IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR 2227/05

In the matter between**:**

Kistiah Naidoo	**Applicant**
And	
The Minister of Safety & Security N.O.	**1st Respondent**
The National Commissioner of the	
South African Police Services N.O	**2nd Respondent**

JUDGMENT

1. The applicant brought an application in which he seeks an order that the decision by the first and second respondents to unilaterally terminate his services in terms of Section 35 of the South African Police Services Act, No 68 of 1995, as well as his unilateral decision to only pay an amount of R1210 227-40 to the applicant be reviewed and set aside.

2. The applicant further seeks an order referring the matter back to the second respondent for reconsideration. The applicant also seeks condonation for the late filing of this application, if applicable. The respondents are opposing the application.

3. The applicant was employed as a police officer in the South African Police Service. During 1991 to 1993 he was a Station Commander of the Phoenix Police Station in Kwa-Zulu Natal. He was later replaced by Colonel Munsamy. At that stage he held the rank of a Superintendent. He was later appointed to senior superintendent.

4. With regard to his demotion from being the station Commander, he filed a grievance. The dispute ended at the arbitration hearing in which the arbitrator issued an award ordering the respondents to appoint the applicant to the rank of assistant commissioner. The award was made an order of court on 6 June 2001. The application to review the award was dismissed as well as an application for leave to appeal.

5. In the meantime charges of misconduct and corruption were brought against the applicant. As a result of these charges, he was suspended from duty with effect from December 2001. The suspension was with salary.

6. Negotiations took place between the parties and their legal representatives with a view to finding a solution to the problem facing the respondents in appointing the applicant while there were pending charges. Eventually, agreement was reached to appoint the applicant to the rank of assistant commissioner with effect from 6 June 2001 and simultaneously terminating his services with effect from 28 February 2005 in terms of Section 35 of the South African Police Services Act No. 98 of 1995. The respondents paid out a severance package. The applicant has accepted the benefits paid and has not tendered to refund same.

7. Section 35 of the SAPS Act provides that:

"The National Commissioner may, subject to the provision …discharge a member –

(i) because of the abolition of his or her post, or the reduction in the numerical strength, the reorganisation or the re-adjustment of the service;

(ii) If, for the reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the service or will otherwise be in the interest of the service; or

(iii) If the President or a Premier appoints him or her in the public interest under any law to an office which this Act of the Public Service Commission Act does not apply."

8. Mr. Bredenkamp who appeared for the applicant submitted that Section 35 has the ingredients of the operational requirement dismissal. He then argued that the respondents took a decision to implement Section 35 while the matter was still being discussed and no settlement reached. He further submitted that this was in bad faith and rendered the process procedurally unfair.

9. Mr. Bredenkamp further submitted that the applicant is not satisfied with the calculation of the package paid to him in particular, the leave pay and the bonuses. It was submitted that the payment of bonus and leave pay was not rational as it was not paid out at 100%. The applicant does not want to be reinstated but wants the court to substitute the amount payable and order that the respondent pays the amount for the leave as quantified by him or that the amount of the package be referred back to the respondents for recalculation.

10. In paragraph 1 and 2 of this judgment, I set out the relief sought by the applicant in the notice of motion. The argument presented by Mr.

Bredenkamp points to a different relief. In this respect, Mr. Bredenkamp submitted that the applicant does not seek an order in respect of the first leg of paragraph 1 of the notice of motion. In short, the applicant no longer seeks the review and the setting aside of the unilateral termination of his services. Accordingly, the issue that remains is the unilateral payment of the package.

11. Mr. Havenga who appeared for the respondents submitted that what a person gets in terms of the size of the package is what the law says and at times through negotiations. The applicant has received more than R2 million before tax. His complaint now relates to the amount paid for bonus and leave days. I have not been provided with any document setting out the guidelines for the calculation of bonuses and leave pay.

12. It was submitted that the discharge of the applicant in terms of section 35 does not require the applicants consent. I agree with this submission. All that is required is a consultation. I am of the view that consultation did take place. The proposal to discharge the applicant was made by his attorney. Both parties agreed to this. It is also apparent that the discharge was agreed following the investigations of the possibility to keep the applicant in employment in the light of the pending disciplinary proceedings against him and the breach of trust. It cannot, on the papers before me be said that the respondents acted in bad faith in discharging the applicant. In any event, the applicant is no longer challenging the discharge.

13. The applicant has not presented me with any regulations pertaining to the calculation of the leave pay. His contention is that he was entitled to 100% leave pay and not 60%. The applicant has not set out the legal or factual basis for alleging that the payment of 60% was not rational. The onus is

on the applicant to prove this.

14. The applicant also failed to show that the manner of calculating the leave pay needed to be negotiated with him. The respondent's counsel submitted that the package payable is calculated in terms of a collective agreement. The respondent pleaded as follows at p113 Para 32.2 and 32.3:

> "32.2 Secondly the number of days to which the applicant is entitled, is a matter dealt with by collective agreement over which the second respondent has no control.
>
> 32.3 Thirdly the calculation of days is a matter dealt with by the DPSA and they have been asked to reconsider the matter. I still want a reply."

15. The applicant filed a replying affidavit but failed to deal with these allegations made by the respondents. This issue has to be decided on the respondent's version. Accordingly, I accept Mr. Havenga's argument that the number of days to which the applicant is entitlied is dealt with in terms of the collective agreement. There is no allegation by the applicant that the calculation was not in terms of the collective agreement.

16. The respondent has further submitted that the calculation of days is dealt with by the DPSA and that they had been asked to reconsider the matter. I have already mentioned that the applicant did not reply to this allegation. I find it strange that the applicant persisted with the prayer that the respondents be ordered to reconsider the package in the face of the undisputed allegation that the DPSA has been requested to reconsider the calculation. The result is that the review application was uncalled for.

17. I am not satisfied that the calculation of the leave days is a matter for negotiation. Mr. Bredenkamp questioned why the question of leave days

was referred to DPSA if it was not an issue for negotiation. I think the answer to this is that it is not the respondents who are responsible for calculating how many leave days the applicant is entitled to. The calculation, if incomplete, was not done by the respondents and had to be sent back to the body whose responsibility was to make the calculation.

18. It was also submitted that the question of incentive and bonuses should be referred back. I am of the view that this is not any issue for the review. If the applicant is not satisfied that the package was correctly calculated, a review cannot assist him in the light of the denial by the respondents that these are not negotiable issues. It is for the applicant to sue for the outstanding payment if he feels that he was short paid.

19. I have indicated that there is no factual or legal basis for alleging that the payment made to the applicant was irrational. In the circumstances, the applicant has failed to make a case for the relief sought. The application stands to be dismissed.

20. In the light of the conclusion I have come to, it is not necessary to make a decision on the question of lateness of the review application. I see no reason why the costs should not follow the results.

21. The order I make is the following:

a) The application for the review is dismissed.
b) The applicant is ordered to pay the costs.

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NGCAMU AJ

Date of Hearing: 24 October 2006

Date of Judgment: 05 February 2007

For the Applicant: Adv. J.M. Bredenkamp instructed by Van Zyl Le Roux & Hunter Inc

For the Respondents: Adv. H.S. Havenga instructed by the State Attorney.