REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

CASE NO: P 582/2011

In the matter between:

MINISTER OF POLICE	**Applicant**
and	
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL (SSSBC)	**First Respondent**
MALUSI MBULI (*N.O.*)	**Second Respondent**
VUYILE SENENE	**Third Respondent**
NOMAGENIYA HOMBILE	**Fourth Respondent**

Summary: (Review – arbitrator did not misconstrue case – review dismissed).

REASONS FOR JUDGMENT

LAGRANGE, J

[1] On 17 April 2014 the following order was handed down:

1.1 The application to review and set aside the arbitration award issued by the second respondent on 3 October 2011 under case number PSSS 538-11 is dismissed.

1.2 The applicant must pay the respondents' costs.

[2] My brief reasons for the judgement are set out below.

Background

[3] For the sake of contextualisation, a brief outline of events giving rise to the dismissal of Constables V Senene (third respondent) and N Hombile (fourth respondent) is necessary. The common cause facts were usefully summarised by the arbitrator as follows:

> *"48. The evidence which form common facts of this dispute is that the suspects which are the two boys were apprehended by the security officer at Camagu Junior Secondary School and were found in possession of dagga. The matter was referred to the Principal who then called the members of the SGB and the CPF. The police were also called and it is two applicants in this dispute who attended the matter of the SAPS.*
>
> *49. The two boys were handed over to the police officers who born enforcement officers in order to deal with the matter as police officers. There were no statements that were taken by the police officers from the Security, the Principal, members of the SGB and the CPF.*
>
> *50. The police officers conducted an investigation in the place where the dagga was allegedly bought but could not find the person who was selling the dagga at the house. The boys being the suspects were then taken to the bus stop and were warned and released by the police."*

[4] The police officials claimed that they exercised their discretion not to arrest the learners on the basis of a directive issued by the National

Commissioner on 28 April 2005 to curb the arrest and detention of suspects in petty crimes that can result in civil claims against the SAPS. They exercised their discretion on the basis that the suspects were juveniles, they were writing exams at school, and the crime in question was not of a violent or serious nature.

[5] The essence of the charges against the constables were:

5.1 They were in breach of Regulation 20 (f) of SAPS Regulations in that they prejudiced the administration, disciplined or efficiency of the Department, office or institution by failing to bring the suspects, who had been handed over to them by the Community Policing Forum and the School Governing Body as well as the school watchman, to the police station for the purposes of charging them.

5.2 They had contravened regulation 20 (i) of the SAPS Regulations by failing to carry out an instruction without reasonable cause. However, they were acquitted on this charge in the original disciplinary proceedings.

5.3 They had contravened regulation 20 (q) by contravening the services code of conduct in failing to investigate criminal conduct endangering the safety or security of the community by: failing to bring the two arrest suspects to the police station; failing to arrest the third person who sold the dagga to one of the suspects, and failing to enter the exhibit in the SAP 13 Register immediately after it was seized.

The arbitrator's findings

[6] The arbitrator found that there were different ways of dealing with situations and the circumstances of each situation would differ from case to case. He found that the National Commissioner had given police officers discretion in effecting the arrest of suspects, which they had exercised in the manner described. He found that those reasons were legitimate and found that their conduct of not arresting the suspects but warning them was reasonable and fair in the circumstances.

[7] He also found that the incident had been recorded in one of the constable's pocketbooks and they had reported it at the police station.

There was also no evidence that the dagga they had confiscated was not entered in the SAPS 13 Register. Consequently, he concluded that the two constables had not contravened the regulations in question.

[8] Finding that their dismissal had been substantively unfair and that the employment relationship had not broken down, he ordered their reinstatement with effect from 1 November 2011.

Grounds of review and evaluation

[9] The principal grounds of review set out in the applicant's founding papers were that:

9.1 The arbitrator's finding that the third and fourth respondents were not guilty of failing to execute their duties was one that no reasonable arbitrator could have reached. A related ground of review was that the arbitrator took account of irrelevant factors while failing to take account of relevant ones. Essentially, this latter ground is only of significance to the extent that it shows why an arbitrator arrived at a conclusion that was unreasonable.[1]

9.2 The arbitrator misconstrued the essence of the matter because his reasoning was based on the fact that the third and fourth

[1] See ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*** where the LAC restated the principle governing the assessment of a failure to consider material facts:

> *"[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health & another NO v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."*

(emphasis added)

respondents had a discretion whether or not to arrest the suspects in question. The applicant's main contention is that this was a misdirection by the arbitrator because:

> *"The crux of the matter was that the respondents failed to execute their duties in that; they failed to take statements from the complainant(s) and/or the eyewitnesses and also they failed to open a police docket against the said learners. In addition, the respondents failed to register into the SAP 13, the exhibits which was seized from the said learners. The exercise of their discretion whether to arrest or not the said learners was not an issue at all."*

[10] The applicant also complained that the arbitrator had committed a gross irregularity by asking one of the applicant's witnesses to place his signature on a piece of paper so that it could be compared to the signature on a statement allegedly signed by him. Once this had been done the arbitrator ruled that the statement had been signed by the witness. During the course of argument, it became clear that even if this complaint was justified and that the Commissioner ought not to have intervened on his own accord in eliciting evidence of this nature, there was nothing that turned on the consequence of such evidence being admitted.

[11] In addition, during the course of the argument, it was submitted that the arbitrator had been unnecessarily robust in dealing with the applicant's representative's attempt in the arbitration to test the evidence about the quantity of the dagga seized and the constables' contention that the suspects were writing exams. However, this was not specifically cited as a ground of review in the founding papers and consequently could not be considered by the Court.[2]

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[2] See ***Commercial Workers Union of SA v Tao Ying Metal Industries & Others*** **(2008) 29 *ILJ* 2461 (CC)** at 2483:

> *[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an*

[12] In argument and in the answering affidavit of the respondents, it was pointed out that it could not be argued that the crux of the matter concerned, amongst other things, the failure of the constables to open a case docket because that was never something they had been charged with and found guilty of not doing.

[13] In answer to the complaint that the exercise of the constables' discretion was irrelevant, the respondents pointed out that it was because they had exercised their discretion in accordance with the directive that they did not bring the suspects to the police station and by implication that was a complete defence to that charge and therefore highly relevant. It was obviously a significant factor in determining whether or not their dismissal was fair.

[14] Furthermore, the respondents pointed out that it was also never one of the specific charges against the applicants that they failed to take statements. In reply, the applicant contends that the charge was broad enough to comprehend this specific failure.

[15] On the question of the evidence in support of the dagga not being entered into SAPS 13, the only evidence was that of the chairperson of the disciplinary enquiry who claimed that the dagga had only been registered 20 days after the incident. On the other hand, there was the evidence of an extract from a pocketbook entry of Constable Senene, which read:

"*November 2009/11/16*

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arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible."

See also, more particularly, ***Comtech (Pty) Ltd v Commissioner Shaun Molony N.O and others*** **[2007] ZALAC 35 (DA 12/05) (21 December 2007)** in which the LAC observed:

> *"[15] The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by "an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside." Rule 7A requires the notice of motion to call upon, in this case, the commissioner "to show cause why the decision or proceeding should not be reviewed and corrected or set aside."*

from them that he refused to give us statement and also told us that they do not want to put them in custody. We told them that we will investigate the source dagga and we took two schoolboys because one of them confessed that he is out. After we finished to investigate we warned Thabiso Ngabeni and Aseza Mboyi and we took that dagga to the SAP13/357/11/2009 DUTY OFF reported off duty free from…"

(*sic*)

A signature appears over the entry at this point, which Senene claimed was the signature of the person who handed over the dagga to them, one 'Nantsika'. The applicant essentially contended that it was not reasonable for the arbitrator to rely on the say-so of the chairperson of the enquiry who claimed he had inspected the SAPS 13 register. The respondents submitted by contrast that given the reference to the register which appears in Senene's pocketbook it should have been relatively easy to contradict his evidence of when that entry was made by producing a copy of the corresponding entry in the register itself.

[16] Whether the charges were wide enough to embrace the allegations referred to in the review application which the constables had not been specifically charged with, namely failing to take statements or failing to open a docket, the essential issue is whether the arbitrator misdirected himself by focussing on the constables' defence to their alleged dereliction of their duties, by accepting that they had exercised a *bona fide* discretion not to charge the suspects. I do not see how this could be construed as amisdirection if it provided a complete defence to the charges. It may be that another arbitrator might have found that the constables exercised their discretion too leniently, but that is a matter on which arbitrators might reasonably differ. Moreover, the constables did provide a justification for exercising their discretion in favour of leniency in accordance with the National Commissioner's directive, and that justification was not far-fetched or absurd in the circumstances.

[17] Once it is accepted that the arbitrator did not misdirect his enquiry, the issue is whether his effective conclusion that they exercised their

discretion in a *bona fide* manner is one that no reasonable arbitrator could have arrived at. The applicant has not provided any reasons why that should be so because the focus of its attack was primarily aimed at the alleged misdirection as such, and not whether the arbitrator's conclusions on how they exercised their discretion were untenable. Consequently, I do not think the Commissioner can be faulted in this regard, or that his finding were unreasonable in this respect.

[18] On the question of whether the dagga had been entered timeously in the register there was conflicting evidence and the arbitrator concluded that the employer had failed to discharge the onus of proof in circumstances when there was no reason why it could not have produced an extract from the register to confirm the presiding officer's evidence that he had seen the entry. This was not an unreasonable conclusion of the arbitrator, even if another arbitrator could have decided this point in favour of the employer.

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R LAGRANGE, J
Judge of the Labour Court of South Africa
24 March 2015

APPEARANCES

For the Applicant: N Voultsos of the Office of the State Attorney

For the First Respondent: J R Basson

Instructed by: Grosskopf Attorneys