commit the charge of attempted murder. In doing so, the arbitrator misconstrued that the nature of the enquiry before him concerned a disciplinary complaint, which required the allegations raised to be considered against the employer's disciplinary code and the standard of conduct required of the appellant. In narrowing the enquiry to a focus on whether intent to commit attempted murder had been proved, and not whether the appellant's conduct constituted a breach of the SAPS code of conduct, the arbitrator adopted an unduly formalistic approach to the proceedings. In doing so he committed a gross irregularity in the conduct of the matter, which resulted in a defect arising in the proceedings.

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[4] At para 25.
[5] *First National Bank, a Division of Firstrand Bank Ltd v Language and Others* [2013] ZALAC 23; (2013) 34 ILJ 3103 (LAC) at para 24; *Woolworths (Pty) Ltd v CCMA and others* (2011) 32 ILJ 2455 (LAC) at paras 32 – 33

[16] In *Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[6] this Court cautioned against an overly formalistic approach to workplace discipline,[7] quoting Le Roux and Van Niekerk:[8]

'*Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.'*

[17] The Labour Court cannot be faulted for arriving at the conclusion that the arbitrator had failed *"to understand the nature of the dispute he had to arbitrate"* and that this rendered the award reviewable. This was so given that a defect arose in the proceedings, which took the form of a gross irregularity, in the arbitrator adopting the narrowed approach that he did to the enquiry. Furthermore, the manner in which the arbitrator approached the evidence caused the decision reached to be one that a reasonable decision-maker could not reach. This was so since the finding that the probabilities supported the version of the appellant was arrived at, without having regard to the conflicting versions placed before the arbitrator or to the approach set out in *SFW Group Ltd & another v Martell et Cie & others.*[9] In addition, the arbitrator's finding that the bullet which hit Mr Sefumba had ricocheted was arrived at when no ballistic evidence regarding the trajectory of such bullet had been placed before the arbitrator to support such a finding. The finding that, given that a cartridge found on the scene did not match the appellant's firearm, suggested that the appellant was not the only person firing shots, was

[6] [2011] ZALAC 15; [2011] 10 BLLR 963 (LAC); (2011) 32 ILJ 2455 (LAC).
[7] With reference to Coetzer "*Substance over form – the importance of disciplinary charges in determining the fairness of a dismissal for misconduct*" (2013) 34 ILJ 57 and the cases cited therein.
[8] PAK le Roux and Andre van Niekerk: *The South African Law of Unfair Dismissal*, (Juta & Co, 1994), at 102.
[9] 2003 (1) SA 11 (SCA) at para 5

similarly arrived at without regard to the evidence or to what the most plausible inference to be drawn in the circumstances was.

[18] Having regard to these defects in the arbitration award, I am satisfied that the Labour Court was correct in its finding that the award fell to be set aside on review and remitted back to the second respondent for a new hearing before a different arbitrator. The decision reached was one that a reasonable arbitrator could not have reached on the material before him. For all of these reasons, the appeal must fail.

[19] Given that the appeal was raised by an individual employee, and having regard to considerations of law and fairness, I consider it appropriate to make no order as to costs.

Order

[20] For these reasons, the following order is made:

1. The appeal is dismissed with no order as to costs.

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SAVAGE AJA

Phatshoane ADJP and Murphy AJA agree.

Representatives:

Appellant: Mr R Grundlingh

Instructed by Bester & Rhoodie Attorneys.

First respondent: Mr G I Hulley SC and Ms A Mofokeng

Instructed by the State Attorney