IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

NOT REPORTABLE

CASE NUMBER: C177/2008

In the matter between:

MYERS, IVAN — Applicant

and

NATIONAL COMMISSIONER, SAPS — First Respondent

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL — Second Respondent

DE KOCK, C — Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application by the first respondent for leave to appeal against

a decision of this Court dated 12 January 2009.

[2] Having read written submissions on behalf of both parties (that is, the first respondent who is now the applicant, on the one hand, and the applicant, now the respondent in this application, on the other) I am satisfied that there is no reasonable prospect that another Court may come to a different conclusion on the facts of this case than that reached by this Court.

[3] The first respondent's grounds of review are no different from the arguments advanced on his behalf at the hearing of the main application. On those arguments, this Court remains satisfied that the third respondent's award falls to be set aside and that this matter should urgently be remitted to the second respondent for a de novo hearing before a different commissioner.

[4] For the sake of convenience I repeat the salient facts as well as the bases underpinning this Court's finding in this regard. The third respondent found that the applicant's dismissal had been procedurally and substantively fair and the applicant sought the substitution of that finding with an order reinstating him to the position he held at the time of dismissal with retrospective effect. To that end, he invoked all four

review grounds for which section 145(2) of the Labour Relations Act, 66 of 1995 ("the LRA") provides. This Court found that the appropriate order would be to remit the matter to the second respondent for *de novo* hearing for reasons that appear below.

Common Cause Facts

[5] The applicant had 28 years unbroken service in the South African Police Service ("the SAPS").

[6] He was 6 years away from becoming eligible for early retirement when he was dismissed.

[7] He was dismissed on 12 July 2007 for prejudicing the SAPS by submitting an article to a Cape Town daily newspaper and a weekend newspaper concerning the condition of police dogs (malnutrition) at the Maitland Dog Unit without the permission of his commander or media liaison official and in breach of the SAPS standing orders and regulations.

[8] At the time of publication of the articles the applicant held the rank of Superintendent in the SAPS and was employed as Unit Commander of

the Maitland Dog Unit.

[9] The issue of the police dogs' malnutrition was raised by the South African Police Union ("SAPU") with the SAPS top management in February 2007 after some members of SAPU who worked at the Maitland Dog Unit approached the union about the problem.

[10] SAPU then invited the applicant to a meeting at its offices since he was Commander of that Unit. The purpose of the meeting seems to have been to ascertain from the applicant the reasons for this development. As the applicant was on leave at that time, he felt he was in no position to comment but rather to find out from management.

[11] As a journalist from *Die Burger* newspaper was present at that meeting, the applicant contacted the SAPS provincial commissioner to alert him that the media "was on to the story about the dogs" and that he should take steps to prevent the story as that would prejudice the SAPS. Adverse media reports about the dogs appeared in any event the following day, one of them saying the dogs were eating their own excrement.

[12] On 16 February 2007 members of the public expressed their outrage at the condition of the dogs.

[13] As Commander of the Unit the applicant interrupted his leave on 21 February 2007 to "take control of the situation" as he felt he was "duty bound to do". There he found the chief veterinarian of the SAPS, the SAPS media liaison officer and two senior SARS officials. The chief veterinarian told him they were about to hold a meeting on the issue of the dogs. When he asked to be part of the meeting his request was denied.

[14] Two days later the applicant sent an electronic mail to *Die Burger* newspaper in which he expresses his view candidly about the condition of the dogs and what causes it. An article based on that electronic mail appeared on 26 February 2007 in *Die Burger*. There is no doubt that it does not portray the SAPS in a good light.

[15] Four months later, on 18 June 2007, the applicant was charged with "prejudic[ing] the administration, discipline or efficiency of a Department, Office or Institution of the State" by "making a Media communication". This was the main charge. In the alternative, he was charged with "fail[ing] to carry out a lawful order or routine instruction without just or reasonable cause, namely S.O. (General) 156 by making a Media communication". The main charge was founded on regulation 20(f) of the SAPS Discipline Regulations, while the alternative charge

derives from regulation 20(i) of those regulations.

[16] At the conclusion of the disciplinary hearing the applicant was found guilty and the sanction imposed was that of dismissal and a R500 fine.

[17] On appeal, the sanction of a fine was set aside but the dismissal was confirmed.

[18] He then referred the matter to con/arb under the auspices of the second respondent. Conciliation failed and the third respondent presided over the arbitration at the conclusion of which he found the applicant's dismissal to have been substantively fair.

[19] It had been agreed between the parties that no oral evidence would be led at the arbitration but that the record of the disciplinary proceedings would serve as the only material to which the third respondent should have regard. In addition, closing arguments would be made by the parties' respective representatives. That is what happened and so procedural unfairness was not at issue.

The Bases for the Court's Finding

[20] This Court found that this matter must be remitted to the second respondent for urgent de novo consideration by a different

commissioner. The bases for that finding were these.

[21] The applicant invoked all four grounds of review for which the LRA makes provision in section 145(2).

[22] On a *conspectus* of relevant case law, however, the permissible grounds of review seem wider than those set out in section 145(2) of the LRA and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC)).

[23] More recently, the Constitutional Court has pronounced that "the better approach" is to enquire whether the decision reached by the

commissioner is one that a reasonable decision-maker (presumably faced with the same evidence) could not reach (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), at paragraph [110]).

[24] In my respectful view the "constitutional standard" now propounded by the Constitutional Court in *Sidumo* bears a striking resemblance to the test usually applied in applications for leave to appeal, the only difference being the substitution of "a reasonable decision-maker" for the higher court or another court. The danger is thus the blurring of the line between an appeal on the merits, on the one hand, and a review based on the rationality and justifiability of the decision when regard is had to the evidence advanced on the other. To my mind, an irrational and/or unjustifiable decision must *pari passu* be unreasonable. It is hoped that the reasonableness standard now propounded by the Constitutional Court will in future be tightened to ensure there is no confusion as regards the extent to which reasonableness of the commissioner's decision may be tested.

[25] It seems to me the proper approach is to ask not whether the commissioner's decision is one that a reasonable court (or reasonable decision-maker) could not reach but rather whether, in light of the

evidence advanced and having due regard to considerations of equity (after all, the Labour Court is primarily an equity court), the commissioner's decision is one that can properly be said to be reasonable. Thus phrased, the standard avoids a review enquiry that leads inexorably to entanglements in appeal territory.

[26] This in my respectful view is not so much an exercise in substituting this court's own standard for that of the Constitutional Court, as it is an attempt at giving the constitutional standard a construction that eschews the blurring of the line between reviews and appeals.

[27] This Court has found that the decision of the third respondent is reviewable on the following grounds.

[28] In his award the third respondent moves emphatically from the premise that the applicant had been found guilty on the main charge, even though he appreciates that the chairperson of the disciplinary hearing confused the two charges by tampering the one with elements of the other.

[29] This the third respondent dismisses as a mere technicality that should not affect the fact that the applicant had been charged with both the

main and the alternative charge.

[30] Relying on an earlier decision of this court, the third respondent then takes the view (correctly) that arbitration proceedings are a *de novo* consideration of the issue in question, and that he is not bound by the fact that the charge sheet had been incorrectly drawn up. He then proceeds to consider both charges in determining the fairness or otherwise of the applicant's dismissal.

[31] There are a number of fundamental misdirections in the third respondent's approach. First, the third respondent was not confronted with a charge sheet that had been incorrectly drawn up. He was confronted with a higgledy-piggledy finding of guilt which confused the one charge with another. The result is that it is not clear on which of the two charges the applicant was found guilty. A perusal of the transcribed record of the disciplinary hearing (page 245), a written notification of the sanction in terms of regulation 16(1) dated 16 July 2007, and the appeal decision dated 14 December 2007 demonstrates the confusion as regards the charge on which the applicant was found guilty.

[32] Second, the precise charge on which the applicant was found guilty at the disciplinary hearing is important for purposes of considering an appropriate sanction. Different considerations may apply in determining

an appropriate sanction for the main charge in contradistinction to the alternative charge. For example, article 7 of Schedule 8 to the LRA (Code of Good Practice) applies in relation to the alternative charge for purposes of finding an appropriate sanction, the "rule or standard regulating conduct in the workplace" being Standard Order (general) 156. Not so in relation to the main charge which seems suited more to the application of articles 3(4), 3(5) and 3(6) of the Code of Good Practice in the absence of a rule or standard regulating conduct in the workplace. Thus, for purposes of finding an appropriate sanction, the two charges are not "very much intertwined" as the third respondent suggests.

[33] Third, in determining the appropriate sanction in relation to the main charge, it was imperative for the third respondent to ascertain whether the applicant had previously been disciplined on the same charge (see article 3(4) of the Code of Good Practice), and consider the seriousness of his conduct. This in my view was something that (in the language of the Constitutional Court in *Sidumo*) a reasonable decision-maker could have done. The third respondent did neither. Instead he found the seriousness of the misconduct in "the applicant's position within the SAPS" and in his "long service record within the SAPS", not in the nature of the misconduct and the adverse effect it may have on SAPS. This is a serious misdirection in my view. Long service, it seems to me,

tends to be a mitigating factor and not a factor justifying the ultimate sanction.

[34] Fourth, at the disciplinary hearing, Commissioner Strydom gave evidence of three other occasions when the applicant was found guilty of misconduct. The first was in 1984 when the applicant skipped a red traffic light. The second was in 2002 when the applicant was again charged with misconduct involving "racial undertone" for which he received a suspended sanction of dismissal. The third was in January 2007 when the applicant was charged with "gross insubordination" for which he again received a suspended sentence. *Ex facie* the award, it does not seem the third respondent considered any of these previous infractions and sanctions in arriving at his decision that the applicant's dismissal was fair. It is thus difficult to find justification for the appropriateness of the sanction of dismissal.

[35] Fifth, in finding that the applicant's conduct evinced "a clear disregard of authority" the third respondent seems to have taken to heart the characterisation of the applicant's conduct by the chairperson of the disciplinary hearing as demonstrative of "insolence . . . impudence, cheekiness, disrespect and rudeness". But the applicant was not charged under regulation 20(s) which deals with insolence and disrespect. This was yet another serious misdirection.

[36] Sixth, although the third respondent is with respect correct when he says arbitration proceedings are a *de novo* consideration of the issue at hand, the one over which he presided was somewhat limited in its breadth of evidential consideration by the fact that the parties had agreed to confine themselves to the record of the disciplinary hearing. This was in my view not an appropriate case for that because the evidence on the applicant's previous infractions (for one thing) is rather imprecise and so it would have been impossible to ascertain whether he had previously been found guilty of the charges now preferred against him so that an appropriate sanction could then be determined.

[37] Seventh, having been so straitjacketed, the third respondent was not at liberty to speculate on the precise charge on which the applicant was found guilty when the record seems to suggest, at best, that he was found guilty on the charge other than that on which the third respondent says he was. In my view, the record is rather higgledy-piggledy in this regard.

[38] For that reason, it would not be appropriate in the circumstances of this case either to substitute my own finding as the applicant will have me do, or remit the matter to the second respondent for reconsideration in the same manner as the third respondent did. Clear evidence needs

to be led in this case and a clear finding made on that evidence. This is a relatively young matter.

[39] Nothing that has been advanced on behalf of the first respondent in written submissions persuades this Court that another court may come to a different conclusion on the facts of this case.

[40] In the result, the application for leave to appeal cannot succeed.

_____

Ngalwana AJ

Appearances

For the applicant:	*Mr JA Nortje*
Instructed by:	*Wynand Du Plessis Attorneys*
For the 1st respondent:	*Mr E De Villiers-Jansen*
Instructed by:	*State Attorney, Cape Town*
Date of judgment:	*20 April 2009*