



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C585/16

In the matter between

NATIONAL COMMISSIONER OF POLICE SERVICE

First Applicant

SOUTH AFRICAN POLICE SERVICE

Second Applicant

and

COLONEL MD BOBIE N.O.

First Respondent

SERGEANT F. CAALSEN

Second Respondent

Heard: 24 October 2017

Delivered: 2 February 2018

Summary: An application under section 158(1)(h) requires a litigant to conceptualise the ground in law on which the review application based and present this to the Court by means of its pleadings and in submission. A state employer that seeks to review the decision of its own functionary cannot do so merely because it regards the decision as incorrect.

JUDGMENT

RABKIN-NAICKER J

- [1] This is an unopposed review of a decision made by the First Respondent in his capacity as Appeals Authority of the Second Applicant (the SAPS). It is brought under section 158(1)(h) of the LRA. Condonation is sought in the review papers for the late filing of the review on the 7 September 2016 in respect of a decision issued on the 23 February 2016.
- [2] The applicant's submit that their challenge to the decision of the Appeals Authority (which overturned the dismissal of Second Respondent) is based on it being irrational, unreasonable and unjustifiable on the evidence before it.
- [3] This application is one of a number coming before the Labour Court relying on the authority of **Hendricks v Overstrand Municipality & Another**¹ on the understanding that an employer such as SAPS may take its disciplinary decisions on review on any grounds permissible in law. The appeal decision in this case is worth recording in full as follows:

"This is an appeal against the finding and sanction of the appellants in terms of regulation 17(3) of the South African Police Service Disciplinary Regulations.

The appellant was charged with three counts of misconduct of which one was withdrawn. The two charges are contravening Regulation 20(z) by committing a common law or statutory offence of murder and Regulation 20(q) by contravening any prescribed Code of Conduct for the Service or Public Service in that he shot rounds(sic)

¹ (2015) 36 ILJ 163 (LAC)

Grounds of appeal

The employees' grounds of appeal are stated at length. They refer to both procedural and substantive issues.

Analysis of the evidence:

The appellant submitted that the purpose of firing the shots was to warn the suspect. He states that the other shot was fired by accident when his wrist was struck by an object which was thrown by the suspect. He also denies that the shots were fired in order to effect arrest.

The appellant further admitted to firing a shot at the suspect in private defence. The chairperson erred in not taking into consideration that a knife was found next to deceased's body.

Furthermore Cst Mzuzu also admitted that he fired warning shots. The ballistic expert's in his statement stated that it is not definite that the shot that killed the deceased came solely from the appellant's fire-arm. There is no clear causal connection between the conduct of the appellant and death of the deceased.

In terms of section 205 of the Constitution, 1996, the objects of the police are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

The appellants alleges that the chairperson was bias, after reading the transcript, it appears that the chairperson did not take into consideration the evidence of CSt Mzuzu and W/O April. Cst Mzuzu in his testimony alleges that the deceased was fighting, he further pointed out that the deceased threw objects towards them. He had a sharp object in his arm (page 48 par 20)

The appellant's version contains elements of private defence, he states that the deceased kept throwing objects at them even after being ordered to stop. The appellant states that the deceased jumped towards him and ignored the request

to stand still and that he noticed that he had a sharp object in his hand. He decided to fire a warning shot and thereafter he notices him running and he fell.

After reading the appeal and considering the facts I do not think that the employer has evidence which indicates that the appellant is the one who fired the fatal shots. The appellant indicated that he fired the shots in self -defence, the other colleague also admitted that he fired warning shots and was ordered to pay a fine of R500. The appellant must therefore be treated in the same manner as the co-accused. The appeal is therefore upheld.”

- [4] In this particular review application, the applicant takes issue with the following findings of the Appeals Authority:
- 4.1 That the disciplinary chairperson did not take into consideration the evidence of Mzuzu and April, and specifically Mzuzu's evidence that the deceased was fighting and throwing objects at the police members, and had a sharp object on his arm.
 - 4.2 That Caalsen's evidence contains elements of private defence which justified him shooting at the deceased, because of the following: the deceased continued to throw objects at the police even after being ordered to stop: the deceased jumped towards Caalsen and ignored the request to stand still, and Caalsen notices a sharp object in his hand; Caalsen fired a warning shot and thereafter notices the deceased running and he fell.
 - 4.3 That SAPS did not have evidence indicating that Caalsen is the one who fired the fatal shot; that Mzuzu also admitted that he fired warning shots, but was ordered to pay a fine of R599; that Caalsen must be treated in the same manner as Mzuzu.

[5] In respect of the finding in 4.1 above, the founding affidavit analyses the evidence contained in the transcript of the disciplinary enquiry in some detail. The applicant's conclusions in respect of the finding are that:

"Thus all the findings by the appeals authority in this paragraph are factually incorrect, and without basis, and his decision is therefore reviewable."

[6] In respect of the finding in 4.2 above, the evidence is again examined. The applicant submits in its founding papers at the outset of its analysis that:

"The appeals authority's conclusion that Caalsen's shooting was justified because the deceased was still throwing objects at the police members is not correct."

[7] On the finalisation of its analysis in respect of the finding in 4.2 above the founding affidavit contains the following submission:

"The appeals authority ignored all the above evidence, and gave no reasons for rejecting the disciplinary chairperson's findings. In this respect, the appeals authority decision was grossly irregular, irrational and arbitrary."

[8] Regarding the finding contained in 4.3 above, and highlighting certain evidence in the transcribed record before the appeals authority, the applicant submits in its founding papers that:

"The effect of the decision of the appeals authority is to ignore all the above evidence. In the circumstances, the appeals authority decision is unreasonable, irrational, arbitrary and grossly irregular."

Evaluation

[9] The authority relied on in this and other similar applications is that in **Hendricks v Overstrand Municipality & another (2015) 36 ILJ 163 (LAC)** in which Murphy AJA held that:

"[29] In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the

grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'."

[10] While this court's jurisprudence in reviews under section 145 of the LRA is substantive and has developed over a considerable period, section 158(1)(h) of the LRA requires a labour court litigant to branch out into less known and comfortable territory. The pleadings and submissions in such applications must provide the Court with an understanding of which ground of law an applicant relies. Is the decision sought to be reviewed administrative action which involves an exercise of public power and the application of PAJA? Or does an applicant rely on review of an exercise of public power in terms of the principle of legality?

[11] These questions are complex as the Constitutional Court in **Cape Town City v Aurecon (Pty) Ltd**² reflected stating that:

"An interesting question arose during the hearing: Is an administrator's right to review its own decision sourced in PAJA or the broader principle of legality? The position in our law on this question is presently uncertain."

[12] The footnote to the above comment bears recording:

" In *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014 (3) BCLR 333; [2013] ZACC 49) this court considered the nature of an application that was made in terms of s 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative acts of decision-making officials. In para 28 the majority found that the 'true nature of the application [was] one for judicial review under the principle of legality'. The minority, on the other hand, in para 92, found that 'the procedure for bringing [the] application to court was governed by the PAJA'. More generally, the interplay between review under PAJA and legality review has been extensively discussed and has, at times, given rise to differing interpretations in this court's jurisprudence. See the cases of *Pharmaceutical*

² 2017 (4) SA 223 (CC) at paragraph 24.

Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1); Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14); Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) (2008 (1) BCLR 1; [2007] ZACC 20); Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 293 (CC) (2010 (5) BCLR 391; [2010] ZACC 4).”

- [13] Whether the principle of legality or PAJA applies can have implications for the discretion to be exercised in applications for condonation³. Further, the Supreme Court of Appeal has recently held in a majority judgment, that if PAJA applies, a litigant does not have an option to bypass it and to make a legality challenge, and that to allow such bypass would lead to PAJA's disuse, which the drafters of s 33(3) of the Constitution could not have intended.⁴
- [14] The above jurisprudence is highlighted to underline the need for applications under section 158(1)(h) to grapple with the complexities involved, and for state entities who do not agree with the findings of their disciplinary chairpersons or appeal authorities, to grasp that a review under section 158(1)(h) cannot be successful merely because the decision in question is labelled ‘irrational’ or ‘unreasonable’. The application before me does not identify the grounds in law on which it is based but essentially differs with factual findings of the Appeal Authority and on that basis labels these as ‘irrational, unreasonable or irregular.’
- [15] A review will not be successful if it is brought because the State entity believes the decision was incorrect. In the Court’s view this is precisely the position in the papers before me as is reflected in paragraphs 3 - 9 above. The applicant’s

³ Are the prescripts of PAJA applicable or is the test a “unreasonable” period of delay; see CAPE TOWN CITY v AURECON SA (PTY) LTD 2017 (4) SA 223 (CC) at para 37

⁴ STATE INFORMATION TECHNOLOGY AGENCY SOC LTD v GIJIMA HOLDINGS (PTY) LTD 2017 (2) SA 63 (SCA) paras 27, 37-38.

papers are akin to those found in appeal proceedings. The distinction between review and appeal proceedings is one that must be preserved.⁵

[16] In view of the above the application for condonation and review stand to be dismissed and I make the following order:

Order

1. The application is dismissed.

H RABKIN-NAICKER

Judge of the Labour Court of South Africa

Appearances

For the Applicant: N. Mangcu-Lockwood instructed by the State Attorney

⁵ BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS 2004 (4) SA 490 (CC) at para 45

The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the F process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view G to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.