



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

Case no: JS 787 / 14

In the matter between:

PROVINCIAL COMMISSIONER: NORTH WEST
SOUTH AFRICAN POLICE SERVICE

1st Applicant

THE NATIONAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICE

2nd Applicant

And

SAFETY AND SECURITY SECTORAL BARGAINING
COUNCIL

1st Respondent

PATEL M N.O.

2nd Respondent

POPCRU OBO MOSWEU I B

3rd Respondent

DATE HEARD: 8 December 2016

DATE DELIVERED: 22 February 2017

SUMMARY: Whether an employee who had been dismissed in an internal disciplinary action is to be regarded as being on suspension as envisaged in Regulation 17(9) of the SAPS Regulations pending the outcome of his/her appeal.

Held, that Regulation 16(4) has the effect of deeming all employees as suspended pending the outcome of their appeal.

Held, that the 3rd Respondent, who had been suspended without remuneration remained so suspended pending the outcome of his appeal and was entitled to be reinstated, with pay, after the lapse of the thirty (30) working days period within which the appeal had to be finalised.

JUDGMENT

MALINDI AJ

Introduction

[1] The First and Second Applicants (“the Applicants”) have brought a review application seeking a declaratory order in terms of which an interpretation of Regulation 17(9) of the South African Police Service Regulations¹ (Reg 17(9)) should be made. The Regulation reads as follows:

“Regulation 17(9)

The Appeal authority must finalise an appeal within thirty (30) working days from the date of the receipt of the appeal, failing which, in cases where the employee is on precautionary suspension or temporarily transferred, he or she must resume duties immediately and await the outcome of appeal.”

[2] Regulation 17(9) has to be read in context with Regulation (16)(4)(a) and (b) which provides as follows:

“(4) (a) In the event of the sanction of dismissal being imposed on the employee, such dismissal shall take effect twenty one (21) calendar days after the determination is made: Provided that such

¹ Notice No. R643, GG28958 of 3 July 2006

employee shall be deemed to have been suspended with immediate effect with full remuneration, unless the employee is under suspension without remuneration in accordance with regulation (13)(2), in which case the suspension without remuneration will continue.

- (b) If an employee referred to in paragraph (a), lodges an appeal against the finding or determination in terms of regulation 17, the employee shall be deemed to have been suspended, as provided for in paragraph (a), until the conclusion of the appeal proceedings: Provided that if the appeals authority confirms the discharge, the discharge of such employee shall take immediate effect.

- [3] The Applicant's contend that although the appeal that was lodged by the Third Respondent on behalf of Mosweu ("Mosweu") was not concluded within 30 working days as contemplated in terms of Regulation 17(9), Mosweu is not one of the employees in respect of which the regulation provides that they must resume duties immediately pending the outcome of the appeal.
- [4] On the other hand, the Third Respondent contends that Mosweu qualifies for resumption of his duties with effect from the date on which the 30 working day period referred to in Regulation 17(9) lapsed on the 30th of August 2014 and payment from that date to date of the outcome of the appeal. During the hearing it was confirmed that the appeal outcome confirmed Mosweu's dismissal on the 30th of November 2016.

Background and Chronology of Material Facts

- [5] Mosweu joined the service of the Applicants on 16 May 1990 as a police officer with a rank of warrant officer. He was at all material times stationed at the Rustenburg Police Station.
- [6] On 31 March 2014 Mosweu was placed on suspension without pay following allegations of various acts of misconduct levelled against him. He went through

a disciplinary hearing and was found guilty by the Chairperson who also recommended a sanction of dismissal on 6 June 2014.

- [7] Aggrieved by the chairperson's recommendation of dismissal Mosweu appealed against the chairperson's findings of guilty as well as the recommended sanction of dismissal. Mosweu's appeal is dated 2 July 2014 and was filed by electronic mail on 3 July 2014
- [8] At the time the Third Respondent's heads were drafted, Mosweu was still waiting for the appeal outcome.
- [9] The Third Respondent further proceeded to lodge a dispute with the First Respondent. The dispute was regarding an alleged unfair labour practice of dismissal.
- [10] During the arbitration, the commissioner would decide whether the Applicants failed to comply with Regulation 17(9) of the SAPS discipline regulations of 2006.
- [11] During the arbitration, the Third Respondent criticized the SAP's failure to comply with regulation 17(9) in that the appeal was, according to the Third Respondent, long lodged on the 22nd July 2014 but was not finalized within the prescribed thirty (30) day period as dictated under Regulation 17(9).
- [12] The Commissioner made a finding that the employer had failed to comply with Regulation 17(9) and ordered that the Third Respondent had to resume his employment with immediate effect, pending the outcome of the appeal.

Consideration of the law

- [13] I am required to consider whether the Commissioner was correct, not reasonable, in concluding that the Applicants had failed to comply with Regulation 17(9) by not reinstating Mosweu after 30th August 2014 and ordering that he be reinstated within 24 hours pending the outcome of his appeal.

[14] The Applicants submit that whereas Regulation 17(9) states expressly that employees who are entitled to reinstatement into their positions pending the outcome of an appeal after the lapse of the 30 day period are those that were on “precautionary suspension or temporarily transferred” at the time of their dismissal. The regulation does not effect or avail those “who are out rightly or directly dismissed.” Therefore in the case of Mosweu, he is not entitled to resume duties whilst awaiting the outcome of the appeal since he is a dismissed employee, not on under precautionary suspension or temporarily transferred.

[15] Mosweu had been suspended in terms of Regulation 13(2) which provides that:

- “(2) The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in Annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: Provided that –
- (a) Before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations;
 - (b) The Commissioner considers the representations and inform the employee of the outcome of the representations;
 - (c) The disciplinary process must be initiated within fourteen (14) calendar days of the date of the decision to suspend the employee without remuneration; and
 - (d) The disciplinary process is not completed within sixty (60) calendar days from the commencement of the suspension, the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider, the Commissioner must take any such decision

on continued suspension within seven (7) calendar days of receiving written representations on continued suspension and inform the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of thirty (30) calendar days.

[16] It was stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² that:

“[18]The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[17] In *Bothma-Batho Transport (Edms) BPK v S Bothma en Seun Transport (Edms) Bpk*³ it was found as follows in reference to the Endumeni Municipality case at para [18]:

² 2012 (4) SA 593 (SCA) at [18]

[12] ... Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

[18] I was referred to the case of *Ntuli v South African Police Service and Others*⁴ in support of the submission that Regulation 17(9) fails to cover the situation of a directly dismissed employee where an appeal is not concluded within 30 days. I did not find this case helpful in this enquiry.

[19] It is my view, therefore, that I must apply the rules of interpretation as espoused in *Natal Joint Municipal Pension Fund*, that is, to interpret the Regulations as a whole and in context. I will therefore consider the literal meaning of the words in the relevant regulations 17(9) and 16(4) and in the light of all relevant and admissible context, including the Constitution of the RSA, the Labour Relations Act and the Collective Agreement No.1 of 2006, dated 02 February 2006, between the South African Police Service, third Respondent and South African Police Union.

Analysis

[20] As stated above, Mosweu was suspended in terms of Regulation 13(2) without remuneration. Sub-item (3) of Regulation 13 states that a suspension is a precautionary measure.

³ 2014 (2) SA 494 (SCA) at [10] – [12]

⁴ [2012] ZALCD 14 (D862/12); (2013) 34 ILJ 1239 (LC)

[21] After Mosweu was found to have committed misconduct and a sanction of dismissal was meted out, he lodged an appeal in terms of Regulation 17(3) and (4). It is common cause that his appeal was not concluded within 30 working days as stipulated in Regulation 17(9).

[22] The Regulations contemplate a speedy process in disciplinary proceedings, including appeal processes, in compliance with the Labour Relations Act⁵ whose purpose is to promote “the effective resolution of labour disputes.”⁶ In *Mashego v Cellier NO and Others*⁷ it was said:

[15] The Constitution guarantees the right to fair labour practices. The LRA gives effect to those rights. One of its primary objects is to promote the effective resolution of labour disputes. In order to be effective, dispute resolution should be speedy. And both time and legal costs should be minimised. In *National Education Health and Allied Workers Union v UCT* the Constitutional Court recognised this principle and said:

“By their nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily. . .”

[16] As the learned authors in *Labour Relations Law: a Comprehensive Guide* point out, the drafters of the LRA intended that disputes be resolved quickly. The Explanatory Memorandum noted that the brief of the task team drafting the LRA was, amongst other things, to “provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration”. It was meant to adopt “a simple non-technical and non-jurisdictional approach the dispute resolution”. By providing for the determination of dismissal disputes by final and binding arbitration, the act adopted “a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal.”

⁵ Act 66 of 1995

⁶ Section 1(d)(iv) of the Labour Relations Act

⁷ (2016) 37 ILJ 994 (LC) at [15] and [16]

- [23] What is clear from the reading of Regulation 16(4) and 17(9) is that they seek to cure the mischief of prolonged disciplinary processes and appeal processes. Regulation 17(9) in particular requires a speedy appeal process in order to ensure that the employer does not prejudice the employee by keeping that away from their duties for a protracted period and also to avoid the prejudice to the employer of paying an employee for long periods pending the finalisation of the process.
- [24] Furthermore, Regulation 4 principles require that “discipline must be applied in a prompt, fair, consistent and progressive manner.”
- [25] In this context and the clear reading of regulation 17(9) it is envisaged that if the employer does not conclude appeal processes within 30 working days it does so at the pain of reinstating the employee pending the outcome. Reinstatement envisages payment for the services rendered. Of course, if the outcome is in favour of the employee then he/she continues in the position or is reinstated to the original position if he/she was temporarily transferred as a precautionary measure. If the outcome is against the employee, as is the case herein, the employee would not have lost out on remuneration for the period that the employer was dilatory.
- [26] Whether Mosweu is covered by Regulation 17(9) depends on the meaning of regulation 16(4).
- [27] It is required that proceedings against an employee who has been suspended without remuneration be initiated within fourteen (14) calendar days of the date of the decision to suspend him/her,⁸ and that if the disciplinary process is not completed within sixty (60) calendar days,

“the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the commissioner must consider.”⁹

⁸ Regulation 13(2)(c)

⁹ Regulation 13(2)(d)

[28] Furthermore,

“A decision that the suspension continues may only be for a further period of thirty (30) calendar days.”¹⁰

[29] All this points to the principle that a suspension in terms of Regulation 13(2) must not operate unfairly and to the prejudice of the employee whereby a sanction of suspension without remuneration is applied without the employee having been found guilty of misconduct.

[30] Regulation 16(4)(a) deems an employee against whom a sanction of dismissal has been imposed to have been suspended with immediate effect with full remuneration.¹¹ This is merely to accommodate the fact that such a dismissal takes effect only twenty-one (21) calendar days after the sanction of dismissal is made. However, in the case of an employee who at the time the sanction of dismissal is imposed is under suspension without remuneration in accordance with Regulation 13(2), the suspension without remuneration continues.¹² In other words, such an employee as Mosweu is in this case, remains suspended without remuneration until the dismissal comes into effect twenty-one calendar days after its imposition.

[31] Mosweu therefore remained suspended without remuneration even at the time that he lodged his appeal. Regulation 16(4)(b) provides that if an employee who is dismissed but was not under suspension at the time, and an employee who was under suspension without remuneration as referred to in Regulation 16(4)(a), lodges an appeal is deemed to have been suspended as provided for in paragraph (a) until the conclusion of the appeal process. Therefore, Mosweu continued to be suspended without remuneration at the time of lodging his appeal. In other words, he was not considered a dismissed employee but a suspended employee. The discharge or dismissal would only take effect immediately upon confirmation of such by the appeal authority.¹³

¹⁰ Ibid

¹¹ Regulation 16(4)(a)

¹² Ibid

¹³ Regulation 16(4)(b)

[32] The Applicants are therefore incorrect in their submission that Regulation 17(9) does not contemplate a person in Mosweu's position. His dismissal by the disciplinary panel did not distinguish him from those who were on suspension or temporary transfer pending the commencement of hearings. In fact, Regulation 6(4) clarifies his position fully that he remains suspended pending the final pronouncement of the appeal authority. It is therefore also incorrect that Regulation 17(9) is not clear in this regard.

[33] I have come to the conclusion that the Second Respondent was correct in finding that the Applicants had failed to comply with Regulation 17(9) of the South African Police Service regulations under Notice No. R643, Government Gazette 28985 of 3 July 2006, and ordering that Mosweu is to resume his duties within twenty-four (24) hours of becoming aware of the award pending the outcome of the appeal, as provided for in Regulation 17(9).

[34] Since Mosweu should have resumed his duties within twenty four (24) hours after the lapse of the thirty (30) working days period referred to in Regulation 17(9) I will accordingly modify the Second Respondent's second part of the award.

[35] Regarding the award of compensation for the period of 30 August 2014 to 30 November 2016, I am enjoined to give an amount of compensation that is fair to both parties. Mosweu's referral of the dispute was a claim for unfair labour practice not in contract. In the circumstances I consider compensation in the amount equivalent to 12 month's salary, to be paid at Mosweu's salary at the time of his suspension, to be fair.

Order

[36] I therefore make the following order:

1. Condonation for the late filing of the review application is granted;
2. The review application is dismissed;
3. The first and second Applicants are to pay to Mosweu compensation equivalent to 12 month's salary calculated at the time of his suspension.

4. The first and second Applicants are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

MALINDI AJ
ACTING JUDGE OF
THE LABOUR COURT

REPRESENTATION

For the Applicants: Adv. DM Matlou

Instructed by: State Attorney

For the Respondents: Mr T Majang of Majang Attorneys