IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA15/2017

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN

POLICE SERVICE **First Appellant**

SOUTH AFRICAN POLICE SERVICE **Second Appellant**

and

M.A. MPHALELE N.O. **First Respondent**

POPCRU obo A. MEZICHEL **Second Respondent**

Held: **15 November 2018**

Delivered: **11 December 2018**

Summary: Review of the disciplinary sanction imposed by employer's appeal authority – appeal authority reversing sanction of dismissal against employee – court finding that appeal authority's decision irrational and unreasonable in light of the employee's conduct.

Held that evidence demonstrates indisputably that employee had succumbed to his personal difficulties and had acted fraudulently in a manner that made him wholly unreliable as a police officer, a lawyer and an employee in whom the station commander needed to repose considerable trust. Appeal upheld

and Labour Court's judgment set aside – appeal authority's decision is substituted with a finding upholding the sanction of the disciplinary hearing.

Coram: Sutherland JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against a judgment of the Labour Court (Gush J) dismissing the appellants' application in terms section 158(1)(h) of the Labour Relations Act[1] ("the LRA") seeking review of the disciplinary sanction imposed by the first respondent ("the appeal authority") in respect of Mr. Ashley Mezichel ("Mezichel"), a member of the second appellant, the South African Police Service ("SAPS"). Section 158(1)(h) of the LRA provides that the Labour Court "may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".[2]

[2] Mezichel was employed at SAPS in Kraaifontein as a legal advisor. He held the rank of Warrant Officer. It is common cause that he had a drinking problem which resulted in emotional difficulties and erratic work attendance.

[3] Members of SAPS are generally required to record their attendance at work in the SAPS Z8 Register by entering the time they report for and leave work each day. The SAPS suspected Mezichel of having falsified attendance records on previous occasions. As a result, he was required, on arrival at and leaving work, to report to Captain Barlow, with whom he shared an office, and Colonel Vanto, his direct supervisor.

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[1] Act 66 of 1995

[2] The grounds permissible in law are (i) those listed in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) the constitutional principle of legality - *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC).

[4] On 4 September 2013, Mezichel signed on for duty in the Z8 Register at 07h30 and left work without permission and without signing off in the Z8 Register. On 5 and 6 September 2013 he failed to report for duty. On those days, senior officers (Lt-Col Philander, Captain Barlow and Captain Du Toit) searched the premises of the police station to ascertain Mezichel's whereabouts, to no avail. Mezichel also did not report to Captain Barlow on that day.

[5] On 10 September 2013, Mezichel did not report for work. Again, on that day, Lt-Col Philander and Captain Du Toit searched the premises of the police station but also went to his home. They were told by his brother that he had left home at approximately 09h00 that morning, supposedly to go to work. No entry was made by him in the Z8 Register that day.

[6] On 11 September 2013, Mezichel again did not report for duty or report to Captain Barlow. Lt-Col Philander and Captain Du Toit again went to look for him at his home. This time he was present. Lt-Col Philander asked him to produce a sick certificate, which he was unable to do. Lt-Col Philander warned him to report on the following day, failing which his salary would be stopped for being absent from work without permission.

[7] In light of his suspicions about Mezichel having previously falsified entries in the Z8 Register, Lt Col Philander photocopied the register on 11 September 2013 with a view to having concrete proof of Mezichel's unauthorised absence for the days in question.

[8] On 12 September 2013, Mezichel arrived at work but did not attend the morning parade at 07h30, which was chaired by Lt-Col Philander. After the parade, Lt-Col Philander saw Mezichel on the premises and immediately went with Col du Toit to check whether Mezichel had booked on for duty in the Z8 Register. They discovered that Mezichel had made entries in the Z8 Register reflecting that he had booked himself off on 4 September 2013, and despite his absences on 5, 6, 10 and 11 September 2013 had made entries reflecting that he had booked himself on and off on those days. Lt Col Philander made another copy of the Z8 Register reflecting the changes.

[9] After further investigation and the gathering of evidence, on 25 October 2013 Mezichel was issued with the notice to appear at a disciplinary hearing on 6 November 2013 to face various charges. The disciplinary hearing was held from 6 November 2013 to 23 January 2014.

[10] On 29 January 2014, Mezichel was found guilty by the disciplinary tribunal of contravening various provisions of the SAPS Discipline Regulations for: i) making false entries in the Z8 Register regarding his attendance on 4, 5, and 10 September 2013; ii) absenting himself from work without reason or permission on 5 and 6 September 2013; iii) failing to carry out a lawful order or a team instruction by not handing in a sick certificate; and iv) failing to report on duty in the Z8 Register on 12 September 2013 and to attend the morning parade.

[11] In relation to sanction, Mezichel put forward various mitigating factors, namely: i) his wife had instituted divorce proceedings against him in June 2013; ii) he had developed a drinking problem and went for psychological treatment in June 2013 and was admitted to a rehabilitation centre from which he was discharged in August 2013, a few weeks before his misconduct; iii) his condition deteriorated and he suffered from depression and stress at the time of the misconduct; iv) he was receiving psychiatric treatment; v) his condition caused him to make bad decisions; and vi) his girlfriend was pregnant.

[12] Against that were the aggravating factors put up by the employer, namely: i) the misconduct involved dishonesty; ii) the misconduct was committed after he left the rehabilitation centre; iii) he showed no remorse; iv) previous attempts to solve the problem by introducing reporting requirements had not worked; v) he had a written warning that was imposed in January 2013 for absence from duty; and vi) as Brigadier van Niekerk, the employee's station commander, testified, the trust relationship had broken down.

[13] On 4 February 2014, the disciplinary tribunal imposed the sanctions of dismissal in respect of the charge related to the false entries in the Z8 Register and final written warnings in respect of the other charges.

[14] On 4 June 2014, the second respondent, POPCRU, noted an appeal on behalf of Mezichel. On 27 November 2014, the appeal authority confirmed the verdict of guilty on all the main charges and was satisfied that the case against Mezichel had been proved on balance of probabilities.[3] However, it chose to reverse the sanction of dismissal in respect of the first charge and replaced it with dismissal suspended for a period of six months. It also reversed the three final written warnings in respect of the remaining charges, combined them for the purposes of sanction, and imposed a combined fine of R500.

[15] The appeal authority was not convinced that the misconduct warranted a sanction of dismissal for three reasons: i) there were unfair delays in the disciplinary process; ii) insufficient weight was given to mitigating factors; and iii) the evidence did not establish that the employment relationship had irretrievably broken down.

[16] The appeal authority's reasoning on the question of sanction was as follows:

> 'Although the Appellant has been convicted on a serious act of misconduct, namely charge number one, for falsifying records of his presence at work and of knocking off from duty, I am still not convinced that such misconduct warrants a sanction of dismissal taking into consideration the delay and the mitigation provided by the Appellant during the hearing, which it (sic) has been totally ignored by the employer. Although a Brigadier was called to testify in aggravation of the case, I am still not convinced that the employment relationship is broken down irreparable so (sic).'

[17] In their founding affidavit, the appellants submitted that the appeal authority unreasonably and irrationally failed to take proper account of the evidence regarding the breakdown of the employment relationship. The station commander testified convincingly that the falsification of records by a police officer upon whom she relied for legal advice made the continuation of the employment relationship intolerable. Part of Mezichel's responsibility was to give guidance and advice on disciplinary issues. His demonstrated lack of integrity inevitably would impact negatively on the trustworthiness of any

[3] Mezichel has not challenged this finding.

advice he might offer on ethical and legal issues in the workplace. Moreover, his misconduct most likely constituted the crime of fraud or forgery and such was intolerable behaviour on the part of a police officer and a lawyer. Accordingly, the appellants submitted, the appeal authority irrationally failed to appreciate and take into account the seriousness of this kind of misconduct by someone in the position of Mezichel.

[18] The Labour Court in its judgment failed entirely to deal with this important contention. It merely stated that consideration of the appeal finding demonstrated a rational connection with the material before the appeal authority, which was taken into account.

[19] We agree with the appellants that the Labour Court erred in this respect. The evidence demonstrates indisputably that Mezichel had succumbed to his personal difficulties and had acted fraudulently in a manner that made him wholly unreliable as a police officer, a lawyer and an employee in whom the station commander needed to repose considerable trust. Such an employee is required to observe the highest standard of integrity, good faith, honesty and reliability. Police officers and lawyers should always (not only in the discharge of their official duties) act honourably in a manner befitting their office, free from fraud, deceit and falsehood, and be virtuous in their behaviour. A police officer must maintain high standards of rectitude in private as well as in public life. A police officer, who in fulfilment of his duties is required to act against fraud, when he practices such in his or her own life, is a hypocrite. This inevitably will result in a total loss of confidence in the officer concerned, which could rub off on the SAPS more generally, adding to a loss of public confidence in SAPS. Brigadier van Niekerk correctly made that point in her testimony. The appeal authority unreasonably failed to make the connection between that evidence and the purpose of the disciplinary measures.

[20] Mezichel's failings and devious behaviour therefore self-evidently destroyed confidence in him, making the restoration of trust virtually impossible. The aggravating factors attending his misconduct outweighed the mitigating factors. Counsel's submission that Mezichel had acted opportunistically when falsifying the register on the spur of the moment, is unconvincing when

gauged against his obvious unreliability and lack of integrity as evidenced in the pattern of his absenteeism.

[21] In the premises, dismissal was the only sensible and rational operational response in the circumstances. Both the appeal authority and the Labour Court erred in this respect. There was no rational connection between the purpose of the SAPS Discipline Regulations pertaining to dishonesty, the evidence before the appeal authority and the reasons given by it for reducing the sanction. The decision was accordingly irrational and must be set aside on review for that reason alone.

[22] The appeal authority was possibly influenced by three procedural delays in reaching its conclusion that the sanction of dismissal was unfair. Firstly, the most serious misconduct was discovered on 12 September 2013 and notice of the disciplinary hearing was given to the Mezichel on 25 October 2013. There was thus a delay of around a month and a half between the misconduct and the employee being charged. That is not an unreasonable period for the employer such as the SAPS to contemplate its options. Mezichel suffered no prejudice from that delay; and the employer's conduct cannot be construed as a waiver of the right to discipline or as impacting on the substantive fairness of the ultimate decision.

[23] Secondly, the chairperson of the disciplinary hearing submitted his report on 3 June 2014 after handing down his sanction on 4 April 2014. In terms of Regulation 16 of the SAPS Discipline Regulations, he was supposed to have submitted that report to the National Commissioner within five days of imposing his sanction. That delay too was inconsequential given that the National Commissioner did not seek to vary the sanction. In so far as the lapse may have delayed an appeal by a month or two and caused the period of suspension to endure longer, such does not impact on the fairness of the sanction of dismissal. The same is true of the delay in compiling the transcript, although it is not clear that the appeal authority took this delay into account in reaching its decision. In any event that delay did not bear upon the sanction of dismissal and at most merely extended the period of suspension, the fairness of which is not in issue before us.

[24] The appeal accordingly must be upheld, the decision of the Labour Court reversed and the decision of the appeal authority set aside on the grounds of irrationality. The nature and gravity of the misconduct here are such that dismissal is a foregone conclusion. Thus remitting it to another appeal authority would merely prejudicially delay the inevitable. The decision of the appeal authority, therefore, must be substituted with one upholding the decision of the disciplinary tribunal.

[25] As regards costs, POPCRU opted to defend a decision of the appeal authority which was in favour of its member and on that basis assumed naturally enough that there was merit in his case. The defence was not unreasonable or frivolous. It is justifiable in the circumstances not to make an award of costs.

[26] In the premises, the following orders are made:

26.1 The appeal is upheld and the order of the Labour Court is set aside.

26.2 The decision of the appeal authority dated 27 November 2014 is set aside and is substituted with a decision upholding the decision of the disciplinary tribunal made on 4 February 2014.

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JR Murphy

Acting Judge of Appeal

I agree

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R Sutherland

Judge of Appeal

I agree

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F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:	Adv EA De Villiers-Jansen
	Instructed by the State Attorney
FOR THE RESPONDENT:	Adv CS Bosch
	Instructed by Marais Muller Hendricks Inc