

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO **D433/03**

DATE HEARD 2004/04/26

DATE DELIVERED 2004/05/03

In the matter between:

F CASSIM

Applicant

and

SOUTH AFRICAN POLICE SERVICES

1st Respondent

MINISTER OF SAFETY AND SECURITY

2nd Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

3rd Respondent

**JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 3 MAY 2004**

MR A DE WET

DION RODER, HEUNIS & CHETTY

ADV. Z. P.

STATES ATTORNEY

JUDGMENT

3 MAY 2004

PILLAY J

[1] This is an urgent application to review, correct or set aside the award of the third respondent. The third respondent held, *inter alia*, that the first respondent's decision to suspend the applicant without pay was not an unfair labour practice. The application is also brought in terms of section 77(5) of the Basic Conditions of Employment Act No 75 of 1977 ("the BCEA").

[2] The applicant was suspended on 6 March 2003 on charges of corruption by the Area Commissioner. It is common cause that regulation 15(1)¹ of the Regulations for the South African Police Services Government Gazette No. 17682, 27 December 1996, permits the suspension of employees against whom disciplinary proceedings have been instituted by the National or Provincial Commissioner. It is also common cause that the powers of the National and Provincial Commissioners in terms of Regulation 15 (1) are delegable in terms of sub-regulation (8).²

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- 1 Regulation 15 (1) (a) The National or Provincial Commissioner may, after hearing an employee against whom disciplinary proceedings as contemplated in regulation 8 has been instituted -
- (i) temporarily transfer; or
 - (ii) suspend such employee on such conditions as determined by such Commissioner.
- (b) The National or a Provincial Commissioner only acts against an employee in accordance with paragraph (a) if:
- (i) there are clear grounds for the allegation or suspicion that the employee has committed serious misconduct; or
 - (ii) the circumstances are such that the employee should not be allowed to exercise his or her powers or to perform his or her duties and functions.
- 2 Regulation 15 (8) The relevant Commissioner may delegate to any member of the rank of Director, or equivalent or higher rank, any of the powers vested in him or her in terms of subregulation (1).

[3] Acting on the basis of such delegated power, it was submitted for the first respondent, the Area Commissioner suspended the applicant.

[4] However, the applicant disputed that the power to suspend the payment of his emoluments was also delegable. Such power, because of the serious economic impact it has on employees, was and remained vested in the National or Provincial Commissioner. The purported suspension of the applicant's emoluments was accordingly *ultra vires* the provisions of sub-regulation (6)3, so it is submitted for the applicant.

[5] For the first respondent it was submitted that any powers of the National or Provincial Commissioner were delegable in terms of section 154 of the Police Service Act No 68 of 1995 ("SAPSA"). The delegation of the power to the Area Commissioner to suspend the payment of the applicant's emoluments was

3 Sub-regulation (6) An employee who has been suspended, shall in respect of the period of his or her suspension, unless specifically otherwise stipulated, be entitled to the salary, wages, allowances, privileges or benefits to which he or she is under normal circumstances as an employee entitled: Provided that the National or Provincial Commissioner may from time to time or any stage during the suspension of an employee, in his or her discretion, after hearing the employee, direct that the suspension or further period of suspension of such an employee be without any or a portion of his or her salary, wages, allowances, privileges or benefits.

4 Section 15 Delegation
(1)(a) Subject to section 15 of the Exchequer Act, 1975 (Act 66 of 1975), any power conferred on the National or Provincial Commissioner by this act or any other law, excluding the power contemplated in section 13 (7)(a), may be delegated in writing by any such Commissioner to any member or other person in the employment of the Service, or a board or body established by or under this Act or a law referred to in section 217 (3) of the Constitution, who or which shall exercise such power subject to the directions of the Commissioner concerned.

(b) Paragraph (a) shall apply *mutatis mutandis* in respect of any power delegated by the National Commissioner to a Provincial Commissioner under that paragraph.

(2) The delegation of any power by the National or Provincial Commissioner under subsection (1) may be withdrawn by such a Commissioner and any decision taken by anyone under such delegated power may be withdrawn or amended by such Commissioner, and shall, until it is so withdrawn or amended, be deemed to have been taken by the National or Provincial Commissioner concerned: Provided that any such withdrawal or amendment shall not affect any right, privilege, obligation or liability acquired, accrued or incurred as a result of such decision.

effected in terms of Consolidated Notice 11 of 1999. This notice amended regulation 15(6). The first respondent also relied on Annexure SAPS6 attached to the heads of argument filed on its behalf. As there had been a valid delegation to the Area Commissioner, the suspension without emoluments was not *ultra vires*, so it was submitted for the first respondent.

[6] The first respondent's representative handed up from the bar section 15 of the SAPSA, SAPS6 and Consolidated Notice 14 of 2000. SAPS6 was a photocopy of a copy of an unsigned letter purportedly issued by the National Commissioner. It was also not on the official letterhead of the first respondent. It was addressed to all Provincial and Divisional Commissioners. The purpose of the letter was to draw attention to the unacceptable situation regarding the suspension with emoluments of a large number of police officers. It called for a review of the terms of their suspension. It also contained a directive that in future all persons would be suspended without emoluments.

[7] Consolidated Notice 14 of 2000 was a computer print-out without any marking that it was an official notice. At the bottom of this one-page document there appeared to be an explanation about a delegation of powers contained in sub-regulation 6. Despite the Court's repeated requests for clarification of the status of these documents, the first respondent's representative could not assist the Court. Consolidation Notice 11 of 1999, which was specifically relied on by the first respondent, was not made available to the Court initially.

[8] If these documents were subordinate legislation, it would have been necessary to determine how they ranked in relation to the regulations. Given the

importance of the matter for the sector, the Court stood the matter down until the end of the week to give the first respondent's representative an opportunity to clarify what the legal basis was for the delegation of the suspension of the applicant's emoluments. The Court also directed both parties to prepare supplementary heads on whether sub-regulation (8) was *ultra vires* the SAPSA.

[9] When the matter resumed only Mr *de Wet* had prepared heads on the question of *ultra vires* of sub-regulation (8). Counsel for the first respondent did not do so. It transpired during the course of her address that she abandoned her previous argument and was no longer relying on section 15(1) of the SAPSA as authority for the delegation. Instead, she was relying on an interpretation of regulation 15(1) *per se* as authority for the delegation of the power to suspend the payment of emoluments to the Area Commissioner. She relied on the unreported decision of *Folata v Minister of Safety and Security and Others*, case No 11367/00. Whether sub-regulation 8 was *ultra vires* was not an issue for the first respondent. Accordingly, she did not submit any heads in that regard.

[10] This sudden change of tack and the failure of counsel for first respondent to submit argument on a point of law was most unhelpful. Notwithstanding the first respondent's stance, the Court was nevertheless obliged to enquire whether sub-regulation (8) is *ultra vires* section 15(1) of the SAPSA.

[11] Section 15 is an enabling provision which, subject to certain exceptions, permits any power conferred on the National or Provincial Commissioner to be delegated. Regulation 15(8) provides specifically for the delegation of only the powers vested in the Commissioners in terms of regulation 15(1). The powers in

regulation 15(6) are therefore not delegable in terms of the regulations. On the face of it, it appears that sub-regulation (8) clashes with section 15 because it limits the wide powers conferred by the SAPSA on the National and Provincial Commissioners to delegate "any" power to Area Commissioners.

[12] However, having scrutinised the SAPSA more closely, it emerges that the power to discipline and suspend is prescribed not by the SAPSA but by regulation made by the Minister (sections 40 and 24(f) and (g) of the SAPSA). As the power to suspend was not conferred by the SAPSA on the National or Provincial Commissioner, sub-regulation (8), which limits the delegation to sub-regulation (1) only is not in conflict with section 15(1) of the SAPSA.

[13] The first respondent's new argument was: Regulation 15(1) permitted the suspension of employees on such conditions as determined by the National or Provincial Commissioners. Since it was delegable to an Area Commissioner in terms of sub-regulation (8), the power to determine the conditions was also delegable to the Area Commissioner. The conditions could include the suspension of emoluments. Furthermore, the power to impose conditions of suspension were delegable if the delegation was simultaneous with issuing the notice of suspension of employment. Such conditions of suspension were imposed after hearing the applicant.

[14] The applicant's own evidence was that the Area Commissioner viewed his representations and then concluded that he should be suspended without emoluments with effect from 6 March 2003.⁵ So it is submitted for the first respondent.

⁵ Paragraph 13 of the founding affidavit.

[15] The applicant persisted with its submission that the omission of sub-regulation (6) from sub-regulation (8) meant that only the powers in sub-regulation (1) were delegable. In so far as the first respondent's new argument might have any validity, it was submitted that the applicant had not been given a hearing before his emoluments were suspended. Sub-regulations (2) and (3), which deal with the situation where an employee is suspended without a hearing, vest certain powers in the National or Provincial Commissioners. These powers are also not delegable in terms of sub-regulation (8). Any representation the applicant made had to be considered by the National or Provincial Commissioner, so it was submitted for the applicant.

[16] The first respondent's counsel advanced no reasons as to why the Minister would permit the delegation of powers to impose conditions, including the suspension of emoluments, to the Area Commissioner if such suspension occurred simultaneously with the suspension from employment and not permit such delegation when the suspension of emoluments is considered in terms of sub-regulations (3)(a) or (6). I cannot see any logic for such a differentiation.

[17] Moreover, sub-regulation (6) begins on the premise that the suspension from employment will be with emoluments unless otherwise stipulated. The norm in the police service, as in the private sector, is therefore to suspend with emoluments. Suspension without emoluments is the exception. If this situation has to be changed, then the Minister will have to amend the regulations. It cannot be changed by the National or Provincial Commissioners.

[18] It is debatable whether the conditions imposed in sub-regulation (1) include

suspension without emoluments. I do not have to decide that issue. However, in my opinion regulation 15(1) must be interpreted restrictively so as not to deprive individuals of fundamental rights. To suspend the payment of an employees emoluments could deprive him of his dignity, especially if his alleged misconduct has not been proved. Sub-regulation 6 provides specifically for the circumstances in which emoluments may be suspended. That is the procedure the first respondent should follow.

[19] The facts are that the applicant received a notice advising him that he was "deemed to be suspended as from 6 March 2003". The notice does not stipulate any conditions. The first respondent admits that the notice was silent about the applicant's emoluments. The applicant was then given an opportunity to make representations on 14 March 2003 regarding his "possible suspension to produce any reasons why (he) should not be suspended".

[20] The first respondent admits that the applicant was provisionally suspended with immediate effect on 6 March 2003. However, testimony for the first respondent is that the applicant was summoned to a disciplinary inquiry on 14 March 2003. There is no evidence of a notice to attend a disciplinary inquiry on that day. Annexure FC2 to the founding affidavit is evidence that he made written representations as to why he should not be suspended on 14 March 2003. Notice of the appointment of the officials to participate in the inquiry⁶ was only issued on 7 May 2003. On the first respondent's own version the disciplinary inquiry was scheduled for 14 July 2003.

⁶Annexure FC5

[21] Also on the first respondent's version, the decision to suspend the applicant without emoluments was taken after considering his representations and personal circumstances on 14 March 2003.⁷

[22] I accordingly find that the applicant was suspended on 6 March 2003 without a hearing. His suspension on that day was also without conditions. If there were any conditions they would have been evident from the suspension notice. After he was given a hearing on 14 March 2003 his emoluments were suspended retrospectively from 6 March 2003. The applicant's suspension from employment and the suspension of his emoluments as a condition did not occur simultaneously. Therefore, even if there were any merit in the submission that the suspensions should occur simultaneously it is not supported by the facts.

[23] Although the suspension notice states that the suspension was in terms of regulation 15(1)(a), all the evidence points to it having been issued in terms of sub-regulations (2) and (3)(a). Sub-regulation (1)(a) provides for suspension after hearing an employee. Sub-regulation (3)(a) provides for a temporary suspension without a hearing. In those circumstances an employee must be given notice within five days of the suspension of the reasons therefor and be advised that he may, within seven days, make representations to the National or Provincial Commissioner about his temporary suspension or the conditions thereof.

[24] This is precisely what happened to the applicant. His notice of appeal specifically states that it was in terms of sub-regulation (3).

[25] My finding that the suspension was not in terms of sub-regulation (1)(a) but

⁷Paragraph 7 of the answering affidavit.

sub-regulations (2) and (3)(a) is dispositive of the entire matter. The powers in sub-regulation 2 and 3(a) are not delegable. Only the powers in sub-regulation (1) are delegable in terms of sub-regulation 8. Counsel for the first respondent did not contend otherwise.

[26] The first respondent's opposition having been based on the suspension being effected in terms of sub-regulation (1)(a) must therefore fail.

[27] The arbitrator gave no reasons for his finding that the Area Commissioner had the delegated authority to suspend the applicant without pay. However, it would appear that the applicant's case before the arbitrator was based on the suspension of emoluments having been effected purportedly in terms of sub-regulation (6). That was also the applicant's initial argument before me until the first respondent changed the basis of its opposition. Even if the arbitrator was confronted with an analysis of sub-regulation (6) and not sub-regulations (2) and (3)(a), the result should have been the same: Sub-regulation (8) does not provide for the delegation of powers in sub-regulation (6). (*Nkulande and Others v Assistant Commissioner Pretorius NO and Another* (unreported case No 97/034888 per SOUTHWOOD)) The arbitrator's failure to apply his mind sufficiently to the interpretation of the regulations amounts to a gross irregularity in the circumstances. Moreover, the Court has original jurisdiction to determine the matter finally in terms of section 77(5) of the BCEA.

[28] I grant an order in the following terms:

1. The award of the third respondent is reviewed and set aside.

2. The first respondent is directed to reinstate the full emoluments of the applicant whilst on suspension with effect from the date of his suspension, i.e. 6 March 2003.

3. The first respondent to pay the applicant's costs.

Judge Pillay, D

08 June 2004