



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case No: JA57/22**

In the matter between:

WILLIAM MARKET MABUNDA

Appellant

and

SOUTH AFRICAN POLICE SERVICES

First Respondent

**SAFETY & SECURITY SECTORAL BARGAINING
COUNCIL**

Second Respondent

MARGARETH SMITH N.O.

Third Respondent

Heard: 16 November 2023

Delivered: 02 May 2024

Coram: Waglay JP, et Malindi and Savage AJJA

JUDGMENT

MALINDI AJA

Introduction

[1] The appellant for rescission, Mr William Market Mabunda (Mabunda), was charged by the first respondent, the South African Police Service (SAPS) with four charges, primarily relating to his disposal or release of a motor vehicle which was under the SAPS's custody as an impounded vehicle. It is alleged that Mr

Mabunda, who was then a Warrant Officer in the SAPS, gave instructions to one Mr Joseph C Mabena (Mabena), a tow truck driver, (as an alleged representative of the owner) to tow it to Mamelodi West. It is alleged that Mr Mabunda fraudulently completed a false vehicle disposal form in terms of SAP 430i to the effect that the investigation giving rise to the vehicle's impoundment was complete and that it may be returned to its lawful owner. It is alleged that the vehicle was to be delivered at Mr Mabunda's stepfather's place although it was allegedly bought by his brother, Mr Aubrey Mabunda (Aubrey).

[2] Then Warrant Officer Suzman Solly Ngobeni, and now Captain in the SAPS (Capt. Ngobeni) was the investigating officer in this matter. Mr Mabunda released the vehicle in his absence.

[3] The offence took place on 16 November 2007. An internal disciplinary action was instituted in 2009 and Mr Mabunda was found guilty and dismissed on 31 March 2009. He was aggrieved by the outcome and referred the dispute to arbitration under the auspices of the Safety and Security Sectoral Bargaining Council (SSSBC), the arbitration proceedings were held on 9 and 10 November 2011. The Bargaining Council award (Award) was delivered on 28 November 2011 per Margaret Smith, but received by Mr Mabunda on 5 December 2011. Mr Mabunda's dismissal was held to be procedurally and substantively fair. Aggrieved by the Award, Mr Mabunda launched an application to review and set aside the Award to the Labour Court on 17 January 2012. The review was dismissed in his absence by the Honourable Justice Van Niekerk on 31 August 2016. Mr Mabunda thereafter brought an application to rescind the Labour Court judgment before the Honourable Justice Mahosi and the application was dismissed on 2 September 2021.

[4] On 25 May 2022, Mr Mabunda petitioned the Judge President for leave to appeal the judgment of Mahosi J and leave was granted on 22 August 2022.

Background and salient facts

[5] Mabunda worked at the Vehicle Investigation Services (VIS) in Pretoria, the vehicle theft unit. Then Warrant Officer, and now Lieutenant Maluleka, had seized/impounded the vehicle while it was in a Ms Vovo's possession. No further

particulars relating to this Ms Vovo are available, although Mr Mabunda alleges that he assisted her in reclaiming the vehicle that she had bought and therefore was the lawful owner thereof.

- [6] At the arbitration, Capt. Ngobeni testified that he had been investigating the case for a long time, estimated to be a year. He learnt, after being unavailable for a long period on a separate covert investigation, that the vehicle had been handed over to a person who had come to collect it. When he returned from this covert operation, he reported three cars missing from his list of impounded vehicles including the Mazda 323, in terms of National Instruction 1 of 1997 (Order 1 of 1997). He compiled the report in anticipation of an audit to be conducted by the inspectorate on impounded vehicles.
- [7] The vehicle disposal order form reflected Mr Mabunda as the investigating officer.
- [8] Mr Mabunda contended that he acted properly because if an investigating officer in a matter is not around, other officers may assist the person making inquiries regarding their impounded property.
- [9] It is common cause that the relevant vehicle disposal form SAP 430i provides for the release of the vehicle to the lawful owner or person authorised by the lawful owner.
- [10] The SAP 430i lists Mr Mabena as the owner who towed the vehicle to Mr Mabunda's stepfather's place (Mr Mabunda Snr). Mr Mabunda's version is that the vehicle was bought by his brother, Aubrey, from Ms Vovo. In other words, Aubrey had become the new owner of the vehicle after buying it from Ms Vovo. Aubrey authorised Mr Mabena to collect the vehicle from the pound. Therefore, Mr Mabena was authorised by the lawful owner to collect the vehicle.
- [11] As a result of Capt. Ngobeni reporting the vehicle as missing and the discovery that Mr Mabunda was instrumental in its release from the pound, Captain BJ Van der Westhuissen (Capt. Van der Westhuissen), a VIS commander, was appointed to conduct a full investigation into the matter.

- [12] Capt. Van der Westhuissen testified that when he was taken to the address where Mr Mabena delivered the vehicle (at Mr Mabunda's stepfather's place), the vehicle could not be found although Mr Mabunda Snr said it was parked in the garage. Mabunda Snr said it must have been removed overnight.
- [13] Capt. Van der Westhuissen's further investigations revealed that the lawful owner of the vehicle was in fact Mr Isaac Malete (Mr Malete), according to a certificate of registration, who was in the process of selling the car to a Mr JP Malete.
- [14] During Capt. Van der Westhuissen's investigation, it was discovered that no ownership of any vehicle under Aubrey's name was found in terms of the National Traffic Information System (eNatis). This is despite Mr Mabunda's evidence that Aubrey ran a taxi service and had bought the vehicle to enlist it in his business.
- [15] According to Capt. Van der Westhuissen, Mr Mabena did not present the right documents for the release of the vehicle from the pound. The correct documents would have been a vehicle registration certificate and the owner's identity document (ID) if collected by the owner or; if collected by a representative of the owner, the owner's permission letter that a representative collects the vehicle, the vehicle registration certificate and copies of the owner's and representative's IDs. In short: the registration certificate, permission letter and ID of the owner are required if the vehicle is to be handed over to a person other than the owner.
- [16] At the time that Capt. Van der Westhuissen testified the vehicle was still missing, and it was not at Aubrey's house.

Assessment of the full evidence

- [17] In view of the grounds of review put forward by the appellant, it is convenient to deal with the assessment of the totality of the evidence in the arbitration immediately.
- [18] Mr Mabunda contends that it is practice that if the investigating officer is not available, especially on a consistent basis, another officer may attend to the

disposal of a vehicle if it is claimed by the lawful owner. In this regard, the evidence of how he took over this matter was ventilated in the arbitration.

[19] The version that was put to Capt. Van der Westhuisen was that Mr Mabunda had never said that Mr Mabena was the lawful owner of the vehicle but that his brother bought the vehicle from Ms Vovo. Ms Vovo had in turn bought the vehicle from its previous owner. Ms Vovo was in possession of the vehicle when it was seized by Lt Maluleke. Aubrey, as the new owner, gave a permission letter authorising Mr Mabena to collect the vehicle from the pound. Mr Mabena collected the vehicle and delivered it at Mr Mabunda Snr's place.

[20] Capt. Ngobeni testified at the arbitration proceedings held on 9 and 10 November 2011 that only the docket enquiry officer may authorise the release of the vehicle, alternatively, may authorise another person to do so if the investigating officer is satisfied with the correct ownership. In other words, it has to be confirmed with the enquiry officer if the vehicle may be released in their absence.

[21] However, Capt. Ngobeni was not aware of the disposal of the vehicle either on the day it was done nor for many months thereafter until the owner arrived at his office enquiring after his vehicle. The lawful owner of the vehicle, Mr Malete claimed his impounded vehicle some seven months later after it was released by Mr Mabunda. This alerted the investigating officer, Capt. Ngobeni, to the vehicle's disappearance without his authority, he testified.

[22] When Mr Malete came to collect his car, Capt. Ngobeni completed the SAP430i on 10 June 2008 and handed everything to Mr Malete to collect his car at the pound. While Capt. Ngobeni was driving out of the police station on his way to the Eastern Cape, Mr Malete called to inform him that the car was not found in the pound. He returned to the police station and verified that the vehicle was not there. There was also no indication in his file that the car had been disposed of previously. This version contradicts that of Mr Mabunda who testified that he called Capt. Ngobeni on the day that Ms Vovo first came to his office and that Capt. Ngobeni had given him permission to take over the investigation.

[23] Furthermore, Mr Mabunda's assertion that he had taken over the investigation and that it had taken him three weeks to complete it is contradicted by Capt.

Ngobeni's version that he had completed the investigation, that he had called Mr Malete several times and had even left notice at Mr Malete's house to collect the car as it had been cleared as lawfully his.

[24] Mr Mabunda tendered evidence that clearly contradicts his version that he had contacted Capt. Ngobeni when he testified that, because of Ngobeni being frequently unavailable, he took over as investigating officer and that there was no need to obtain prior permission to do this from Capt. Ngobeni. He testified further that he put his details as investigating officer on the vehicle disposal order form because if one has done any investigation on a case they put their details on the form. This explains why when Capt. Ngobeni attended to this matter when Mr Malete reported to his office, his file did not show that the vehicle had already been disposed of. Mr Mabunda had not inserted the SAP 430i bearing his name as the investigator in the file.

[25] Mr Mabunda was at sixes and sevens under cross-examination regarding ownership of the vehicle by Aubrey. Examples of his evidence in the following respects reveal this:

25.1 His brother handed in the permission letter in mid-January 2007 and but for certain documents still outstanding, they would have released the car in January 2007 and not on 16 November 2007. There is no explanation of what these missing documents were. According to Lt Maluleke, all documents were placed in the file when he impounded the vehicle. He testified that he was satisfied that Ms Vovo was the lawful owner because of the sale agreement she had in her possession. He, however, conceded that the matter required investigation because the vehicle registration certificate was not in her name and only the purchase agreement served as proof of ownership.

25.2 A lawful owner is one that presents a letter of permission, registration certificate and the ID *"of the person from whom you bought the vehicle"*. Mr Mabunda deliberately leaves out that the ID should be that of the lawful owner and not of a person from whom the vehicle is allegedly bought.

- 25.3 He considers the lawful owner of the vehicle to be Ms Vovo because Vovo brought in the vehicle registration document, and all other documents, including the registration certificate, ID copy, purchase agreement, and her ID copy. This could not be so as according to his evidence, Mr Mabena was only given Ms Vovo's permission letter, the purchase agreement between Ms Vovo and a Mr Molako and a copy of Vovo's ID.
- 25.4 He could not have told his brother, Aubrey, about the availability of the car to purchase after he assisted Ms Vovo with the release of the car from the pound three weeks before 16 November 2007 if his brother had already issued a permission letter in mid-January 2007. During his investigation, Ms Vovo lost interest in the vehicle and sold it to Aubrey for R12 000.
- 25.5 Mr Mabunda belatedly introduces a registration certificate in Ms Vovo's possession on the basis that she had another registration certificate besides the one in the file because cloned vehicles can have more than one certificate. Besides this afterthought, had he retrieved Capt. Ngobeni's enquiry docket in his enthusiasm to advance the *Batho Pele* principles by assisting Ms Vovo, the existence of two registration certificates would have concerned him and he would not have released the vehicle.
- 25.6 Mabunda alleges that the charge was not proved because the owner, Ms Vovo, was not called. While assisting Ms Vovo, he called Capt. Ngobeni and Capt. Ngobeni told him to proceed with the investigation.
- 25.7 Unable to deny that there is a vehicle registration certificate in Mr Maleté's name, he said that he was aware of Maleté's registration certificate and also that Mr Maleté had sold the car to Ms Vovo. It was never his version that Ms Vovo had bought the car from Mr Maleté but that it was from Mr JP Maleté. He later denied that the car had two registration certificates.
- 25.8 When he was unable to produce proof of the sale agreement for R12 000 between Aubrey and Ms Vovo, he alleged that the police had broken into his house and had taken documents and appliances. However, if his evidence is true that he made copies of documents that Ms Vovo had

given him and kept them in his enquiry docket, they would not have been at home.

25.9 Asked about the vehicle's whereabouts, Mr Mabunda testified that he could not return or retrieve the car from his stepfather or Aubrey because it was involved in an accident before Capt. Van der Westhuissen went searching for it and it was taken to Ext 6. He told Capt. Van der Westhuissen about this. It was seized (by the police) thereafter because it had been allowed, i.e. owner registration details used in many identical vehicles.

25.10 The version that the car was given to Aubrey's taxi driver to use as a taxi was not put to any witness, especially Capt. Van der Westhuissen who was investigating its whereabouts.

25.11 In his 2010 statement, Mr Mabunda says it was after some days that Ms Vovo came back to the office and he took her statement and presented the file to Capt. Bennets for the disposal of the vehicle. In evidence, he said it took nearly three weeks to investigate.

25.12 In his 2010 statement, Mr Mabunda states that later in the day when Ms Vovo came to his office, the documents in her possession were copied and he gave same to Capt. Ngobeni. It was on this day and at this stage that Capt. Ngobeni asked him to continue with the investigation and he took it over. This totally contradicts his evidence that Capt. Ngobeni was not available on the day and had in fact been unavailable on a number of occasions hence, in the spirit of *Batho Pele*, he took it upon himself to assist Vovo.

Conclusions on the evidence

[26] In argument, Ms Masondo who appeared for Mr Mabunda, relied heavily on Capt. Ngobeni's evidence that he did not authorise the release of the vehicle but that the group commander or docket monitor may authorise action on a docket when the allocated investigating officer is not available (or unable to execute an action).

[27] Capt. Ngobeni testified further under cross-examination that there was compliance with SAP 430i and therefore that Capt. Bennets was acting appropriately when she authorised the release of the vehicle after Mr Mabunda submitted the documentation. Capt. Bennets testified on her part that all documents would be in the disposal order per SAP 430i in order for her to authorise the release of a vehicle.

[28] Capt. Ngobeni also testified that the release of the vehicle must be his decision. I understand this to mean that the investigator must be consulted on the final decision to release a vehicle if they are still alive and able to take that decision even if another officer concludes the investigation in their absence.

[29] Mr Mabunda could only proffer a nonsensical answer as to why Capt. Ngobeni would open a case of theft of the vehicle under Order 1 of 1997 if he knew that Mr Mabunda had taken over the investigation. His response was that he was equally puzzled because Capt. Ngobeni could simply have come to him for the reason why the vehicle had gone missing. Clearly, Capt. Ngobeni would not have opened the Order 1 of 1997 enquiry if he knew that Mr Mabunda had taken over the investigation and had disposed of the vehicle.

[30] Whereas both Lt Maluleke and Mr Mabunda received documents from Ms Vovo at the time of the seizure of the vehicle and its release, respectively, these documents have gone missing in their original form and as copies. Mr Mabunda could not explain why he did not simply ask Ms Vovo to give the originals to Capt. Van der Westhuissen when Capt. Van der Westhuissen was investigating the theft of the car from the pound. He proffered a nonsensical answer that he did not want to interfere with a witness because when he contacted Mr Malete he threatened to report him for interference with the investigation.

[31] Mr Mabunda seeks to blame Capt. Van der Westhuissen for not contacting Ms Vovo during his criminal investigation into the theft of the car at the pound. He was also required to discharge the evidentiary burden of calling Vovo as his witness. The fact that he did not do so draws an adverse inference that he knew that she was not going to support his version.

[32] He could not explain why he did not disclose Ms Vovo's documents at the disciplinary hearing before they were allegedly stolen from his house.

[33] This evidence was considered in the arbitration.

[34] Mr Mabunda was found guilty in the disciplinary hearing on 31 March 2009. He referred the matter to the second respondent, the SSSBC, and the Award was delivered on 28 November 2011, but stamped as received on 5 December 2011 by the Bargaining Council. The arbitrator, Mrs M Smith, held that the dismissal was procedurally and substantially fair.

In the Labour Court

[35] On 16 January 2012, Mr Mabunda launched a review application praying for the Award to be set aside. He set out the grounds of review as follows:

- '7. Grounds of Review: I submit that the annexed arbitration award is defective as enunciated in section 145 of the Labour Relations Act, for the following reasons:
 - 7.1 The arbitrator misconstrued her duties as an arbitrator who is appointed to resolve disputes in terms of the Act.
 - 7.2 The arbitrator also misconstrued the evidence that was placed before her hence she ended (sic) making a finding that is not supported by the facts of this matter.
 - 7.3 She did not apply her mind to the evidence properly placed before her hence her reasoning is not supported by the facts before her.
 - 7.4 Despite the provisions of section 138(1) of the Act, she failed to adhere and to apply the law of evidence and thus she exceeded the power she derives from the law.
 - 7.5 The arbitrator committed a misconduct or a gross irregularity by giving weight to inadmissible evidence while failing to give weight to admissible evidence, that clearly indicated that my dismissal was unfair.

7.6 She exceeded the power she derives from the Act, by upholding my dismissal while on the other hand the employer failed to lead admissible evidence that supported the charges proffered against me.

7.7 The arbitrator failed to determine the dispute in accordance with the principle of fairness, as her factual finding does not correspond with the evidence properly placed before her.'

[36] The grounds of review were supplemented in terms of Rule 7A(6) and (8) of the Labour Court Rules.¹

[37] On 31 August 2016, Van Niekerk J (as he then was) made an order dismissing the review application. The transcript of proceedings on the day records Van Niekerk J as having said:

'COURT: My concern is that there are simply no grounds for review made out in this application...'

[38] On 26 August 2019, Mr Mabunda launched a rescission application of the order of Van Niekerk J in terms of Rule 16A(a)(1). The application was opposed by the SAPS.

[39] The rescission application was considered on the papers on 1 September 2021 by Mahosi J. This delay was clearly a result of the COVID-19 restrictions and protocols applicable at the time.

[40] Judgment was delivered on 2 September 2021.

[41] Following the dismissal of the application for leave to appeal, Mr Mabunda launched his petition for leave to appeal on 25 May 2022. The Labour Appeal Court granted leave to appeal on 22 August 2022.

The rescission proceedings

[42] The notice of appeal sets out three grounds of appeal. They can be summarised as follows. The Labour Court –

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.

42.1 erred in assessing Mr Mabunda's reasons for his absence at Court when the review hearing came before Van Niekerk J;

42.2 failed to apply the principles embedded in the assessment of "*erroneously sought or granted*" and "*good cause shown*";

42.3 failed to assess the prospects of success on appeal and that the arbitrator had misdirected herself in assessing the evidence before her and the appropriateness of the sanction.

[43] Mahosi J dealt with the dismissal of the review application on the merits and said:

'In addition, to an extent that Van Niekerk J dismissed the applicant's review application, he clearly has no prospects of succeeding in his review application.'

[44] This was held in view of Van Niekerk J's finding that Mr Mabunda had not set out appropriate grounds for review in the review application or had not established such grounds in the application.

[45] In describing the nature of his application before Mahosi J, Mr Mabunda says that he seeks rescission of the Van Niekerk J judgment dismissing his review "*due (to) non-appearance of the appellant*". This is not the reason that the review application was dismissed. It was dismissed for lack of merits to sustain a review and setting aside of the Award. Since Van Niekerk J's finding in this regard has not been appealed against, his order stands. In the circumstances, Mahosi J's finding that this defect destroys any prospects of success on review is correct. It is trite law that where there are no prospects of success on appeal or review, even a full and reasonable explanation for default will not compensate for the lack of a prospect of success.

[46] Mahosi J also dealt with Mr Mabunda's contentions on the conduct of his representatives and grounds for rescission in terms of Rule 16A and section 165 of the Labour Relations Act.² Having sketched the history of Mr Mabunda's

² Act 66 of 1995, as amended.

default, especially his erstwhile attorney's letter of 8 July 2018, the Court concluded that:

[11] To an extent that the applicant seeks to rescind or set aside the Court order on the basis that it was granted in his absence, Rule 16A(2)(b) is applicable. Accordingly, the applicant is required to show cause why the Court order should be set aside. As such, he must not only show that he has sufficient and reasonable explanation for the default, but must also show that he has a prospect of success in the review application.

[12] It is apparent that the Registrar sent all the notices, including the notice of set down, to the addresses that the applicant had provided in the notice of set down and the notice in terms of Rule 7A(6) and (8)(6) of the Rules of this Court. It is further apparent that the Court order that is sought to be rescinded was not granted erroneously. This is so because the transcribed record of the proceedings of 31 August 2016, shows that, having established that the applicant was in default of appearance, Van Niekerk J raised a concern that the review application lacked grounds of review. On the basis thereof, he dismissed the application.

[13] I agree with the first respondent that the applicant's failure to give notice of change of address and Mr Kuhn's unprofessional conduct do not (sic) constitute good cause. In addition to an extent that Van Niekerk J dismissed the applicant's review application, he clearly has no prospect of succeeding in his review application.'

[47] The letter of 8 July 2018 by Mr Kuhn reads as follows:

[5] The applicant submitted that he subsequently appointed Mr Kuhn of Rudolf Kuhn Attorneys and further alleges that the notice of set down was sent to Mr Kuhn who later alleged that he could not remember receiving it. In the letter dated 8 July 2018, Mr Kuhn confirmed the following to the applicant:

- "1. You terminated my mandate in July 2018 and collected your file contents on 09 July 2018.
2. You telephoned me on 1 July 2019 and requested assistance with your matter.

3. On 4 July 2019, you furnished me with a number of documents. It appears that the application for enrolment on the opposed roll dated 7 March 2016 was sent to you at Suite No 2, 1st Harmonie Building, 16 Merriman Avenue Vereeniging by registered post. It appears that it was also faxed to the fax number that I was using at the time but I don't recall whether I received it or what transpired at the time.
4. The directive for heads argument dated 15 April 2015 was not set to me but appears to have been sent to a fax number 085 537 9320, which is unknown to me.
5. The notice of set down dated 18 August 2016 under case number JR3232/11 was not sent to me.
6. I confirm having advised you that I am not able to assist you further in this matter and that you should seek legal advice in the event that you wish to pursue your matter.”

[48] The appellant's contentions that Mahosi J failed to consider the applicable law to an application for rescission are not borne out of her treatment of the application above.

Conclusion

[49] It is clear that Mr Mabunda's default was a result of relevant notices and directives of the Labour Court being sent to the addresses and contact fax numbers of his erstwhile attorneys, Mr Gobile and Mr Kuhn, both of whom were no longer representing him at the relevant time when the review application was to be heard. These attorneys and Mr Mabunda had failed to provide the Labour Court's Registrar with Mr Mabunda's direct contact numbers and had failed to file notices of withdrawal in terms of the Rules of the Labour Court. Mahosi J held that these failures do not constitute good cause to grant a rescission of an order of Court.

[50] Regarding the treatment of Mr Mabunda's prospect of success on review, Mahosi J dealt with the requirements thereof. This Court has further dealt in full with the evidence presented before the Bargaining Council. The Court is satisfied that

there is no prospect of success on review. Van Niekerk J was correct that the grounds of review failed to sustain the test that an arbitration award is reviewable and bound to be set aside if the decision maker has come to a decision that a reasonable decision maker could not come to.³ Mr Mabunda was a mendacious witness. Capt. Van der Westhuissen was a very good witness. The same cannot be said for Capt. Ngobeni, Lt Maluleke and Capt. Bennets - all who vacillated on important aspects of the evidence. However, their clear attempts to protect Mr Mabunda at times are outweighed by the common cause facts and other objective evidence.

[51] In the circumstances, the Labour Court exercised its discretion not to grant rescission judicially.

[52] Therefore, the following order is made:

Order

1. The appeal is dismissed.
2. There is no order as to costs.

Malindi AJA

Waglay JP and Savage AJA concur.

³ *Sidumo and Another v Rustenburg Platinum Mines and Others* (2007) 28 ILJ 2045 (CC); 2008 (2) SA 24 (CC)

APPEARANCES:

FOR THE APPELLANT:

Ms N Masondo

Instructed by S Mabaso Inc. Attorneys

FOR THE RESPONDENTS:

Adv A Mofokeng

Instructed by State Attorney

LABOUR APPEAL COURT