IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C35/2019

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE Applicant

and

TLOKOTSI LEPHEANA First Respondent

GILBERT ROLAND BOOYSEN N.O. Second Respondent

Date heard: 7 October 2020 on the papers

Delivered: 18 January 2021 by means of scanned email

JUDGMENT

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[1] This is an opposed application in terms of section 158(1)(h) of the LRA. The applicant seeks to review and set aside a decision by the second respondent (the Chairperson) handed down on 12 November 2019. The Chairperson found the first respondent not guilty of misconduct on account of the delay in instituting the disciplinary proceedings. There is also an unopposed application for condonation for the late filing of the review and of the supplementary affidavit. I am satisfied that the explanation for any delays is adequately detailed and that it is in the interests of justice that I decide the review on its merits.

[2] The second respondent is currently employed in the rank of Constable at Visible Policing Athlone SAPS. On the 8 January 2018 he was among three members of SAPS who were chasing a suspect in a case involving theft of copper. The

suspect was shot on the upper body and declared dead on the scene. The first respondent's version of events was that he discharged his firearm by firing three warning shots to the ground.

[3] The incident was investigated by the Independent Investigative Directorate (IPID) in terms of its enabling legislation (the IPID Act). Section 28 of the IPID Act authorizes IPID to investigate, *inter alia*, any deaths as a result of police action and was triggered by the incident.

[4] On the 25 June 2018, the IPID provided the applicant with its disciplinary recommendations in terms of section 30 of the IPID Act. The applicant was directed to institute disciplinary proceedings against the first respondent. On the next day, 26 June 2018 an investigative officer was appointed in terms of Regulation 8(1) of the SAPS Discipline Regulations. The appointment of the investigator stated that the investigation should be finalized within 30 calendar days "or as soon as practically possible thereafter".

[5] On the 7 August 2018, the investigating officer compiled the outcome and stated that he was of the opinion that the evidence indicated a *prima facie* case of misconduct. On the same day the Investigative Officer's superior certified that he was satisfied that "the alleged misconduct is of a serious nature and justified the holding of a disciplinary hearing". The first respondent was notified of the following charges of serious misconduct:

"by contravening Regulation 5(3)….of the South African Discipline Regulations, 2016, in that you allegedly committed misconduct in that on 2018-01-08 at 0.70 LOERIE ROAD ATHLONE that you contravened

Reg 5(3) (a) Fails to comply with, or contravenes an Act, regulation or legal obligation; that you shot and fatally wounded a suspect namely Nathi Tonjeni

Reg 5(3) (b) (i) Performs an act or fails to perform any act with the intention to cause harm or prejudice the interests of the service, be it financial or otherwise, that you shot a suspect running away from you that did not cause any imminent harm or danger or any grievous bodily harm to you

Regulation 3(3) (t) Conducts himself in an improper, disgraceful and unacceptable manner in that you failed to act in a responsible and controlled manner and also not utilizing the available resources responsibly, efficiently and effectively to maximum use

Reg 5 (3) (gg) Neglect his or her duty or performs his or her functions in an improper manner by fatally wounding the suspect.

[6] The Chairperson was appointed on 15 August 2018 to preside over the disciplinary proceedings. On 5 September 2018", the employer's representative tried to serve the written notice of the charges on the first respondent but he was on sick leave and the written notice to appear at the hearing was served on him on 20 September 2018.

[7] On 4 October the representatives of the parties met with the Chairperson and the parties agreed to set the matter down on 24 and 25 October 2018. At the hearing on 24 October 2018, the first respondent pleaded not guilty and raised a procedural challenge alleging that the applicant had delayed instituting disciplinary action given that the incident occurred on 08 January 2018. The hearing was postponed for argument on this point on 12 and 13 November 2018.

[8] The employer's representative announced at the hearing of 12 October that it would be proceeding with the main charge only which was framed as follows:

"In terms of section 40 of the South African Police Service Act, 1995 (Act No 68 of 1995), read with the South African Police Service Discipline Regulations, 2016, you are hereby charged with serious misconduct as provided for in regulation 5(3)(a) of the South African Police Regulations, 2016, in that on 8 January 2013 at 07:30 at Loerie Road in Athlone, you – Regulation 5 (3)(a), failed to comply with or contravened an Act, namely section 120 (3)(b) of the Firearm Control Act, Act 60 of 2000, in that you discharged or otherwise handled a firearm in a manner likely to injure or endanger the safety of a person, or with reckless disregard for the safety of a person, which resulted in the fatal shooting of Mr Nathi Tonjeni.

[9] Having heard the arguments from the parties on the issue of the delay in instituting the disciplinary hearing, the Chairperson issued the following Report:

"Introduction

On the 12th November 2018 in the case against no.7174801-6 Const T Lepheana, the employee was found not guilty.

The chairperson was Lt. Col. Booysen.

The employer representative was Captain Sias.

The employee representative was Mr.Mgoveni of Popcru.

Contents

1. The employee pleaded not guilty to one charge that was put before him by the ER.
2. Through his union representative he made certain submissions to his plea.
3. His submissions hovered over the delay by the state as employer.
4. The employee's submission was made in terms of SAPS Disciplinary Regulation 2016,
    1. Regulation 4(b) The principles which states as follows:
    2. Discipline must be applied in a prompt, fair, consistent and progressive manner; and
    3. 4(d)(ii) Are timeously informed of the allegations of misconduct against them.
    4. The employee's further submission rested also on Reg 8(1) and Reg 8(2)
    5. On the other hand, the ER argued against these submissions
    6. The ER contended that the criminal matter was investigated by Independent Police Investigative Directorate (IPID).

7. That the inherent investigation of a case of this nature is a timeous investigation and waiting on the outcome of reports such as post mortem and ballistic reports. Therefore the employer could not finalise the investigation in terms of the stipulated time periods as set out in the SAPS Disciplinary Regulation, 2016

8. In the deliberation, the chairman, concluded that the arguments of the ER did not speak to the charges put to the employee

9. That waiting for the report would not influence the outcome of the disciplinary charge.

10. That the employee did not have to wait for the IPID conclusion of the criminal case.

11. The Chairman found that the submission tendered by the employee far outweighs the arguments of the employer and in the interests of fairness found in favour of the employee, subsequently found him not guilty.

Comments

SAPS Disciplinary Regulation, 2016 is clear

1. Regulation 4(b) and 4(d)(ii) formed the basis for the chairman's decision.

2. In terms of regulation 4(m) the investigation must be done independently and separate from other investigations.

3. Therefore the employer did not have to wait for the outcome of the IPID investigation.

4. By doing so the employer disregarded the regulation 8(1) and regulation 8(2), therefore are not being fair towards the employee

5. Of all the disciplinary trials chaired by this chairman, this is the first time that a report is requested from the chair.

6. This request can be viewed as unduly influencing this chairman or other chairpersons in future trials to be biased towards the employer.

This trial was recorded and the recordings can be easily scrutinized.

Conclusion

The Appointed chairman of PC case no.523/2018, conduct was in line with regulation 4(1) of the SAPS Disciplinary regulation, 2016."

[10] A reading of the transcript of the disciplinary hearing reveals that the prejudice to the employee relied on was the extent of worry he had been subjected to in waiting to find out if he was going to be charged and the effect on his family life. The applicant's case is premised on the issue of the need for the IPID Report, given that there were three members chasing the suspect that had been killed and it thus had to wait for a ballistic and postmortem report before initiating the investigation and charges. This argument is summarized by the Chairperson but the actual argument presented before his summary is not before me as the recording of certain parts of the disciplinary was defective.

[11] The following part of the Chairperson's summing up bears recording:

"The employer rep stated that the investigation takes long, and I agree with him, it does take long, but if you look at the charges that is sent or put here before the Chairman, it goes about the safety. In essence it just goes about the safety regulations that was maybe not upheld or adhered to It doesn't go about the member being charged with murder of the member being charged with his action to, that went to the killings of this. It says here:

"Failed to comply with or contravenes an act, namely section 123(b) of the Firearms Control Act of 60 – that you discharged or otherwise handled."

So this is where we go. You handled the firearm and it discharged:

"In a manner likely to injure persons, or endanger the safety of people, or with a reckless disregard for the safety of a person."

And that is where now, how did …Constable Lepheyana handle the matter, handle that firearm at his given time?

So in other words we are not going to wait for a ballistic report, we're not going to wait for an inquest report. Sorry, the inquest report (indistinct – voice drops). A post mortem report, which do take long, and under those circumstances, if this charge had been that, then obviously it is reasonable to have to wait for that, but now we cannot wait for that. We must ascertain the actions of the member; was he negligent? Did he disregard the safety …(indistinct)? And I think if you have done that, then the investigation could have been ….fast-forwarded much quicker and referred to trial."

[12] The decision to limit the charge to reckless endangerment was as stated above only made on the 12 October 2018 before the Commissioner, and after receipt of the IPID report. The IPID Recommendations, which were contained in a Memorandum before the Chairperson included that the first respondent should be charged for murder.

[13] The applicant brings a legality review. It submits that the second respondent's decision ought to be supported by the evidence and information before him as well as the reasons given for it. The decision must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly given. It is submitted that the finding that there was no need for ballistics or post mortem reports because the First Respondent was not charged with murder does not meet this test.

[14] The ballistics report indicates the following:

14.1 Three cartridge cases were found at the scene of the incident, one of which was found next to the deceased, Mr Tonjeni;

14.2 That cartridge cases received in sealed evidence bags were fired in the same firearm;

14.3 Three 9mm parabellum calibre Vektor/LEW model Z88 compact semi-automatic pistols without magazines were examined (one of which was the firearm used by the First Respondent's on the date of the incident) and the mechanisms of the pistol were tested and found not to be self-loading, but not capable of discharging more than one shot with a single depression of the trigger.

[15] The post-mortem report indicates *inter alia* that the cause of death was unnatural and as a result of the gunshot wound of the abdomen. It is submitted on behalf of the applicant based on the information contained in the ballistic report and post-mortem reports, it is clear that the reports are inextricably linked to the charge of misconduct, in which it was alleged that the First Respondent failed to comply with section 120(3)(b) of the Firearms Control Act in that he **discharged or otherwise handled a firearm in a manner likely to injure or endanger the safety of a person, or with reckless disregard for the safety of a person, which resulted in the fatal shooting of Mr Tonjeni.**

[16] A further important challenge to the Chairperson's decision is that he did not take the provisions of the IPID Act into account. Section 28 of that Act authorizes the IPID to investigate a whole variety of matters involving the police and complaints including death as a result of police action. It obliges the SAPS to refer such matters to the IPID by means of notification within 24 hours of the event and SAPS members must provide their full cooperation to the IPID. It is submitted that once section 28 was triggered it was incumbent on t the IPID to conduct an investigation. Once completed the IPID is statutorily obliged to make recommendations to the National Commissioner or a Provincial Commissioner. In term of Section 30 of the IPID Act it is incumbent on the SAPS to "initiate disciplinary proceedings in terms of the recommendations made….."

[17] It is submitted by Advocate Matsala for the applicant that the Chairperson's finding that it was unnecessary to wait for the outcome of the IPID investigation failed to take into account the purpose for which the IPID was established, the nature and seriousness of the alleged misconduct as well as the provisions of the IPID Act. I must agree. Reliance by the Chairperson on Discipline Regulation 4(m) to support his decision does not meet the test of rationality in my view. That Regulation provides that:

"(m) the investigation into an alleged misconduct must be done independently and separate from any other investigation"

[17] The SAPS investigation was done separately on receipt of the obligatory recommendations provided to it by the IPID. It would defeat the purpose of

independent oversight over the sort of misconduct alleged in this case, for the investigations to be held concurrently.

[18] I have not had the benefit of heads of argument on behalf of the first respondent but have considered all the pleadings in the matter. The first respondent has submitted in those papers that the reasons for the delay were insufficient, and that IPIDs investigation could have run concurrently. On the issue of 'unfairness' to the first respondent given the delay in instituting the disciplinary hearing, the Constitutional Court has reiterated that delay per se does not constitute unfairness[1]:

"[70] The applicant calls in aid several cases. However, the delay per se does not constitute unfairness, but rather as Sachs J put it in Bothma, albeit in the context of a delay in bringing a private prosecution:

'[T]he delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining F whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.'

[71] This also accords with the general principles of how delay impacts the fairness of disciplinary proceedings. The question whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules. Whether the delay would impact negatively on the fairness of disciplinary proceedings would thus depend on the facts of each case.

[72] In Moroenyane, the Labour Court considered factors which this court initially propounded in Sanderson in the context of assessing delays in criminal prosecutions, and applied those factors to determine what constituted an unfair delay in the context of disciplinary proceedings. It held:

[1] Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others (2019) 40 ILJ 773 (CC)

‘(a) The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.

(b) The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.

(c) It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.

(d) Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.

(e) The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

(f) All the above considerations must be applied, not individually, but holistically.’ ”

[19] In the circumstances of the length of the delay in this case, and the reason therefor, as well as the nature of the alleged misconduct, and in applying the above principles, I find the submissions on behalf of the applicant to be compelling. The decision of the Chairperson does not stand scrutiny and falls to be set aside. There is no basis in law or equity to mulct the first respondent in costs.

[20] In the result, I make the following order:

Order

1. The decision of the Second Respondent of 12 November 2018 under PC case 523/18 is reviewed and set aside;

2. The charge of misconduct, in which it was alleged that the First Respondent failed to comply with section 120(3)(b) of the Firearms Control Act, must be set down for hearing de novo before a Chairperson other than the Second Respondent;

3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Applicant: R. Matsala instructed by the State Attorney

For the First Respondent: Pleadings drawn by M.M. Mitti Inc who withdrew as attorneys of record.