

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D1488/18

Reportable/Not Reportable

In the matter between:

SOUTH AFRICAN POLICE SERVICE

Applicant

and

SAFETY AND SECURITY SECTORAL  
BARGAINING COUNCIL

First Respondent

COMMISSIONER SABER A JAZBHAY

Second Respondent

SH SOMARU

Third Respondent

Heard: 2 February and 22 March 2022 (via Zoom)

Delivered: 12 May 2022 (Electronically)

JUDGMENT

WHITCHER J

[1] This is an application in terms of Section 145 of the Labour Relations Act, 1995 to review and set aside the Second Respondent's award<sup>1</sup> that the dismissal of Third Respondent ('the Respondent') was substantively unfair.

[2] At the time of his dismissal, the Respondent was a Sergeant stationed at the Ladysmith Police Station in the Collision Unit. On 9 January 2013, the

Respondent and Warrant Officer Gericke, also from the Collision Unit apprehended one Imtiaz Ahmed for alleged possession of illegal Dullah cigarettes and took him to the police station. They did not open a criminal docket and enter the cigarettes into the SAP 13 (the register of evidence required for a criminal trial), and they released Ahmed.

[3] Shortly thereafter they and Ahmed left the station office. In the car park they came across the Station Commander (General Chirwa) who had just knocked off and the Respondent and Chirwa briefly conversed. I mention this because what transpired in the car park is important.

[4] On 11 January 2013, following an alleged complaint from Ahmed, the Applicant conducted a search of the Respondent's premises for the cigarettes. They found none of the cigarettes. It transpired that the Respondent and Gericke had placed the cigarettes in the storeroom of the Collision Unit.

[5] The following day, the Respondent and Gericke opened a criminal docket against Ahmed and entered the cigarettes into the SAP 13. Ahmed was eventually convicted on their evidence.

[6] The Respondent and Gericke were charged with misconduct. In the charges, it is alleged that they failed to "work actively" to "prevent corruption", insofar as they failed to arrest and open a case against Ahmed and to immediately enter the cigarettes into the SAP 13 register.

[7] They were found guilty as charged, but Gericke was given a final written warning and a fine and the Respondent was dismissed. The chairperson reasoned that the Respondent had played the leading role in the misconduct, was 'dishonest' in his actions and, while he had over 20 years of service, Gericke had longer service. Moreover, unlike Gericke, he did not have a clean record. In this, the chairperson relied on offences which had occurred more than 15 years ago.

---

<sup>1</sup> Dated 3 May 2018

[8] The Respondent disputed the substantive fairness of his dismissal and the matter went to arbitration.

[9] At arbitration, the Respondent's explanation 'in the round' for his conduct - why he did not charge Ahmed and did not enter the cigarettes in the SAP 13 - was that when he and Gericke reached the police station with Ahmed at about 21h30, two things happened in close proximity.

[10] He was handed a call on Ahmed's cell phone. The person on the other end of the call "sounded like an Indian male" and identified himself as Colonel Moodley. He told the Respondent that he is part of the SAPS unit dealing with organised crime and that Ahmed was working with him on a sting operation.

[11] He requested the Respondent "to hand back the stuff to" Ahmed and let him go. The Respondent told him he could not do this and asked him to confirm in writing his credentials and that Ahmed was "working as an informer".

[12] The Respondent then decided that they would release Ahmed in the interim but keep the cigarettes in the storeroom of the Collision Unit. They also made copies of Ahmed's papers (ID, driver's license and so on) and recorded the events in their pocket books and the OB of the Collision Unit. The Respondent testified that the Collision Unit had its own OB book.

[13] In the midst of all of this, Gericke received an urgent call out to a collision in Rossboom so they left the station office, at the same time as Ahmed.

[14] In the car park they happened to meet the Station Commander (General Chirwa), who had just knocked off and in passing, Chirwa asked where they were off to. The Respondent replied that they were on their way to a collision in Rossboom. He denied Chirwa and Ahmed's version that Chirwa enquired about Ahmed - who was he and what had he done - and that he told Chirwa that Ahmed had been arrested for a driving offence and released with a warning.

[15] The Arbitrator found there had been no fair reason to dismiss the Respondent. In his view, the Respondent had provided a plausible and reasonable explanation for his conduct. He also preferred the Respondent's version of the conversation with Chirwa. He also found that there had been no fair reason to treat the Respondent less favourably than Gericke and impose different sanctions.

[16] In my view, the Arbitrator's approach to the matter and his finding(s) are unassailable according to the standard for review.

[17] I agree with Respondent's counsel that in the circumstances of this case, a reasonable decision-maker would have decided the issue of misconduct in the way the Arbitrator did, by asking: Did the Respondent have reason to believe that there was a possibility that Ahmed was a police informer?

[18] As to the Arbitrator's finding in this regard, the court notes the following.

[19] The Applicant claimed that there were material contradictions in the Respondent's version and it is inherently improbable. Not an iota of evidence with reference to the record was placed before this court to substantiate this claim.

[20] The telephone call was a matter of critical importance and Ahmed, the Applicant's only witness who was competent to testify about it, admitted under cross-examination that he received a call and that the caller asked to speak to the Respondent. The fact of the telephone call was thus common cause.

[21] The Respondent's evidence on the content of that call was not refuted with evidence to the contrary and not challenged in cross-examination. It would therefore have been reasonable for an arbitrator to apply the rule stated in *Small v Smith*.<sup>2</sup>

Once a witness's evidence, on a point in dispute, has been deliberately left

---

<sup>2</sup> 1954(3) 434 (SWA) at 438F-H.

unchallenged in cross examination, the party calling that witness is normally entitled to assume that, in the absence of notice to the contrary, such witness's testimony is accepted as correct.

[22] It appears from the record that Colonel Moodley is not a fictional character, but an SAPS employee. The Applicant could have, but chose not to call him. A contention to the effect that it is the Respondent who should have called him would have had no merit, if such had been made (but was not). The absence of corroboration is not a ground for rejecting the evidence of a good witness and in this case the Arbitrator found the Respondent to be a good witness.

[23] The Respondent's evidence on the PB and OB was challenged only to the extent of an unproven allegation that the OB used by the Respondent was not the "official" OB.

[24] On the Respondent's conversation with Chirwa, the Respondent demonstrated with detailed reference to the record that Chirwa and Ahmed materially contradicted each other. On Chirwa's evidence, Ahmed would not have heard the conversation and would, therefore, not be competent to testify. Ahmed would, therefore be lying, insofar as he attempted to contribute evidence on the topic.

[25] It is, as submitted by the Respondent, unlikely that the conversation would have made a strong impact on Chirwa's memory. It **was a** brief conversation that was, quite literally, made in passing, at the end of a working day. Furthermore, the conversation did not concern matters in which Chirwa was involved. A reasonable arbitrator would, therefore, not necessarily attach- decisive weight to Chirwa's evidence about the conversation.

[26] It is, as submitted by the Respondent, distinctly possible that Chirwa could, as the Respondent testified, have mixed up the information that he was told, and, therefore, assumed incorrectly that Ahmed had something to do with

Rossboom. Under cross-examination, the Respondent stated that he believed that Chirwa had misunderstood what was said during the conversation. There was no mention about Ahmed. There was, however, mention about an accident in Rossboom. On the other hand, it is inherently improbable that the Respondent would have told an obvious untruth in the presence of his superior, Gericke. It is furthermore, inherently unlikely that Gericke would not have been dismissed, if there was reason to believe that he was implicated in any dishonesty.

[27] Finally, the Applicant did not even address the Arbitrator's findings on consistency. This, alone, is a compelling reason why a reasonable decision maker might have found that the dismissal was unfair: the Respondent was not implicated to any greater extent than Gericke, who crucially was his senior at all material times. The service records and disciplinary records had no material consequence in the matter. Both had long service records and the prior misconduct relief on by the chairperson dated back 15 years.

### Costs

[28] The court's view is that special consideration do apply in this case, as submitted by the Respondent. The Respondent is a dismissed employee who did not have the financial support of a trade union and had to defend a carefully considered and reasonable arbitration award. Judging by the pleading of the Applicant, this matter ought to have been dismissed outright.

### Order

1. The review application is dismissed with costs.

**Benita Whitcher**

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv D Pillay

Instructed by State Attorney, KwaZulu-Natal

For the Third Respondent:

Adv DP Crampton

Instructed by Tomlinson Mnguni James  
Attorneys

[FaSeedat@justice.gov.za](mailto:FaSeedat@justice.gov.za)

[peterh@tmj.co.za](mailto:peterh@tmj.co.za) [loist@tmj.co.za](mailto:loist@tmj.co.za)