REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D1020/13

In the matter between:

BONGUMUZI INNOCENT NGCOBO **Applicant**

and

SOUTH AFRICAN POLICE SERVICES **First respondent**

ARBITRATOR ALMERIO DEYSEL N.O. **Second respondent**

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **Third Respondent**

Heard: 16 January 2015

Delivered: 21 May 2015

LABOUR COURT

Summary: Arbitration award – review of – dismissal – commissioner – finding employee not guilty of misconduct – no evidence of breach of trust relationship – employee entitled to reinstatement – award reviewed and set aside.

JUDGEMENT

HARKOO, AJ

Introduction

[1] This is an application, in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995 to review, set aside and correct an arbitration award dated 27 August 2013, issued by the second respondent, under case number PSSS 214, under the auspices of the third respondent; as well as an application for the condonation of the late filing of the first respondent's answering affidavit. The application for review was opposed by the first respondent who was the erstwhile employer of the applicant. The application for the condonation of the late filing of the first respondent's answering affidavit is not opposed.

Background

[2] The applicant was employed by the first respondent as a Constable since 7 July 2008 and toward the end of his employment he was working at the Mainline Train Unit in Durban. He earned a salary of R8461.25 per month.

[3] The applicant and Mrs Nyawuza were acquaintances. Mrs Nyawuza stayed at Montclair in Durban. Her husband, Mr Nyawuza was a Magistrate at Nongoma Magistrate's Court. Mr Nyawuza normally stayed in Nongoma during the week and returned to the marital home during weekends.

LABOUR COURT

[4] One of the other magistrates at the Nongoma Magistrate's Court passed away and the rumours arose that Mr Nyawuza was responsible for his death.

[5] On the afternoon of 1 June 2011, Mr Nyawuza travelled from Nongoma to Ulundi by taxi. During the early evening of 1 June 2011, Mr Nyawuza was in the vicinity of an Engen service station on the outskirts of Ulundi. At one stage Mr Nyawuza stood next to the main road leading from Ulundi to Nongoma some distance away from a motor vehicle that was parked alongside the road. After some time Mr Nyawuza walked to the motor vehicle and got into the front passenger seat of the motor vehicle, where he remained for about two minutes. After two minutes Mr Nyawuza alighted from the motor vehicle, walked to the garage tuck shop, where he purchased toilet paper. He then returned to the motor vehicle which was still parked alongside the road and again got into the front passenger seat of the motor vehicle. After about five to six minutes the motor-vehicle made a U-turn and drove off in the direction of Nongoma.

[6] After driving some distance, the motor vehicle stopped and Mr Nyawuza alighted from the vehicle. He went to a spot nearby to relieve himself. While Mr Nyawuza was relieving himself, he was shot a number of times from behind and died on the spot.

[7] The murder of Mr Nyawuza was investigated by Captain Bonginkosi Mncube of the Richards Bay Organised Crime Unit. Captain Mncube went to the scene where the murder took place during the morning of 2 June 2011 where he viewed Mr Nyawuza's body. Mr Nyawuza's cell phone was in his pocket. At some stage Captain Mncube went to the Engen Service Station in Ulundi and viewed the video footage of Mr Nyawuza's movements in the vicinity of the service station. Captain Mncube also obtained the cellphone records reflecting the calls that were made between the cellphones of Mrs Nyawuza and Mr Nyawuza as well as the calls that were made between Mrs Nyawuza's cell

LABOUR COURT

phone and that of another cellphone which was later discovered to be that of the applicant.

[8] On 30 June 2011, Captain Mncube and other members of the Richards Bay Organised Crime Unit arrested Mrs Nyawuza at her home. At some stage later, they saw the applicant driving away from the Durban Central Police Station; he was followed and it was established that the applicant went to Mrs Nyawuza's house. After the applicant left Mrs Nyawuza's house his motor vehicle was stopped and he was arrested.

[9] Captain Mncube took the applicant to the offices of the Cato Manor Organised Crime Unit where he and other members of the Organised Crime Unit questioned the applicant.

[10] During the early hours of 1 July 2011, Captain Mncube drove the applicant to the Richards Bay Police Station where he was detained in the police cells. Later that morning Captain Mncube took the applicant to the rooms of Dr Kalapdeo, a medical doctor who at that stage was the district surgeon. Dr Kalapdeo examined the applicant and compiled a report. Thereafter Captain Mncube took the applicant to the offices of the Richards Bay Organised Crime Unit.

[11] Captain Mncube arranged with Captain Hlongwa of the Durban Political Violence Unit to go to the offices of the Richards Bay Organised Crime Unit, where Captain Hlongwa spoke to the applicant. At some point in time the applicant was instructed to undress to his underpants so that photographs could be taken of his body. At that stage the applicant did not have underpants on and the photographs were taken while his private parts were covered with a placard.

[12] At some stage Captain Hlongwa completed certain documents which were signed by the applicant. These documents reflected that the applicant was

LABOUR COURT

informed of his rights and he was given certain warnings. In one of these documents, which appeared to be signed by the applicant, the following appeared in the handwriting of Captain Hlongwa which on the face of it, were the applicant's responses to the following questions:

> 'Do you know why you are brought to me, and if so, why?
>
> > Yes, I will go and point to you the place where I shot and killed Mr Nyawuza with a fire-arm and also the place where I threw away the pistol fire-arm.
>
> If it is to do a pointing out, how do you know that you may do a pointing out to me?
>
> > It came after the investigating officer informed me of the allegations and my rights when I started telling him about the case, he stopped me and he asked me if I can point out the places to a person like yourself if I'm free'.

[13] Thereafter the applicant, Captain Hlongwa and a photographer drove to the Engen Service Station in Ulundi, to the scene where Mr Nyawuza was murdered as well as to the Tugela River Bridge. Photographs were taken at these places. The applicant was then taken to the offices of the Richards Bay Organised Crime Unit, where the applicant signed a further document.

[14] The applicant was then detained at Westville Prison in Durban, pending a criminal trial.

[15] On 21 July 2011, while the applicant was in detention, he was notified of his suspension. The notice of suspension read, *inter alia,* as follows:

> '1. You are hereby notified that you are deemed to be suspended from duty in terms of Section 43 of the South African Police *Service Act 68 of 1985 until such time as you are released from custody.*

LABOUR COURT

> 2. You(r) suspension is without salary, wages, allowance, privileges or benefits with effect from 2011-06-30.
>
> 3. The reason for your suspension is that you are in custody for: MURDER NONGOMA CAS 37/06/2011…
>
> 4. Should you be released on bail or otherwise, you are no longer deemed to be SUSPENDED. The Unit Commander is however, considering either continuing with your suspension of temporary transferring you in terms of Section 43 of the Police Act'

[16] While the applicant was detained at Westville Prison in Durban he was notified to attend a disciplinary enquiry in prison.

[17] According to the first notice the enquiry was scheduled to take place on 25 January 2012. On that date, the applicant was represented by a POPCRU official, Mr Bongokwakhe Shezi. There was a general consensus that the venue was not suitable for the hearing and the enquiry was postponed so that a suitable date could be arranged.

[18] The second notice was served on the applicant personally in the prison and was to the effect that the enquiry would be held during the period 20 to 23 February 2012. On that day the enquiry was postponed due to the applicant indicating that he no longer wished to be represented by Mr Shezi and in order to enable the applicant to arrange for a different representative. The enquiry was postponed to 12 to 15 March 2012.

[19] Prior to the date of the hearing in March 2012, the applicant resolved his issues with Mr Shezi and arranged for Mr Shezi to represent him at the hearing. The disciplinary hearing did not proceed in March 2012. The applicant was notified by a prison official that the enquiry did not proceed because the initiator, Captain Marthinus Schutte had personal issues. The enquiry was

LABOUR COURT

postponed without a date of the hearing being arranged with the applicant or Mr Shezi.

[20] The enquiry was thereafter scheduled for hearing on 10 to 13 April 2012 at the Westville Prison. The parties were in dispute as to whether or not the applicant was notified that the disciplinary enquiry would proceed on those days. On that day, the applicant indicated to the chairperson, Lt Colonel Dovhani Clive Malenga that he was never served with a notice to attend a disciplinary enquiry on 10 April 2012, that his representative, Mr Shezi, was not aware that the disciplinary enquiry was set down for hearing on that particular date and that he was not prepared to proceed with a disciplinary enquiry on that day. The enquiry was postponed to the following day.

[21] Despite objection by the applicant, a disciplinary enquiry proceeded on 11 April 2012 without the applicant being represented. The applicant remained silent during the proceedings and did not cross-examine Captain Mnucube and Captain Hlongwa who gave evidence during the enquiry about the circumstances under which the applicant allegedly confessed to murdering Mr Nyawuza.

[22] On 14 April 2012, the applicant was found to have committed the misconduct referred to in two of the charges that he faced during the disciplinary enquiry. These two charges were described as follows:

Charge 1

'In terms of Section 40 of the South African Police Services Act, 1995 (Act 68 of 1995), read with South African Police Disciplinary Regulations, 2006, you are hereby charged with misconduct, in that you allegedly contravened Regulations 20 (a) in that on 2011-06-01 on Route to Magistrate Nyawuza's home, at Vuna Reserve, Nongoma, you failed to comply with the legal obligation as stipulated in Part one of Standing Orders 31 (General) which means that the Constable:-

LABOUR COURT

(4) Shall continuously be on the alert to prevent crime and protect the public. He shall at all-times be observant and never omit to report any circumstances that may appear to affect the public welfare or the good name and trust each of the Force adversely.

(5) Shall refrain from being overzealous or meddlesome and should, therefore, not concern himself unnecessarily with trifling matters.

(7) Shall always act in a dignified, calm and compose(d) manner and, when addressing members of the public, he shall do so in moderate language. He must not allow abusive language or threats, however unreasonable, insulting or provocative, to upset him.

<u>Charge 2</u>

In terms of Section 40 of the South African Police Services Act, 1995 (Act 68 of 1995), read with South African Police Disciplinary Regulations, 2006, you are hereby charged with misconduct, in terms of Regulation 20(q) in that you allegedly contravened the prescribed Code of Conduct for the Service by failing to:

Uphold and protect the fundamental rights of Magistrate Nyawuza whereby on 2012-06-01 on Route to Magistrate Nyawuza's home , at Vuna Reserve, Nongoma you lured him into a trap and shot him three times. You therefore intentionally executed him.

Act impartially, courteously, honestly, respectfully transparently and in an accountable manner towards Magistrate Nyawuza whereby on 2011-06-01 on Route to Magistrate Nyawuza's home, at Vuns Reserve, Nongoma you intentionally kill him for your own personal relationship gain with his legally married wife'.

[23] On 14 April 2012, Lieutenant-Colonel Malenga in essence dismissed the applicant for the following reasons:

LABOUR COURT

> 'The employee failed to report or act against any crime to be committed or about to be committed against the deceased by planning a premeditated murder with the deceased's wife'
>
> 'The employee contravened Code of Conduct for the South African Police Service by failing to create safe and secure environment for all the inhabitants of the Republic'.
>
> 'The employee has contravened Regulation 20(q)(in that he) failed to uphold and protect the fundamental rights of Magistrate Nyawuza whereby on 2011-06-01 on Route to Magistrate Nyawuza's home, at Vuna Reserve, Nongoma he lured him into a trap and shot him three times. He therefore intentionally executed him'.
>
> 'The employment is a reciprocal relationship and the employee must serve the employer's interests and act in good faith. The employee must refrain from misconduct generally... The trust between the employer and the employee is irretrievable broken down. The employee has made the employment to be intolerable and impossible'.

[24] On or about 19 April 2012, Mr Shezi, acting on behalf of the applicant, launched an internal appeal. The appeal was not finalised within 30 working days and only on 11 September 2012 did the Appeals Authority make a decision to dismiss the appeal.

[25] While the outcome of the appeal was pending the applicant and Mrs Nyawuza appeared in the High Court, on 15 May 2012, on a charge that they murdered Mr Nyawuza. The Court heard the evidence of Captain Mncube, Captain Hlongwa, and Lieutenant-Colonel Duma as well as the evidence of Dr Kalapdeo and the photographer who photographed the alleged pointing out. After a trial within a trial the Court found that: 'the State had not proved beyond a reasonable doubt that the pointing out by Mr Ngcobo and the confession by Mrs Nyawuza were made freely and voluntarily'. At the end of the trial the Court concluded as follows:

LABOUR COURT

> 'Taking into account the complete lack of evidence and the inadmissibility of the pointing out and the confession which the State attempted to prove, the state has failed to prove that either Mr Ngcobo or Mrs Nyawuza were involved in the death of Mr Nuawuza. In the premises, YOU ARE BOTH FOUND NOT GUILTY AND DISCHARGED'.

[26] The applicant referred an unfair dismissal dispute for conciliation and arbitration to the third respondent. The applicant challenged both the procedural and substantial aspects of his dismissal. The dispute could not be resolved through conciliation on 21 June 2012 and a certificate to such effect was issued.

The arbitration hearing

[27] The arbitration hearing was held on 22 October 2012, 5, 6 and 7 February 2013, 18 and 19 April 2013 and 16 July 2013.

[28] The applicant challenged the procedural as well as the substantive aspects of his dismissal.

[29] He contended that the procedure was unfair because he was not given advance notice that the enquiry would continue on the 10 and 11 April 2011, that he was for that reason unable to arrange for his representative, Mr Shezi to be present, that it was unfair not to accede to his request for an adjournment and that his right to representation was infringed. He also contended that the first respondent's failure to finalise the appeal hearing within 30 working days of receipt of the appeal, was unfair. It was not in dispute that the appeal was finalised some five months after it was lodged and nearly 3 months after the referral to the third respondent. The applicant furthermore denied any involvement in the murder of Mr Nyawuza.

[30] At the arbitration, the commissioner identified the procedural and substantial issues to be considered.

LABOUR COURT

[31] As far as the procedural fairness was concerned, he identified the following:

> 'whether the applicant was served with the notice to attend the disciplinary hearing during the period 10 to 13 April 2012?,
>
> whether the failure to accede to the applicants request for a postponement of the enquiry on 11 April 2012 to afford him a further opportunity to arrange to be represented rendered the procedure unfair?;
>
> whether the applicant's right to be represented at the disciplinary enquiry was infringed by the failure to postpone the enquiry on 11 April 2012?;
>
> whether the appeal was finalised within the time frames set out in the South African Police Service Regulations and, if not, whether that rendered the procedure unfair?'

[32] As far as the substantive fairness was concerned, he found that it was necessary to consider: "whether the respondent (first respondent) had a fair reason for dismissing the applicant and in particular whether the respondent proved on the balance of probabilities that the applicant was involved in the murder of Mr Nyawuza. The underlying issues were:

> whether Mrs Nyawuza made reports to Captain Mncube and Lt Colonel Duma about the applicant's involvement in the murder including whether such reports were freely and voluntarily made and whether the evidence about it was admissible;
>
> whether the applicant made reports to Captain Mncube and Captain Hlongwa about his involvement in the murder including whether such reports were freely and voluntarily made and whether evidence about it was admissible?

LABOUR COURT

whether there was any other evidence proving on a balance of probabilities that the applicant was involved in the murder of Mr Nyawuza'.

[33] The first respondent led the evidence of five witnesses at the arbitration hearing. These witnesses were:

Captain Marthinus Schutte, who acted as the respondent's representative during the disciplinary enquiry,

Lieutenant-Colonel Dovhani Clive Malenga, the chairperson of the disciplinary enquiry,

Lieutenant-Colonel Sabela McCordick Gift Cele of the National Mobile Train Unit in Durban, who allegedly served a notice to attend the disciplinary enquiry on the applicant,

Captain Mncube, the investigating officer of the criminal case, and

Captain Hlongwa, to whom the applicant allegedly confessed and allegedly pointed out the murder scene and the place where the fire-arm used in the shooting, was thrown away.

[34] The applicant presented the evidence of the following witnesses, at the arbitration:

Mr Bongokwakhe Henry Shezi, the POPCRU shop steward who represented the applicant on the day when the disciplinary enquiry was adjourned,

Mrs Thandeka Nyawuza, the wife of the late Mr Nyawuza, and

LABOUR COURT

Mr Sikhumbuzo Khanyile, Mrs Nyawuza's son-in-law who resided at Empangeni.

[35] The commissioner took cognizance of the fact that the hearing scheduled for the 10 to 13 April 2011 was the fourth occasion that the disciplinary enquiry was set down for hearing. The applicant was not responsible for two of the adjournments and was only responsible for the adjournment on 20 February 2011. On that occasion, the disciplinary enquiry was adjourned because the applicant was dissatisfied with his representative. It appeared from Mr Shezi's evidence that the rift came about because he advised the applicant to remain silent during the disciplinary enquiry. In Shezi's view, it was prudent to do so because the first respondent was reliant on documents that were to be used in the criminal trial. The applicant did not want to follow the advice and intended to state his case in response to the allegations.

[36] The hearing scheduled for 12 to 15 March 2011 did not take place because of the family responsibilities of the initiator, Captain Schutte. The applicant was not informed of the dates of the next hearing. Mr Shezi required to be notified of the date of the next hearing, seven days in advance.

[37] The applicant's case was that he was never notified that the disciplinary enquiry was set down for hearing on 10 to 13 April 2011. He only learned of the set down during the morning of 10 April 2011 when he was taken out of the cells and brought to the venue. He phoned Mr Shezi but Mr Shezi was not available on such short notice. The enquiry was adjourned to the 11 April 2011 for the applicant to arrange another representative, but that was insufficient time, for him to make arrangements. He renewed his application for an adjournment on 11 April 2011 but it was refused. The hearing proceeded without the applicant being represented. The applicant contended that the first respondent's inability to produce a copy of the notice of set down and proof that the applicant acknowledged receipt of it supported his version that no such notice was ever served on him.

LABOUR COURT

[38] The respondent's case was that notice of the set down of the disciplinary enquiry for hearing on 10 to 13 April 2011 was timeously served on the applicant. Lieutenant-Colonel Cele testified that he served the notice of set down on the applicant personally at the Westville Prison. He stated that when he went to the prison he signed a visitor's register, explained the purpose of his visit to a prison official and obtained the necessary authority from the head of the relevant section, Lieutenant-Colonel Chetty. He maintained that he handed the notice of set down to the applicant who signed a copy of it to acknowledge that he received it. Lieutenant-Colonel Cele kept the signed copy in his office. However, it was somehow misplaced and he could not produce it at the disciplinary enquiry nor could he produce it at the arbitration hearing.

[39] The commissioner found that Lieutenant-Colonel Cele's evidence was strongly supported by official prison documents that Captain Schutte obtained from the Westville prison and handed in at the disciplinary enquiry. It appeared from Captain Schutte's evidence and from the documents itself that Lieutenant-Colonel Cele signed the visitors register at the prison on 29 March 2011 and that Lieutenant-Colonel Chetty on the same day signed an authorisation that he could serve the applicant with a subpoena for a departmental hearing.

[40] The commissioner concluded that the respondent proved on a balance of probabilities that Lieutenant-Colonel Cele timeously served a notice on the applicant notifying him that the disciplinary enquiry was set down for hearing on 10 to 13 April 2011. He therefore found that Lieutenant-Colonel Malenga's finding, at the disciplinary enquiry, that the notice of set down was in fact served on the applicant, was justified and accordingly determined that the refusal to postpone the disciplinary enquiry was not unfair.

[41] On the other ground, that the first respondent's failure to finalise the appeal hearing within 30 days of receipt of the appeal, rendered the dismissal procedurally unfair, based on Regulation 17 (9) of the South African Police Service Discipline Regulations, the commissioner dismissed the argument on

LABOUR COURT

the basis that the regulation did not apply or relate to the present circumstances.

[42] On the substantive aspects of the dismissal, the commissioner found that there was no direct evidence about the circumstances under which Mr Nyawuza was killed and the respondent's case that it was the applicant who killed him was based on circumstantial evidence, including evidence about confessions that Mrs Nyawuza allegedly made to Captain Mncube and that the applicant allegedly made to Captain Mncube and Captain Hlongwa. He therefore found it necessary to consider whether those confessions were in fact made and, if so, whether they were freely and voluntarily made.

[43] Captain Mncube testified that he became suspicious after viewing the cellphone records of Mr and Mrs Nyawuza and that of the applicant. These records reflected that they were cellphone communications between Mr and Mrs Nyawuza and also cellphone communications between Mrs Nyawuza and the applicant on 31 May 2011 until about 22h00 or 23h00. The records reflected no calls to and from the applicant's cellphone on 1 June 2011 and Captain Mncube inferred that the applicant's cellphone was off on that day. The first person phoned by the applicant on 2 June 2011 was Mrs Nyawuza. According to Captain Mncube it was this information that led him and his colleagues going to Durban to interview Mrs Nyawuza.

[44] He further testified that during the course of the questioning, Mrs Nyawuza was asked about the calls that she made on the 31 May 2011 and she volunteered that some of the calls were made to the applicant. He also stated that Mrs Nyawuza admitted that she and the applicant conspired to kill Mr Nyawuza, that she and the applicant had a love affair and that it was the applicant who pushed her into a plan to assassinate Mr Nyawuza. Mrs Nyawuza also informed him that Mr Nyawuza found love messages on her cellphone and threatened to kill the applicant. She informed him further that Mr Nyawuza was suffering from a mental illness which the applicant knew about; the applicant

LABOUR COURT

suggested to her that she should phone Mr Nyawuza and inform him that she was in contact with a traditional healer that could assist him with his problem and that Mr Nyawuza should meet the traditional healer in Ulundi. She informed him also that the applicant would pose as a traditional healer, pickup Mr Nyawuza in Ulundi and then kill him. He stated further that after Mrs Nyawuza made the confession, the applicant was arrested sometime later that night.

[45] Captain Mncube in his evidence confirmed that the applicant was taken to the offices of Cato Manor Organised Crime Unit after his arrest late during the evening of 30 June 2011. He further testified that the applicant was questioned about the cellphone records and he confirmed, from the outset, the information given to him (Captain Mncube) by Mrs Nyawuza. He stated further that the applicant alleged that Mr Nyawuza had phoned him and threatened to kill him and that, that threat, motivated him to kill Mr Nyawuza.

[46] Captain Mncube further confirmed that the applicant was taken to the Richards Bay during the early hours of 1 July 2011 and that the applicant was taken to the rooms of Dr Kalapdeo. He however, denied that he was present when Dr Kalapdeo examined the applicant.

[47] According to Captain Mncube the applicant and Mrs Nyawuza were willing to make confessions and the applicant was willing to point out where the relevant events occurred. He tried to get a magistrate to take statements from the applicant and Mrs Nyawuza. In this regard he phoned Ms Mkhonza, the senior public prosecutor of Empangeni and Eshowe, and requested her to arrange for a magistrate to take down the statements. Ms Mkhonza could not find a magistrate that was available and as a result neither the applicant nor Mrs Nyawuza was taken to a magistrate. It was arranged that Lieutenant-Colonel Duma from the Railway Police in Durban would take a statement from Mrs Nyawuza and that Captain Hlongwa from the Police Violence Unit in Durban would take the applicant to point out the various scenes. Captain Mncube

LABOUR COURT

denied that he influenced the applicant to point out the scenes or that he conspired with Captain Hlongwa to fabricate evidence to the effect that pointings out were done.

[48] According to Captain Hlongwa, the applicant indicated that he would do the pointing out freely and voluntarily and specifically indicated that he was not assaulted or influenced to do the pointing out. He confirmed that he asked the applicant to undress so that photographs could be taken of certain injury marks. The applicant explained where the injury marks were sustained and it did not appear from the explanation that it was due to an assault. Captain Hlongwa further confirmed that the applicant did not have underpants on at the time. He stated that the applicant gave him an explanation for not wearing underpants, but could not recall what the explanation was. According to him, the applicant directed him and the driver of the vehicle to the place where he, ("the applicant") picked up Mr Nyawuza, to the place where Mr Nyawuza was shot and to the place where the firearm was thrown away. Photographs were taken of the pointing out. He denied that he instructed the applicant what to point out. He further denied that he caused the applicant to sign blank forms.

[49] On the applicant's version Captain Mncube alleged that he ("Captain Mncube") was a sangoma and that his ancestors were telling him that the applicant and Mrs Nyawuza had a love affair and that the applicant killed Mr Nyawuza for his wife. The applicant described how Captain Mncube and his colleagues suffocated him with a tube to the extent that he fainted and defecated, soiling his underpants. When he regained consciousness the applicant pleaded with Captain Mncube and his colleagues not to kill him. They said he must agree with them and do whatever they said he must do. The applicant agreed to do so. The applicant was thereafter taken to a toilet where he was allowed to wash himself in the process he flushed his underpants down the toilet. After this Captain Mncube and his colleagues questioned the applicant about a Run X motor-vehicle. When he denied any knowledge of a Run X they further questioned him about the cars that he normally used. In response the applicant

LABOUR COURT

explained that he used three cars belonging to different family members including a blue Toyota Yaris belonging to his sister-in-law. At about 02h00 they went to the Durban Central Police Station where they were met with the applicant's sister-in-law with whom Captain Mncube had a discussion. Thereafter they drove to the Richards Bay where the applicant was detained in the cells at the Richards Bay Police Station at about 4h35.

[50] The applicant further testified that Captain Mncube took him to a doctor later that morning. According to the applicant Captain Mncube was present when the doctor examined him. Because Captain Mncube was present the applicant did not tell the doctor that he was assaulted by Captain Mncube. Thereafter, the applicant was taken to the offices of the Richards Bay Organised Crime Unit. Later that day Captain Hlongwa approached the applicant at the offices of the Richards Bay Organised Crime Unit and requested the applicant to sign certain forms which the applicant refused, saying that he could not sign something that he had not read. Captain Hlongwa then left the room and returned with Captain Mncube. Captain Mncube told the applicant that if he refused to sign the forms, whatever happened at Cato Manor will happen again. The applicant then signed the forms and put his thumb print where they indicated he should.

[51] Captain Hlongwa then asked the applicant to undress. He observed that the applicant had no underpants on and questioned him about that. The applicant explained what happened and Captain Hlongwa then remarked with a smile that "at Cato Manor everybody shit themselves". Captain Hlongwa saw blood on the applicant's leg and questioned him about it. The applicant explained that he was assaulted by Captain Mncube. A photographer was then called in and he took photographs of the applicant. The applicant was told to cover his private parts with a placard. After that the applicant was taken to various places including Tugela River Bridge where Captain Hlongwa instructed him to point at certain spots and photographs were taken. They then returned to

LABOUR COURT

Richards Bay. The applicant denied that he voluntarily pointed out any places to Captain Hlongwa or that he made any admissions to Captain Hlongwa.

[52] Mrs Nyawuza testified that Captain Mncube and his colleagues took her to the Cato Manor police station at about 14h00 and described in detail how she was tortured until 21h15 that evening. She was handcuffed to a chair and suffocated with a plastic bag and a tube on many occasions. She was also hit with a fist and sustained a broken tooth. She was sworn at and they threatened to kill her if she did not admit to being involved in the murder of her husband. It was suggested to her that she had hired a hitman to kill her husband. At one stage, Mrs Nyawuza's cellphone rang and it was the applicant who was phoning her. Captain Mncube put the phone on loudspeaker and instructed Mrs Nyawuza to speak to the applicant. After the phone call Captain Mncube and his colleagues accused Mrs Nyawuza of having an affair with the applicant, and required of her to admit that she and the applicant had murdered her husband. The torture continued and they threatened to kill her if she did not admit. Eventually Mrs Nyawuza stated that she would make the admission that they had required of her. They then made her sign a blank piece of paper after that Captain Mncube and his colleagues left the Cato Manor police station taking Mrs Nyawuza with them. She confirmed that the applicant was arrested later that night.

[53] Mr Khanyile testified that on the day Mrs Nyawuza was arrested, Captain Mncube and his colleagues, without any apparent reason, took him from his home in Empangeni and drove with him to a bush like area near Mtunzini where they questioned him. During the questioning they accused him of killing Mr Nyawuza and tried to influence him to admit that he was involved in the killing, threatening that he would spend a long time in jail if he did not do so.

LABOUR COURT

[54] The commissioner found that the version presented by the first respondent was improbable in comparison to the version presented by the applicant. He further found that it was unlikely that the applicant and Mrs Nyawuza were lovers and that Mrs Nyawuza's evidence that the applicant was a family friend was supported by the evidence of Mr Khanyile.

[55] He further found that the evidence of Mrs Nyawuza and Mr Khanyile about how they were treated supported the applicant's version which was to the effect that he was treated in a similar way as Mrs Nyawuza was treated. He found that the evidence rendered it more probable that it was 'not out of character for Captain Mncube to behave in the manner described by Mrs Nyawuza.'

[56] He also found that it was improbable that the applicant made the confessions and the pointing out or that it was freely and voluntarily done. He stated that:

> 'Like the High Court I am also of the view that it is highly improbable that Captain Mncube could not find any magistrate between the Richards Bay and Durban that was available to take down confessions.'

[57] He further held that:

> 'There was no evidence gainsaying that of the applicant and Mrs Nyawuza that the applicant and Mr Nyawuza were known to each other. This was a factor weighing in favour of a finding that it was not the applicant but someone else who murdered Mr Nyawuza.'

[58] The Commissioner further stated in his award, at paragraph 55, that:

> 'The evidence before me as a whole did not support a conclusion that the applicant's failure to cross-examine Captain Mncube and Captain Hlongwa was due to him not having a defence. It is probable that the applicant's failure to participate in the hearing was due to an ill-conceived perception on his part that the procedure was unfair'.

LABOUR COURT

[59] The Commissioner accordingly held that the first respondent failed to prove that the most probable inference to be drawn from the circumstantial evidence was that the applicant committed the misconduct that he was dismissed for.

[60] Insofar as the relief is concerned, the commissioner in his award stated:

> 'The failure of the applicant to cross-examine the respondents witnesses when they testified at the disciplinary enquiry and his failure to state a case in response to the allegations levelled against him at the disciplinary enquiry had consequences. On the evidence of Lt-Colonel Malenga the trust relationship had broken down. In my view this was to a significant degree caused by the applicant's failure to participate properly in the disciplinary enquiry. As a result continued employment was rendered intolerable and for that reason reinstatement would not be awarded and compensation will also be limited'.

[61] The Commissioner was of the view that both parties were to blame for the breakdown of the employment relationship and elected to award the applicant compensation in an amount equal to half of his loss of income.

[62] He accordingly made the following award:

> '(a) The respondent, South African Police Service is ordered to compensate the applicant, Bongumusi Innocent Ngcobo, for unfair dismissal by paying him an amount of R76 151-25.
>
> (b) The amount of R76 151-25 is to be paid to the applicant within 14 days of the respondent being notified of this award'.

[63] It is this award that the applicant seeks to review.

The review

[64] The applicant and the first respondent are in agreement with the second respondent's finding that the applicant is not guilty of the misconduct with

LABOUR COURT

which he was charged. The applicant seeks to have the relief that was granted, reviewed and set aside on the basis that the second respondent committed a reviewable irregularity, in that the award is not one that a reasonable decision-maker could have made.

The grounds for the review

[65] The applicant submitted that the second respondent, having found that the dismissal was substantially unfair, erred in failing to order reinstatement as the first respondent placed no evidence that the relationship between the parties was so intolerable, to justify a movement away from the default position, that is, of reinstatement. It has been further submitted that the criteria employed by the second respondent in calculating the compensation awarded, is misconceived.

[66] The first respondent submitted that the second respondent is entitled to exercise a discretion and render an award of compensation, that he had acted as a reasonable decision maker, as Section 193 (2) (b) allows for a decision not to reinstate, where there is evidence that a continued employment relationship would be intolerable.

Analysis

[67] The primary issue is whether the Commissioner, having found the applicant not guilty of the misconduct with which he was charged, was required to reinstate the applicant, in the light of the fact that the applicant requested reinstatement.

[68] Section 193 of the Labour Relations Act 66 of 1995, provides as follows:

> ‘(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may-
>
> (a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

LABOUR COURT

(b) order the employer to re-employ the *employee* either in the work in which the *employee* was employed before the dismissal or in other reasonably suitable work or any terms and from any date not earlier than the date of *dismissal*; or

(c) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless-

(a) the *employee* does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or

(d) the *dismissal* is unfair only because the employer did not follow a fair procedure'.

[69] In *Kroukam v SA Airlink (Pty) Ltd*[1] , Zondo JP (as he was then) stated:

'None of the situations set out in sec 193 (2) (a) – (d) exists in this matter. That being the case this court is enjoined by sec 193(2) to grant the appellant an order of reinstatement. In this regard it is important to emphasise that the language of sec 193(2) is such that, if none of the situations set out in paras (a) to (d) exists, the Labour Court, and, therefore, this Court, or, an arbitrator, has no discretion whether or not to grant reinstatement. In the words of sec 193(2) the Labour Court or the arbitrator "must require the employer to reinstate or re-employ the employee" whose dismissal has been found to be unfair. That embraces both dismissals which have been found to be automatically unfair and those which have been found to be, shall I say, ordinarily unfair. Ordinarily unfair dismissal in this context does not include

[1] (2005) 26 *ILJ* 2153 (LAC) at para 114

LABOUR COURT

> those which have been found to be unfair solely because the employer did not follow a fair procedure because those form under the exception of paragraph (d). It refers to those dismissals which are not automatically unfair but nevertheless lack a fair reason'.

[70] Clearly, where an arbitrator finds that an employee has been unfairly dismissed, he or she must order the employer to reinstate or re-employ the employee, unless there is sufficient evidence placed before him or her to satisfy the existence of one or more circumstances specified in Sec 193(a) to (d), in which case appropriate compensation may be awarded.

[71] The question then arises, is whether there was sufficient evidence placed before the commissioner in arriving at the decision not to require the first respondent to reinstate the applicant.

[72] In *Rustenburg Platinum Mines Ltd v CCMA and Others*[2], Cameron JA said:

> 'The code states that it is generally not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship 'intolerable'. 'Intolerable' means 'unable to endure' (*The Concise Oxford English Dictionary*). This necessarily imports a measure of subjective perception and assessment since the capacity to endure a continued employment relationship must exist on the part of the employer. This is not to confer a subjective say-so. Allowing some leeway into the employer's primacy of response does not permit caprice or arbitrariness. A mere assertion on implausible grounds that a continued relationship is intolerable will not be sufficient. The criterion remains whether the dismissal was fair'.

[73] In *Engen Petroleum Ltd v CCMA and Others*[3] , Zondo JP, stated:

> '…And, of course, the ipse dixit of the employer that a particular act of misconduct is of such gravity that it makes a continued employment

[2] (2006) 27 *ILJ* 2076 (SCA) at para 45
[3] (2007) 28 *ILJ* 1507 (LAC) at para 84

LABOUR COURT

relationship with the employee intolerable is not good enough. In my view whether or not in a particular case the act of misconduct by the employee is of such gravity that it makes a continued employment relationship intolerable is a question that must be determined by a party other than one of the two disputants, for example, the court or an arbitrator objectively after taking into account all the facts and circumstances of the case….'

[74] In *Amalgamated Phamaceuticals Ltd v Grobler NO and Others*[4], Pillay J said:

'The mere fact that the applicant does not trust the individual respondents cannot, without more, be a basis for holding that the employment relationship has broken. In a constitutional democracy implicit in the notion of fair labour practice is the obligation to balance the respective interests of the parties. To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair. The breach of trust, if there was such, was not caused by the individual respondents'.

[75] Professor Alan Rycroft in his article, *The Intolerable Relationship*[5] states:

'(b) If the dismissal is challenged as unfair, it may well be necessary for the employer to lead evidence in the arbitration as to intolerability, not necessarily to justify the fairness of the dismissal but rather to persuade the arbitrator that reinstatement is an inappropriate remedy, in terms of s 193(2)(b) of the LRA.

(c) In assessing whether a continued employment relationship is intolerable, the same test should be employed for both the employer and the employee. The test is: Has there been conduct, without reasonable cause, which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee? It is not necessary to show that the employer/employee intended any repudiation of the contract: the courts function is to look at

[4] (2004) 25 *ILJ* 523 (LC) at para 13
[5] (2012) 33 *ILJ* [5]2271 at p2287

LABOUR COURT

> the conduct as a whole and to determine whether its effect, judged reasonably, and sensibly, is such that the employer/employee cannot be expected to put up with it'.

[76] The second respondent in determining the relief that he awarded, stated at paragraph 77 of the award:

> 'The failure of the applicant to cross-examine the (first) respondent's witnesses when they testified at the disciplinary enquiry and his failure to state a case in response to the allegations levelled against him at the disciplinary enquiry had consequences. On the evidence of Lt Colonel Malenga the trust relationship has broken down. In my view this was to a significant degree caused by the applicant's failure to participate properly in the disciplinary enquiry. As a result continued employment was rendered intolerable and for that reason reinstatement would not be awarded and compensation will also be limited'.

[77] Lieutenant-Colonel Malenga's evidence in regard to the trust relationship was that:

> 'Trust is one that builds relations between the employer and the employee. The employee has been given a task to perform, duties by the employer and therefore, the employer, there is no way in any manner that he must perform his duties with diligence, commitment and must refrain from doing any misconduct that will damage the relationship. In this regard, the misconduct that was committed by the employee damaged the relationship between the employer and the employee" (Record: Volume 2, pg 203, lines 7 to 15).

[78] Clearly, Lieutenant-Colonel Malenga's evidence regarding the trust relationship related to the misconduct itself, of which the applicant was found not guilty. Nowhere does Lieutenant-Colonel Malenga state that the trust relationship was broken down because of "the applicant's failure to participate properly in the disciplinary enquiry" as indicated by the second respondent.

LABOUR COURT

[79] It must be borne in mind that Lieutenant-Colonel Malenga was the chairperson of the disciplinary enquiry. Moreover, it was the second respondent's view that the applicant's failure to participate in the disciplinary hearing was probably due to: "an ill-conceived perception on his part that the procedure was unfair".

[80] In *Edcon Ltd v Pillemer NO and Others*[6], Mlambo,JA, pointed out at paragraph 21:

> 'It also cannot be correct as submitted by Mr Redding, that Ismail and Maponya, who were the internal disciplinary enquiry and appeal chairpersons respectively, provided the management view regarding the damaged trust relations. It needs hardly be stated that their role in those proceedings was not as witnesses. They were there to ensure that a fair conclusion was reached by Edcon regarding Reddy's fate…'.

[81] In my view therefore, firstly, the second respondent's reliance on the evidence of Lieutenant-Colonel Malenga, who was chairperson of the disciplinary enquiry, is misconceived, and secondly, to punish an employee, who has been found not guilty of the misconduct, with the ultimate sanction of dismissal, for his failure to cross-examine the respondent's witnesses when they testified at the disciplinary enquiry, or to state his case in response to the allegations levelled against him at the disciplinary enquiry or his failure to participate properly in the disciplinary enquiry, is grossly unfair.

[82] For the reasons set out above, I am satisfied that the second respondent committed a gross irregularity in the conduct of the arbitration proceedings as envisaged in Section 145(2)(a)(ii) and that he exceeded his powers as envisaged in Section 145(2)(iii). In the circumstances, the second respondent arrived at a decision that a reasonable decision maker could not reach and that the competent relief is that of reinstatement.

LABOUR COURT

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[6] (2009) 30 ILJ 2653 (SCA) at para 21.

[83] The next issue is whether the applicant should be reinstated with the respective effect to the date of his dismissal on 14 April 2012.

[84] The extent of retrospectivity is an issue that is left to the discretion of the court or arbitrator within the provisions of Section 193(3) (1) of the Labour Relations Act 66 of 1995.

[85] In *Equity Aviation Services (Pty) Ltd v CCMA and Others*[7] , Nkabinde J, stated at paragraph 36:

> 'The ordinary meaning of the word "reinstate" is to put the employee back in the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of the dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a dated earlier than the actual date of dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement, from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA ordered the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly'.

[7] (2008) 29 ILJ 2507 (CC) at para 36.

LABOUR COURT

[86] In the light of the above, I am of the view that the applicant is entitled to reinstatement, retrospectively from the date of dismissal on the 14 April 2012 on the same terms and conditions that prevailed prior to the dismissal.

[87] I see no reason why costs should not follow the result.

Order

[88] In the result, the arbitration award issued by the second respondent under the auspices of the third respondent dated 27 August 2013 under case reference: PSSS 214-12/13, is reviewed and set aside and replaced by the following order:

88.1. The dismissal of the applicant was substantively unfair;

88.2. The first respondent is required to reinstate the applicant with retrospective effect to the date of his dismissal on 14 APRIL 2012 with full benefits, less any compensation that the applicant received, from the first respondent, subsequent to the dismissal.

88.3. The first respondent is required to pay the applicant's cost.

LABOUR COURT

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Harkoo, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate A Naidoo

Instructed by: R Ramdayal Attorneys

For the Respondent: Advocate D Pillay

Instructed by: State Attorney (KwaZulu Natal)

LABOUR COURT