IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : JR 161/06

In the matter between :

SOUTH AFRICAN POLICE SERVICES **APPLICANT**

and

SUPT F H LUBBE **FIRST RESPONDENT**

THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL (SSBC) **SECOND RESPONDENT**

ARBITRATOR GG SEBOTHA **THIRD RESPONDENT**

J U D G E M E N T

LEEUW AJ:

Introduction:

[1] The Applicant (SAPS) approached this Court on Review in terms of section 158 (1) (g) of the Labour Relations Act No 66

of 1995 (The Labour Relations Act) for an order in the following terms:

> "1. That the ruling handed down by the third respondent (annexure "A") under case no PSS 585-04/05 on 02 November 2005 received by the applicant on 12 December 2005 be and is hereby reviewed and set aside.
>
> 2. An order staying the enforcement of the award and/or ruling made in favour of the first respondent pending the outcome of the review application.
>
> 3. Costs of suite in the event of opposition.
>
> 4. Further and/or alternative relief."

[2] The First Respondent (Lubbe) is a police officer occupying a rank of superintendent in the employ of SAPS. He was charged with 19 counts of misconduct, and convicted of seven (7) at a disciplinary hearing and fined R700-00 cumulatively. He was acquitted of the rest of the other charges.

[3] He lodged an internal appeal against the said convictions of misconduct but not against the sanctions imposed. The convictions were confirmed on appeal but the appeals authority made a finding that Lubbe was guilty of two further charges of misconduct. Lubbe was acquitted by the Disciplinary Tribunal of those two charges of misconduct. The Chairperson of the Appeal Tribunal (The Chairperson) set aside the sanction of a fine and substituted same with an order of dismissal. Lubbe subsequently referred the dispute to the Second Respondent

(Bargaining Council), the grounds being that his dismissal was both substantively and procedurally unfair.

Proceedings at the Bargaining Council

[4] The parties hereto had a Pre-Arbitration Agreement. The arbitrator was required to establish whether or not, the conviction on the nine (9) counts of misconduct inclusive of the two additional convictions on appeal, as well as the procedure followed in imposing a sanction of dismissal, were both substantively and procedurally unfair.

[5] At the arbitration hearing, the Applicant raised five (5) ***Points in Limine*** as tabulated in the **"Applicant's Written Reply to the Respondent's submissions (Answer) re : *Points in Limine***"

> "2.1 **POINT NR 1:** The chairperson on appeal is not entitled to enlarge the ambit of the appeal so as to include an appeal against the sanction where the appeal was confined to an appeal against the merits.
>
> 2.2 **POINT NR 2:** The chairperson (on appeal) is not entitled to impose a harsher or more severe sanction on appeal.
>
> 2.3 **POINT NR 3:** The chairperson on appeal is not entitled to find an employee guilty on charges on which he has been found not guilty by the chairperson of the disciplinary enquiry.
>
> 2.4 **POINT NR 4:** As a result of the unreasonable delay in bringing charges against the employee, the disciplinary proceedings should be declared substantive and/or procedurally unfair.

2.5 **<u>POINT NR 5:</u>** Because the Appeals Authority (which found the Applicant guilty and imposed a sanction of dismissal), comprised of **one member** only, the Appeals Authority acted *ultra vires" .*

[6] From the Heads of Argument prepared by T L Duba, ("Duba") on behalf of SAPS at the arbitration hearing, it is apparent that both parties hereto had agreed that written submissions would be prepared and filed dealing with the abovementioned preliminary points raised, thereafter a ruling **"would be made by the arbitrator after which an agreement will be reached on the number of days required for the Con. Arb. Hearing ….."** See paragraph 2.3 of the **"Respondent's Heads of Argument with regard to Applicant's Heads of Argument with regard to Applicant's *<u>Points in Limine.</u>"***

[7] The arbitrator repeated the Heads of Argument filed by Counsels of both parties hereto and summarized same and made the following ruling on 2 November 2006.

> "I find that the chairperson of the Appeal Authority had exceeded his authority/powers by extending the grounds of appeal to include an appeal on a sanction after he, acknowledged the absence of a sanction as a ground for appeal. Regulation 13 is unambiguous and unequivocally provides for procedures on appeal and the powers of the Appeals Authority. The sanction was not properly before the Appeals Authority because it does not form part of the grounds. I am inclined to agree that the wording of Regulation 13 (8) grants the chairperson the powers to confirm, vary (whichever way), set aside the finding/sanction and make an appropriate order, but only when the said sanction is the subject of/or ground of appeal. I order that

> the ruling by the chairperson of the Appeals Authority on the sanction be declared invalid.
>
> On the second point raised that the chairperson on appeal is not entitled to impose a harsher or more severe sanction I would refrain from making a ruing because the sanction should not have been the subject of appeal. The sanction was not properly before the chairperson on appeal. The charges on which Applicant was found not guilty were also not part of the grounds of appeal. I find that the chairperson exceeded his mandate as stipulated on the grounds by making a finding on charges which there was no appeal. On points of the delay each case has to be decided on the merits. In this case the chairperson of the appeal authority has reasons that the offences were not discovered until later hold merit."

[8] She later clarified her ruling per memorandum dated 21 December 2005 which reads as follows:

> "Applicant raised a ***point in limine*** that Respondent's Appeals Authority acted ***ultra vires*** by giving a ruling on issues that did not form part of the grounds of appeal, such as offences for which Applicant was found not guilty, and the sanction. The Appeals Authority had altered the sanction from financial penalty to dismissal.
>
> Respondent submitted that the Appeals Authority had powers to alter the sanction if it feels that the sanction was inappropriate. The outcome was that the Appeals Authority was found to have acted ***ultra vires,*** and that Applicant was reinstated."

This ruling is still unclear but it would appear as if the Arbitrator's ruling was that Lubbe should be reinstated.

Submissions on Reviews

[9] In his Founding Affidavit, Duba on behalf of SAPS, states the following as grounds for review:

9.1 That the Arbitrator committed a gross irregularity by holding the view that "in order for the chairperson of appeal to determine the sanction and/or appropriate sanction imposed on the first respondent, there must first be an appeal against that sanction." That the arbitrator relied on criminal law principles which she wrongly applied to labour law relations in coming to her decision;

9.2 That when the Arbitrator dealt with the ***points in limine*** raised, she acted as if she was a Court of Review in that she ruled that "the Chairperson of the Appeal Tribunal exceeded his powers and did not have authority to include an appeal on a sanction in the absence of the grounds of appeal which attacked the sanction." Furthermore, that these preliminary points ought to have been referred to the Labour Court which has jurisdiction to entertain same;

9.3 That the Arbitrator was supposed to have had a retrial on the merits in order to determine whether or not Lubbe's dismissal was both substantively and procedurally unfair;

9.4 That the Arbitrator ought to have joined the Chairperson of the Appeal Tribunal as party to the proceedings;

9.5 That the Arbitrator overlooked Regulation 13 (8) of the general regulations of the SAPS in finding that the sanction imposed was not properly before the Chairperson of the appeal tribunal. This ground is in essence the same as the one in 9.2 above;

9.6 That the Arbitrator misdirected herself by stating that the Chairperson of the Appeal Tribunal ought to have afforded Lubbe an opportunity to make submissions before imposing a sanction, in compliance with the ***audi alteram partem*** rule.

I will deal with the abovementioned grounds not necessarily in the order stated.

Did the Arbitrator act as a Court of Review?

[10] It would appear from the oral agreement arrived at between Counsels for both parties at the arbitration hearing, the Arbitrator was required to establish whether or not it was appropriate for the Chairperson to convict Lubbe of two additional charges of misconduct and to vary the sanction of a fine imposed to one of dismissal. The facts were recorded as common cause in the pre-arbitration minutes.

[11] Furthermore, the Arbitrator was directed by both parties to resolve this issue first. No evidence was presented by both parties on the preliminary points raised, presumably because the Arbitrator was not called upon to decide on the merits of the dispute, but rather to determine whether or not the process followed by the Chairperson fell short of procedural fairness, which procedure, if it were to be found to be in order by the Arbitrator, would entail that the arbitration hearing would be in respect of all convictions of misconduct, inclusive of the two further charges.

[12] In her ruling, the Arbitrator stated that the Chairperson "exceeded his authority/powers by extending the grounds of appeal to include an appeal on a sanction…" without herself considering the merits of the case. The Arbitrator made a finding that the holding of the second enquiry rendered the dismissal of Lubbe unfair.

[13] The duty of the Arbitrator on Review was to determine whether or not the dismissal of Lubbe was substantively and procedurally fair. The Arbitrator further made a ruling on the procedure followed without having recourse to the legal position as well as the views of the Labour Courts in that regard.

[14] The issue of the second disciplinary enquiry has been considered by the Courts and I deem it appropriate to discuss the principles applied by the Courts at this stage.

The Law

[15] In the case of ***BMW (SA) (Pty) Ltd v van der Walt*** (2000) ILJ 113 (LAC) at par [12] the Court reiterated the fact that "in labour law fairness and fairness alone is the yardstick" when determining whether or not a second disciplinary enquiry should be held against an employee based on the same facts in a charge of misconduct.

[16] The Court further cautioned against the importation of the Criminal Law principles of ***autrefois acquit*** and ***autrefois convict*** in labour law. Conradie JA went further to make the following remarks: "I should make two cautionary remarks. It may be that the second disciplinary enquiry is ***ultra vires*** employer's disciplinary code ***Strydom v Ukso Ltd*** [1997] 3 BLLR 343 (CCMA) at 350 F-G). That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances."

[17] Zondo AJP (as he then was) gave a minority judgement and was strongly not in favour of the institution of a second disciplinary enquiry. These remarks of Conradie JA were quoted with approval in the case of ***Country Fair (Pty) Ltd v CCMA & Others*** (2003) 24 ICJ 355 (LAC) at par [23] where the Court held that the Appellant (the employer) conducted a second disciplinary enquiry **"without recourse to the express**

provision of its disciplinary code and on the basis of no precedence."

[18] In the case of ***Brandford v Metrorail Services (Durban) & Others*** [2004] 3 BLLR 199 (LAC) at par [19] the Court held that the Arbitrator's Award demonstrated that he **"completely misconceived the correct legal position as currently enunciated in van der Walt and he arrived at the incorrect conclusion that the holding of the "second enquiry"** ***per se*** rendered the dismissal unfair." Per Jafta AJA (as he then was) at par [21]

[19] Furthermore, section 188 (2) of the Labour Relations Act provides that: "Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act." This is what was expected of the Arbitrator to do in the circumstances.

[20] I am of the view and reiterate the fact that in this instance, the Arbitrator was not supposed to assume the role of a Court of Review but rather, and as guided by Counsels for both parties hereto, to determine whether, taking into account the procedure followed by the Chairperson of the Appeal Tribunal, the dismissal of Lubbe was fair and/or whether there were facts which substantively justified the dismissal of Lubbe.

[21] As far as fairness is concerned, the Courts hold the view that a fair labour practice referred to in section 23 (1) of the Constitution embraces the interests of both the employer and employee, who are to be treated equally in that they enjoy the same right. See ***National Union of Metal Workers of SA v Vetsak Co-operative Ltd and Others*** 1996 (4) SA 577 (A) at 593 G – H and ***National Education Health and Allied Workers Union v UCT*** 2003 (3) SA 1 (CC) at paras [39] to [40].

[22] In determining whether or not the dismissal of Lubbe was substantively and procedurally unfair, the Arbitrator had the duty not only to determine the fairness or unfairness of Lubbe's dismissal but had the duty of also determining the fairness to the employer in relation to the "second disciplinary enquiry" conducted by the Chairperson on appeal.

[23] In case of ***Brandford v Metrorail Services (Durban) & Others supra*** referred to above, Jafta AJA as he then was stated in paragraph [21] that:

> "As a result of the arbitrator's misconception of the law relating to the propriety of holding a second disciplinary enquiry, the employer in the present matter was denied the opportunity of having the issue of the fairness of the dismissal considered in a fair public hearing and by means of applying the relevant law. The arbitrator failed to consider whether or not in circumstances of the present matter the employer was entitled to hold the enquiry that led to the appellant's dismissal and, if so, whether the sanction of a dismissal was fair. In my opinion this constituted a gross

> irregularity on the part of the arbitrator. The arbitrator's reasoning was so flawed and the ultimate conclusion he arrived at so unsound to the extent of constituting a gross irregularity as pronounced in ***Goldfields Investment Ltd & another v City Council of Johannesburg & another*** 1938 TPD 551." (My emphasis).

[24] Although the cases referred to above dealt with a situation where the employer conducted a second disciplinary enquiry on the same facts, in the present case, the Chairperson on appeal purported to do the same thing. I am of the view that the same principles applied by the Court can be appropriately imported here in order to establish the fairness of Lubbe's dismissal.

[25] The Arbitrator's conduct of the proceedings as well as her reasoning in coming to the conclusion arrived at, was flawed in that she misconstrued, and in actual fact, was oblivious of the law relating to establishing a fair labour practice as defined by the Courts. For this reason, the ruling by the Arbitrator stands to be set aside.

[26] I accordingly make the following order:

(a) The Ruling handed down by the Third Respondent under Case No PSSS585-04/05 on 22 November 2005 is hereby set aside;

(b) The matter is referred back to the Second Respondent to be heard ***de novo*** by an Arbitrator other than the Third Respondent.

(c) There is no order as to costs.

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M M LEEUW
ACTING JUDGE OF THE LABOUR COURT

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Date of hearing : 20 October 2006
Date of judgement : 19 March 2007