REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Case No: CA 4/09

In the matter between:

THE NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICE

Appellant

And

I MYERS	**First Respondent**
THE SAFETY AND SECURITY AND SECTORAL BARGAINING COUNCIL	**Second Respondent**
ADVOCATE C DE KOCK N.O.	**Third Respondent**

JUDGMENT

ZONDI AJA

Introduction

[1] This is an appeal against the whole of the judgment and order made by Ngalwana AJ reviewing and setting aside an arbitration award that had been issued by the third respondent, ("the arbitrator/commissioner") under the auspices of the second respondent. The arbitration award had been issued in terms of the Labour Relations Act 66 of 1995 (the Act) in respect of an unfair dismissal dispute between the appellant and the first respondent ("Myers").

[2] In terms of the arbitration award, the arbitrator found that the first respondent's dismissal was substantively fair and dismissed the referral. (Procedural fairness of the dismissal was not in dispute)

[3] The appeal is with the leave of this Court, leave having been refused by the Court *a quo*.

Factual Background:

[4] Myers had been in the South African Police Service ("the SAPS") for 28 years when he was dismissed on 13 July 2007. Before his transfer to Bishop Lavis Police Station on 2 March 2007, Myers held a rank of a superintendent and commanded Maitland Dog Unit.

[5] During February 2007, the South African Police Union (SAPU) raised the issue of malnutrition of police dogs at the Maitland Dog Unit with the SAPS management. What had happened is while Myers was on leave, on the instruction of the police management, the daily rations for the police dogs were reduced from 700 grams of food to 500 grams. SAPU strongly believed that a change in the dogs weight which became evident immediately after the implementation of the instruction was as a result of reduction in their daily rations.

[6] Thereafter SAPU invited Myers to a meeting at its offices since he was a commander of the Unit. A certain Mr Leon Ben Lamprecht, a journalist for “Die Burger” newspaper was also present at the meeting. Lamprecht approached Myers as the Unit Commander to explain the reasons for the situation at the Dog Unit. Myers refrained from commenting before establishing if the issue raised by SAPU during his absence had been addressed by the police management.

[7] Myers was concerned that the issue of dogs’ malnutrition had attracted the attention of the media and he contacted the Provincial Commander, Senior Superintendant Visser to make him aware of his concern and asked him to take immediate steps to prevent the story from making headlines in the media. The next day, the story about the dogs malnutrition made headlines in the media. It was inter alia reported that the police dogs were eating their own excrement due to malnutrition. Members of the public reacted with shock and anger at the news of the condition of the dogs, both in print and electronic media.

[8] As a Commander of the Unit, Myers felt obliged to do something to take charge of the situation. On 21 February 2007, he interrupted his leave and returned to work. On his arrival at work he found the chief veterinarian of the SAPS and other senior police officers. The chief veterinarian told Myers that they were about to hold a meeting concerning dogs malnutrition issue. Myers requested to be part of the meeting but his request was turned down. He then left.

[9] On or about 23 February 2007 Myers sent an email to “*Die Burger*” newspaper seeking to address the issue regarding dogs malnutrition and to point out the steps he had taken to resolve the problem. His email appeared in “Die Burger” under the following headlines:

> ‘Maitland: Bevelvoerder Verbreek Swye. Rompslomp laat honder ly’

[10] After giving the background of how the dogs malnutrition came about, Myers proceeded to set out what steps he had taken to rectify the problem.

> 'as the commander of the Maitland Dog Unit I have been approached by numerous colleagues, friends and acquaintances regarding the issue of the dogs at the unit. Many who have criticized me for "starving" the dogs at the unit. I have been forced to remain silent regarding the whole issue and as I am being criticized both publicly and personally I feel that the whole issue must be placed in its true context.
>
> The SAPS in late 2004 tendered for dog food. The tender was awarded to inkosi anathi for the supply of Vets Choice "premium" an excellent grade of dog food and in January 2005 the dogs changed over to Vets Choice "premium", with an instruction from the dog school in Pretoria to feed the dogs 500 grams of Vets Choice per day. Previously the dogs were being fed 800 grams of food per day. After the change we started to notice a slight decline in weight but attributed this to the change over in food.'

[11] Myers' email went on to state:

> 'At 11h00 on 15 February the Provincial Commander as well as Dr Sarkady and later a Director from the Provincial Office arrived at the unit. Attempts to explain the situation regarding the types of dog food, which is the core of the problem, to the Director were fruitless; his viewpoint being that I was not an expert or a nutritionist. Suffice to say that I grew up in a dog environment with my father being highly regarded and respected by the police for his expertise in training dogs to police standards from 1963 to 1988. To say that I am not an expert is far from the truth and alas the same director is of the opinion that I am radical and have a reputation, an opinion which I am sadly sure is shared by many of his peers. Each and every trained dog handler is an expert in his field and is appropriately trained to make a judgment in the condition of his/her respective dog as they work with them every

> day and know their behaviour and what effects it. I was nevertheless instructed to resume my leave and had to vacate the premises.
>
> Director (Dr) Strydom, the head veterinarian of the SA Police Service visited the unit on Wednesday 21 February and held a meeting with the kennel officials, Provincial Commander and Acting Commander of the Maitland Dog Unit. I was excluded form the meeting even though I was on leave and at the unit and requested to be a party thereto.*'*

[12] In conclusion he states:

> 'The Maitland Dog Unit is one of the units in the country that has at its disposal dedicated and committed dog handlers and kennel officials who place the welfare of the dogs above their own interests and the public can be assured that no dog will die of starvation whilst I have such members serving under my command and that all dogs and handlers remain uppermost in my priorities regarding my functions and duties. Whilst numerous calls have been made by the public willing to donate food they can be assured that this is most definitely not necessary, the unit has enough food at its disposal. All dogs that are donated to the police by the public receive the love and care that they as our trusted friends deserve. I trust that the above places the issue regarding the dog unit in perspective and that as handlers we may have our honour and dignity restored.'

[13] On 18 June 2007 Myers was charged with contravening Regulation 20(f) of the South African Police Service Discipline Regulations. It was alleged by the SAPS that Myers by communicating with the media prejudiced the administration, discipline or efficiency of a department, office or institution of the State.

[14] In the alternative, he was charged with contravening Regulation 20 (i) in that during February 2007 he failed to carry out a lawful order or routine instruction without just or reasonable cause, namely Standing Order (General) 156 by making media communication.

[15] Myers pleaded not guilty to the main charge and alternative charge. However, at the conclusion of the disciplinary hearing he was convicted

on the main charge on the ground that he failed to follow the right channels when he made a media communication. But he was acquitted on the alternative charge. He was dismissed and ordered to pay a fine of R500-00.

[16] In justifying the appropriateness of dismissal as a sanction the chairperson of the disciplinary hearing had regard to Myers' period of service and seniority within the SAPS which in his view were indicative of the fact that Myers was or should have been aware of the SAPS rule regarding media communication by members. The chairperson held that Myers had deliberately violated the rule. He found Myers' insolence to have been a factor which aggravated the misconduct. He stated that Myers, as an employee, was required to be obedient to his employer and to act in good faith in the exercise of his duties.

[17] Myers appealed. On appeal the sanction of dismissal was confirmed but the portion of the sentence relating to the payment of a fine was set aside.

Bargaining Council Hearing

[18] Myers thereafter referred his dismissal to the second respondent, the Safety and Security and Sectoral Bargaining Council (Bargaining Council) seeking reinstatement. Conciliation failed and the dispute was referred for arbitration for resolution. The third respondent presided over the arbitration.

[19] The Labour Relations Act permits the commissioner to conduct the arbitration in a manner he or she considers appropriate in order to determine the dispute fairly and quickly. Thus at the commencement of the arbitration hearing the parties agreed that it was not necessary to present oral evidence but that the record of the disciplinary proceedings would be used as the only material to which the arbitrator should have regard to determine the substantive fairness of Myers' dismissal.

[20] The arbitrator found the dismissal of Myers to have been substantively fair and dismissed the referral on the ground that Myers' action, in approaching the media when he was aware that his superiors were already addressing the "issue" and had been told that he was not part of the meeting, was completely unacceptable and indicative of disobedience.

[21] The arbitrator found Myers had contravened both Regulation 20(f) and (i). In finding Myers guilty of contravening Regulation 20 (i) the arbitrator held that Myers had no right to speak to the media without having first discussed the matter with the media liaison officer and his commander. In convicting Myers for a contravention of Regulation 20 (f) the arbitrator reasoned that Myers had no right to speak to the media regarding the malnutrition of the dogs as at that stage the issue was being addressed by the SAPS management. He accordingly found Myers' statement to the media to have been prejudicial to the SAPS.

[22] In confirming the dismissal as an appropriate sanction for the acts of misconduct committed by Myers, the arbitrator had regard to the period of service which Myers had had with SAPS and his seniority within the SAPS which in his view constituted aggravating factors.

Review proceedings

[23] Myers applied to the Labour Court to review the arbitrator's award in terms of section 145 of the Act. The grounds upon which he attacked the arbitrator's award were, firstly that he committed misconduct in relation to his duties, secondly that he exceeded the powers of a commissioner, thirdly, and that he committed gross irregularities and fourthly that the award was improperly obtained.

[24] To substantiate his grounds of review Myers *inter alia* alleged that the arbitrator failed to consider all the circumstances of the case, in particular that Myers did not instigate the issue of the dogs malnutrition, that the arbitrator should not have considered evidence relating to the alternative charge on which he was acquitted and that the arbitrator

acted irregularly in convicting him in circumstances where the evidence presented was lacking in substance to sustain the charges against him.

[25] The Court *a quo* reviewed and set aside the award and ordered that the matter be remitted to the second respondent for a *de novo* hearing on an urgent basis before another commissioner. It ordered the appellant to pay Myers' costs.

[26] The Court *a quo* did not set aside the award specifically on the grounds contained in section 145(2) of the Act. It held that the permissible grounds of review are wider than those contained in section 145(2). It further held that, for the applicant to succeed in the review application, it must be proven that the commissioner's decision is irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is flawed as to elicit a sense of incredulity) and is unjustifiable in relation to the reasons given for it. For its reasoning it placed reliance on *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp No* (2002) 23 *ILJ* 863 (LAC) at para 19; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at para 26; *Carephone (Pty) Ltd v Marcus No and Others* (1989) 19 *ILJ* 1425 (LAC) at para 37 and *Pharmaceutical Manufacturers Association of SA and Another; In re ex parte President of the RSA and Others* 2000 (3) *BCLR* 241 (CC).

[27] Notably, the test for review propounded by the Court *a quo* is slightly different to the one formulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[1] namely whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach ('the reasonableness test").

[28] The Court *a quo* proceeded to hold that the proper approach is not to ask whether the arbitrator's decision is one that a reasonable decision-maker could not reach, but rather whether in the light of the evidence advanced, having regard to considerations of equity; the decision is one

[1] [2007] 28 ILJ 2405 (CC).

that could properly be said to be reasonable. At para 24 of the judgment the Court *a quo* reasoned that an irrational and/or unjustifiable decision "must *pari passu* be unreasonable".

[29] Notably, the Court *a quo* did not set aside the award on the basis of the test as formulated by itself. It, however, did so on the basis of numerous misdirections that it found in the manner in which the arbitrator approached the issues before him.

[30] It held that the arbitrator had misdirected himself in three respects. First, by analysing the evidentiary material, which was before him on the basis that the charge sheet had been incorrectly drawn up, secondly, by failing to consider Myers' previous infractions and sanctions in arriving at his decision and thirdly, in finding that Myers' conduct evinced a clear disregard for the authority, which finding was not an essential element of the misconduct of which he was found guilty.

[31] The Court *a quo* reviewed and set aside the award because of these misdirections.

Proceedings in this Court:

[32] In his heads and in argument before this Court, Mr De Villiers-Jansen submitted on behalf of the appellant that the Court *a quo* erred in its application of the rationality test and in redefining the test laid down in *Sidumo* supra and, further, that in light of the findings and reasons advanced by the arbitrator, it cannot be said that the arbitrator's decision is one which a reasonable decision maker could not reach.

[33] I disagree with Mr De Villiers-Jansen's contention. The Court *a quo* did not set aside the arbitrator's award on the basis of irrationality or the standard it propounded. But it did so on the basis of various instances of misdirections which it found the arbitrator to have made.

[34] It is clear upon a proper analysis of the Court ***a quo's*** judgment that it applied the reasonableness test in reviewing the arbitrator's award. At

para 31 of its judgment, the Court *a quo* held that in determining the appropriate sanction in relation to the main charge, it was imperative for the commissioner to ascertain whether Myers had previously been disciplined on the same charge and consider the seriousness of his conduct. It reasoned that the commissioner's failure to have regard to these factors was something which ("in the language of the Constitutional Court in *Sidumo*") a reasonable decision-maker could not have done.

[35] The other ground upon which the appellant seeks to attack the Court *a quo's* judgment is that the instances of misdirections which it found and on the basis of which it set aside the award were not advanced by the first respondent either in his founding affidavit or in oral argument. Counsel for the appellant argued that the Court *a quo* erred in determining the review application on the basis of the misdirections which were never advanced by the first respondent in support of his case and secondly, in not affording the appellant an opportunity to deal with these misdirections either during or after the hearing in the form of supplementary written submissions. For this proposition the appellant relied on the judgment of this Court in *Palaborwa Mining Co. Ltd v Cheetham and Others*.[2]

[36] I disagree with the appellant's contention. Although the instances of misdirections found and relied upon by the Court *a quo* as the basis for setting aside the award were not pertinently raised by the first respondent as grounds of review, it is, however, apparent on a proper analysis of the pleadings that they are nevertheless foreshadowed in paragraphs 23, 24, 46 and 47 of the first respondent's founding affidavit. In response to the averments made in these paragraphs, the appellant deliberately declined to answer them on the ground that the averments constituted legal arguments. It is therefore not correct to contend that the instances of misdirections relied upon by the Court in setting aside

[2] [2008] 29 ILJ 306 (LAC).

the award were not advanced by the first respondent in his case or that the appellant was not afforded an opportunity to deal with them.

[37] In determining whether the arbitrator's award should have been reviewed and set aside, I will apply the reasonableness test as propounded by the Constitutional Court in *Sidumo supra* and as explained and clarified by this Court in *Fidelity Cash Management Services v Commissioner for Conciliation, Mediation and Arbitration and Others*[3] and by the Supreme Court of Appeal in *Edcon Ltd v Pillemer NO and Others*.[4]

[38] In *Sidumo*, the Constitutional Court in explaining the reasons for departure from the *Carephone* test said at paras 105 – 108:

> "[105] As stated earlier, s 3 of the LRA provides, inter alia, that its provisions must be interpreted in compliance with the Constitution. Section 145 therefore must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.
>
> [106] The *Carephone* test, which was substantive and involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers, was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse s 145 of the LRA.
>
> [107] The reasonableness standard was dealt with in *Bato Star*. In the context of s 6(2) (h) of PAJA, O'Regan J said the following: '[A]n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'

[3] [2008] 3 BLLR 197 (LAC) at para 92.
[4] (2009) 30 ILJ 2646 (SCA).

> [108] This court recognized that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.'

[39] In conclusion it held at paragraph 110:

'…*Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[40] In *Edcon Ltd supra* the Court had this to say at regarding the reasonableness test:

> It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the Commissioner when making the award…'[5]

[41] It should be noted, however, that the standard of review as formulated by the Constitutional Court in *Sidumo* does not replace the grounds of review contained in section 145(2) of the LRA. The grounds of review referred to in section 145(2) still remain relevant.

[42] During argument, Counsel for both parties spent a great deal of time debating whether or not it was proper at the arbitration hearing for the arbitrator in determining the fairness of dismissal to have had regard to the evidence relating to the alternative charge on which Myers was

[5] *Edcorn Ltd supra* para 16

acquitted at the disciplinary enquiry. The debate on this issue was in my view unnecessary as the law regarding the form of the proceedings before the arbitrator is clear. The legal position is that the proceedings before the commissioner take the form of a hearing *de novo*. The findings of an earlier disciplinary enquiry are irrelevant and not binding on the commissioner who is called upon to arbitrate the dispute.[6]

[43] The question is whether the Court *a quo* was correct in holding that the decision or conclusion reached by the arbitrator was one that a reasonable decision-maker could not reach on the material that had been placed before him when he arbitrated the dispute.

[44] In order to answer this question, it is necessary to comment on the charges which Myers faced and, secondly, on the arbitrator's findings. As stated earlier, the aspect relating to the procedural fairness of dismissal was not an issue before the arbitrator and does not have to be considered in this appeal.

[45] Myers appeared before the appellant's disciplinary hearing facing a main charge of contravening Regulation 20 (f) and an alternative charge of contravening Regulation 20 (i).

[46] Generally, Regulation 20 provides for misconduct. Regulation 20 (f) and (i) states that an employee will be guilty of misconduct if he or she amongst other things:-

> '(f) prejudices the administration, discipline or efficiency of a department, office or institution of the State.
>
> …
>
> (i) fails to carry out a lawful order or routine instruction without just or reasonable cause.'

[6] See in this regard *County Fair Foods (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others* (1999) 20 ILJ 1701 (LAC); *Tshishonga v Minister of Justice and Constitional Development and Another* [2006] 6 BLLR 601 (LC).

[47] The main charge under Regulation 20 (f) alleged that Myers, by communicating with the media, prejudiced the administration, discipline or efficiency of a department, office or institution of the State.

[48] The alternative charge alleged that Myers contravened Regulation 20 (i) in that he, by making a media communication, "failed to carry out a lawful order or clear instruction without just or reasonable cause, namely Standing Order General 156." In other words, the instruction which he was alleged to have disobeyed is one contained in Standing Order 156 of the SAPS. He was convicted on the main charge and acquitted on the alternative charge.

[49] In determining whether Myers' dismissal was substantively fair, the arbitrator had regard to the record of the disciplinary proceedings which was before him. The arbitrator started by pointing out that it was clear from the chairperson's reasoning that in convicting Myers on the main charge he referred and relied on the evidence which had been presented in support of the allegations of misconduct on the alternative charge. The arbitrator, however, held that there was nothing wrong with that approach.

[50] In justifying his conclusion the arbitrator pointed out as follows:

> 'It is clear from a reading of his finding that the chairperson was faced with a dilemma regarding what he should find the applicant guilty of based on the evidence placed before him, as there was a main charge and an alternative to the main charge. He then found that the applicant was guilty of the main charge but, in doing so, he incorporated the alternative charge into the main charge, i.e. the applicant's failure to comply with procedures regarding communication with the media.
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> I do not believe that this technicality should affect the fact that the applicant was clearly charged with both prejudicing the SAPS and with not complying with the policies and procedures. The one charge is very much intertwined with the other. I do not believe further that there ought to have been an alternative charge to the main charge. The applicant ought to have been charged with failing to comply with policies and procedures regarding media

communication and he should have been charged with having prejudiced the SAPS in terms of the contents of his communication with the media. It is clear from the disciplinary hearing record that both issues were sufficiently canvassed during the course of the hearing and that the applicant was further given a more than reasonable opportunity to respond to and to state his case in response to both issues.'

[51] Having considered the allegations made in the main and alternative charges and the evidence which had been presented in support thereof, the arbitrator then proceeded to enquire whether Myers had contravened Regulation 20 (i). After analysing evidence relating to the alternative charge (under Regulation 20 (i)), the arbitrator concluded that on the evidence before him, Myers had no right to speak to the media without having discussed the matter with the media liaison officer and his commander. He held that Myers was in breach of the Standing Order 156 (clauses 3(14) and 4(4) and found Myers guilty of contravening Regulation 20 (i). The arbitrator further found that Myers had also contravened Regulation 20 (f) and convicted him accordingly.

[52] Generally, the Standing Order (General) 156 deals with media communication in the SAPS. It embodies a policy which should be observed by the SAPS members when communicating with the media. The policy is in a form of an instruction and its objective is to seek to balance the constitutional right to freedom of expression with the constitutional obligation of the SAPS to achieve certain objectives.

[53] Clause 3(14) enjoins a member of the SAPS to consult with the relevant media liaison official before making on his own initiative, official statements to the media to ensure that SAPS receives the maximum benefit from the exposure.

[54] In terms of clause 4(4), no member may, on his own initiative or that of another member, approach or entertain any media for the purpose of media coverage without the prior authorisation of his commanders.

[55] Mr Nortje, who appeared for Myers, advanced various grounds upon which he submitted that the arbitrator's finding that Myers dismissal was substantively fair was a decision which a reasonable decision maker could not make.

[56] First, he submitted that the arbitrator misdirected himself by failing to conduct a *de novo* hearing on all the material that was before him. He argued that the arbitrator dealt with the matter as if it were an appeal. He rejected the suggestion by the appellant that at the commencement of the arbitration the parties had agreed that it would not be necessary to present oral evidence for the purposes of determining the fairness of the dismissal but that the record of the disciplinary proceedings together with the closing arguments on behalf of the parties would be used for that purpose.

[57] I find Myers' denial of the agreement on procedure extremely disturbing in view of the fact that it is the first time that it is raised. In fact, in his reply to the appellant's answering affidavit, Myers admitted that at the arbitration hearing the parties agreed on how proceedings were to be conducted. It is surprising that he is now denying the existence of the agreement. For these reasons I reject Mr Nortje's first contention.

[58] Secondly, it was submitted on behalf of Myers that the arbitrator acted unreasonably in finding him guilty of a contravention of regulation 20 (f) in the absence of proof of actual prejudice to the SAPS caused by his conduct.

[59] Mr Nortje argued on authority of *Midi Television (Pty) Ltd t/a E-TV v DPP, Western Cape*[7] and *Gazidis v Minister Public Administration*[8] that a communication will be unlawful and thus susceptible to prohibition only if the prejudice that it might cause to the administration of justice is demonstrable and substantial. He pointed out that the evidence of

[7] 2007 (5) SA 540 (SCA) at para 19.
[8] (A2050/04) (24 March 2006) TPD.

prejudice relied upon by the appellant in convicting Myers was lacking in substance.

[60] I disagree with Mr Nortje's contention for two reasons. First, Myers' media statement in effect significantly undermined the appellant's efforts to properly deal with the negative publicity concerning the police dogs starvation issue. Myers' explanation for sending a statement to the media (to set a record straight because the police's response to the media was not truthful) does not take his case any further because he was or should have been aware of what avenues to follow if he felt that the position of his Unit on the issue had not been clearly articulated by the task team.

[61] Secondly, Myers did not have authority to send his statement on the police dogs starvation to the media for publication before consulting with the relevant liaison official.

[62] Prior to the referral of the proposed media statement for comment by the relevant liaison official, it was important in the instant matter, in view of the fact that a misleading suggestion was going to be made in the newspaper article, that the appellant had muzzled Myers from commenting on the issue and that the appellant's bureaucracy was responsible for dogs starvation. For instance the article reports: "Rompslomp laat honde ly" and "Die bevelvoerder van die Maitland-honde-eenheid het sy stilswye verbreek en sy mond uitgespoel oor die situasie by die eenheid".

[63] Myers, by releasing his statement for publication in the media without having first consulted with the relevant media liaison police official, clearly breached Regulation 20(i) and as such he was properly found to have committed misconduct of contravening Regulation 20 (i).

[64] In my view, upon a consideration of all the circumstances of the case it was unreasonable for Myers to send to the media for publication a statement which created an impression that he was deliberately being silenced when there was no evidence to this effect and which in turn

could only have the effect of undermining the SAPS and thereby prejudicing its administration and the discipline. In the circumstances, I find that Myers was correctly convicted of contravening Regulation 20 (f).

[65] Furthermore Mr Nortje's reliance on *Midi Television supra* is misplaced and the case is no authority for the contention he sought to advance. *Midi Television* dealt with pre-publication bans and the nature of prejudice which an applicant must establish in order to succeed to prevent an intended communication from being published in the media. In the instant case, there is demonstrable and substantial evidence of prejudice caused to the appellant by Myers' media communication. It was Superintendant Jones' evidence that before publication of Myers' statement in the media, people appointed by the appellant to handle the police dogs starvation issue had succeeded in containing negative publicity about the issue but after Myers' communication made headlines, the task team had to start all over again.

[66] There is also no merit in the first respondent's contention that his media statement could not prejudice the appellant because he had a right and obligation to restore not only his good name but also that of the Dog Unit and the SAPS by informing the public about the real reason for the starvation of the dogs. The statement that the appellant's "Rompslomp" was responsible for the dogs' starvation was, however, not factually correct.

[67] Thirdly, it was submitted on Myers' behalf that the arbitrator acted unreasonably in entertaining the alternative charge on which Myers was acquitted at the disciplinary hearing. It was argued that the arbitrator, by entertaining the alternative charge and formulating his own charge sheet, acted beyond his powers. The arbitrator was unreasonable, so Myers' counsel argued, to adjudicate the matter on the basis of the new charge sheet without first affording the first respondent an opportunity to respond to the new charge sheet.

[68] I disagree with the first respondent's contention for two reasons. Firstly, it was not irregular for the arbitrator to have considered the alternative charge in an attempt to identify the real dispute between the parties. In fact section 138 (1) of the LRA empowers the commissioner to do so. It provides:

> 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'

[69] The proceedings before the commissioner take the form of a hearing *de novo*[9] and the findings of an earlier disciplinary enquiry are irrelevant and not binding on the commissioner who is called upon to arbitrate the dispute[10]

[70] As correctly held by Ngcobo J in *CUSA v Tao Ying Metal Industries and Others*:[11]

> 'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration … The dispute between the parties only emerges once all the evidence is in.'

[71] The real dispute between the parties was whether the first respondent (Myers) had been authorised to make a media communication relating to the starvation of the police dogs at the Maitland Police Station and whether the first respondent's conduct in communicating with the media prejudiced the administration, discipline or efficiency of the SAPS. The fact that if the above contravention(s) are proven, it gave rise to

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[9] See *County Fair Foods (Pty) Ltd* supra at para 11.
[10] *Tshishonga* supra at para 14.
[11] 2009 (2) SA 204 (CC) at para 66.

contraventions of different sub-regulation is not relevant, nor does it necessarily equate to separate charges simply because the wrong complained of falls into more than one sub-regulation.

[72] For these reasons, I hold that it was appropriate for the arbitrator in the instant matter to have had regard to all the material properly placed before him in ascertaining the real dispute between the parties, as long as he acted fairly to the parties in doing so.

[73] Secondly, the suggestion that the arbitrator adjudicated the matter on the basis of the new charge sheet without first having afforded the first respondent an opportunity to respond to it is rejected. It is clear from the first respondent's heads of argument that the propriety of the arbitrator's decision to consider allegations of misconduct relating to the alternative charge was raised and extensively argued at the arbitration hearing.

[74] In the heads of argument, which the first respondent had presented, he dealt with his defence to the alternative charge. His main defence was that he had a right to do what he did because the Standing Order did not forbid him from communicating with the media and he cited clause 3 (1) of the Standing Order as providing source of authority.

[75] In the alternative it was argued on behalf of the first respondent that the Standing Order did not forbid members of the SAPS from communicating with the media when they are approached for comment by the media. It only forbids them from approaching the media. All of his defences were carefully considered by the arbitrator before he rejected them.

[76] The Court *a quo* found that the arbitrator misdirected himself in analysing the evidential material before him on the basis of his finding that the charge sheet had been incorrectly drawn up. It held that the arbitrator's approach constituted misdirection. It then reviewed and set aside the award on the ground thereof.

[77] In my view, the instance of misdirection relied upon by the Court *a quo* as a ground for setting aside the award is misconceived and the decision to review and set aside the award was wrong. The arbitrator was entitled to have regard to the evidence properly before him in the process of identifying the real dispute between the parties. The arbitrator's approach to the dispute was in my view consistent with the statutory duty which a commissioner must carry out in determining the dispute, namely to deal with the substantial merits of the dispute with the minimum of legal formalities and to do so fairly and quickly.

[78] To sum up, I hold that the allegations of misconduct on the part of Myers were properly established and that he was correctly found to have contravened both Regulation 20(f) and (i). [79] I now turn to consider how the arbitrator analysed the evidential material before him and his approach in determining the appropriateness of dismissal as a sanction. Before doing so, I need to emphasise that although Myers contravened two sub-regulations, it was one act of misconduct and as such it constituted a single contravention. The arbitrator did not lose sight of this. In determining the appropriate sanction the arbitrator correctly considered Myers to have committed a single misconduct.

[80] The arbitrator found that a sanction of dismissal was appropriate in the instant matter because by virtue of his long service record, seniority within the SAPS and his position as a Commander of the Maitland Dog Unit Myers should have led by example; secondly his seniority rendered the misconduct serious, and thirdly the first respondent should not have approached the media regarding the police dogs starvation issue in circumstances where he knew he should not have done so as he was aware that a task team had been established "to address the previous bad publicity."

[81] Section 182 of the LRA enjoins a person considering the fairness or unfairness of the dismissal to take into account provisions of the Code of Good Practice. In the context of this matter, the relevant Code of Good Practice is contained in Schedule 8 of the LRA.

[82] In *Sidumo*, supra the Constitutional Court had this to say at paragraph 78 regarding what the commissioner must do when considering the fairness or unfairness of the dismissal as a sanction:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[83] Item 3(3) of the Code of Good Practice *inter alia* provides:

> 'Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.'

[84] Item 3(4) provides that generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

[85] The question is whether dismissal as a sanction was fair. In the *Sidumo* judgment, the Constitutional Court decided that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a commissioner or arbitrator decides whether dismissal as a sanction is fair in a particular case. The commissioner or arbitrator must decide that issue in accordance with his or her sense of fairness.

[86] Turning to the facts of the present matter, Commissioner Strydom testified at the disciplinary hearing that a decision to dismiss Myers was taken because of his poor disciplinary record. He testified that in January 2007, Myers was charged with and convicted of insubordination. A sanction of dismissal was imposed but it was suspended for six months on condition that he was not convicted of insubordination, insolence, disobeying instruction committed during the period of suspension. Myers appealed against the sentence and the appeal is still pending. Commissioner Strydom further testified that Myers acted irresponsibly in disobeying instruction when he was aware that he was still serving a suspended sentence for disobeying lawful instruction. He characterised Myers as a very ill-disciplined member of the SAPS and he formed the view that Myers' ill-discipline had completely destroyed the trust relationship between him and the SAPS.

[87] The arbitrator determined that the sanction of dismissal was appropriate in the present matter because Myers' actions "were completely unacceptable" and showed "a clear disregard of authority". According to the arbitrator it was completely unacceptable for Myers to have approached the media when he was aware that the police management was already addressing the issue and that he had been told that he was not to be part of the meeting. Myers' actions, the arbitrator found, showed "a clear disregard of authority".

[88] While it is clear from the evidence that Myers was aware that the police management was already addressing the police dogs malnutrition issue, there is, however, no evidence to suggest that he was aware or should have been aware of how the police management had resolved to handle the issue. In particular, there is no evidence to indicate that Myers was aware that the police management had instructed him not to communicate with the media on this issue. He was on leave when the dogs' malnutrition became an issue and he did not attend the meeting of 21 February 2007 which had been called to discuss the issue. Jones, who attended the meeting held on 21 February 2007, confirmed during

cross examination that he was not aware of such instruction having been given to Myers.

[89] In the circumstances, it is clear that there is no evidence to support the arbitrator's finding that Myers' action, in communicating with the media when he was aware that he was not allowed to do so, showed a clear disregard of authority. In the result, the arbitrator's conclusion that Myers disregarded authority was incorrect. It was based on erroneous factual findings and it is a conclusion which a reasonable decision–maker could not have reached. This amounted to gross misdirection and for this reason this court is entitled to interfere with the sanction.

[90] In my view the sanction of dismissal was too harsh and therefore rendered the dismissal unfair. There is no doubt in my mind that Myers acted in contravention of Regulation 20 (i) and (f) by releasing his statement for publication by the media without having first consulted with the relevant media liaison police official. But in my opinion his conduct did not amount to disobedience in the absence of evidence that he had been instructed not to do so. His conduct remains serious but it is not of such gravity that it makes a continued employment relationship between him and his employer or superiors intolerable. In the circumstances, the sanction of dismissal should be set aside and be replaced with an appropriate one.

[91] In reaching the conclusion to replace a sanction, I have also considered the fact that at the time of his dismissal Myers had been with the appellant for about 28 years and he held a senior rank. Shortly before the appellant instituted disciplinary proceedings against Myers, it transferred Myers to Bishop Lavis Police Station to assist in its management because of his impressive ability and leadership skills. Bishop Lavis Police Station had a number of capacity-related challenges.

[92] In the result, I would set aside a sanction of dismissal and replace it with a final written warning valid for 12 months from the date of this judgment

and order that Myers be reinstated in his position with backpay calculated at Myers' rate of pay on the date of the dismissal.[12] In light of the conclusion I have reached it becomes unnecessary to consider the cross appeal.

[93] To sum up, the arbitrator was correct in finding Myers guilty of contravening Regulation 20 (f) and (i). But it is the sanction which he imposed which renders the dismissal unfair. Therefore the court ***a quo's*** decision to review and set aside the award on the ground that it was not clear on which of the two charges Myers was found guilty, was wrong. In the circumstances the appeal should succeed.

[94] As far as costs are concerned, the Court ***a quo's*** award of costs in favour of Myers should be set aside in light of substantial and significant success achieved by the appellant in this appeal. In view of the fact that both parties are partly successful and also of the fact that costs in this Court are awarded according to the requirements of the law and fairness, I am of the view that it is only fair that each party be ordered to pay its own costs.

The Order

[95] In the result I would make the following order:

1. the appeal succeeds and the judgment and orders of the Court *a quo* are set aside and replaced with the following:

    1.1 the first respondent's dismissal is declared to have been substantively unfair;

    1.2 the appellant is ordered to reinstate the first respondent to the position he held in its employment before the first respondent's dismissal;

[12] In this regard see *Republican Press (Pty) Ltd v CEPPWAWU and Others* 2008(1) SA 404 (SCA) para 19.)

1.3 the order in 1.2 above is to operate with retrospective effect to the date of dismissal;

1.4 the first respondent is given a final written warning valid for a period of 12 (twelve) months from the date of this order;

1.5 no order is made as to costs.

2. Each party is ordered to pay its own costs.

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ZONDI, AJA

WAGLAY DJP

[97] I have had the pleasure of reading the judgment prepared by my brother Zondi AJA in this matter. While I agree that there is no basis to interfere with the finding of the arbitrator that Myers had committed the misconduct complained of, I am of the view that there is also no basis to interfere with the sanction of dismissal upheld by the arbitrator.

[98] Before dealing with the issue of sanction, I need to reemphasise that an employer is not and cannot be expected to frame a charge sheet in respect of a misconduct committed by an employee as one would prepare a charge sheet in a criminal matter. The importance of a so-called charge sheet in a misconduct enquiry is to set out the allegation that constitutes the misconduct so that the employee is aware of the

case to which he or she is required to answer. Also of little consequence is the employer's averment that the allegations constitute a number of counts of misconduct or a single count. It is the allegations that constitute the misconduct which must be considered and a conclusion arrived thereon

[99] Turning to the issue of sanction, my brother Zondi AJA, in paragraphs [81] to [83], sets out the ground rules which guide the imposition of an appropriate sanction in cases of misconduct. The important considerations that a review Court must take into account when deciding whether or not the sanction imposed by the arbitrator is reviewable is to test whether- (i) the sanction is that of the arbitrator (the sanction must be one that the arbitrator him/herself has decided or upheld as being appropriate); and whether, (ii) on the evidence presented at the arbitration and on the facts and circumstances properly made available to the arbitrator, the sanction is one that could reasonably be imposed or upheld.

[100] In this matter, clearly the misconduct must be viewed as serious. A media statement by an employee that undermines his/her employer cannot go unpunished, but where the employer serves the public and is expected to maintain a high degree of discipline within its ranks, then, a media statement that undermines the employer displays a lack of respect for authority. This is what Myers' misconduct amounts to.

[101] Further, we are not dealing with a junior officer, but one of 28 years standing. Added thereto, he is an official who occupies a very senior position within the SAPS; he commands a unit. If persons in such a position fail to follow internal rules and regulations, how are they to implement the rules and regulations and demand that their juniors respect them?

[102] As against the above, one must also be mindful of the fact that it is his unit which was the focus of attention. Would he not therefore have been best suited to be in the team to deal with the issue that became a public

concern? It is however, not for this Court to prescribe to the SAPS how it should deal with issues that confront it, but, the fact that Myers was excluded from the team looking to address the issue relating to the health of the police dogs in the unit that was under his control must serve as a mitigating factor. Added thereto is the fact that Myers only has 6 years' service until his retirement. In these circumstances, questions can be raised about the appropriateness of dismissal as a fair sanction.

[103] Whatever one's personal view may be, the test as set out in **Sidumo**[13] and as stated above, is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach.

[104] A consideration of all the relevant facts and circumstances, including the evidence presented at the arbitration in the form of a record, also leads to the conclusion, that Myers, although aware of the fact that the SAPS management was addressing the concerns raised about the diet of the dogs and despite being told that he could not be involved with the management in addressing the problem, sought to challenge their authority without any regard to the rules that regulate his conduct at the workplace. In these circumstances I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come. While it is a harsh sanction, it is not so unreasonable that it stands to be reviewed and set-aside.

[105] Finally, the first respondent cross-appealed against the order of the Court *a quo* which required the matter to be heard afresh by the Bargaining Council. In his cross-appeal he also sought the relief he prayed in his notice of motion. Having regard to the view I have arrived at in respect of the appeal, the cross-appeal must fail. As regards costs in respect of the cross-appeal I believe it is equitable to make no order in respect thereof.

[13] See para 82 of the judgment of Zondi AJA

[106] In the circumstances I make the following order:

(i) The appeal is upheld with costs.

(ii) The order of the court a quo is set aside and replaced with the following order:

"The application for review is dismissed with costs."

(iii) The cross-appeal is dismissed, with no order as to costs

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WAGLAY DJP

I agree with the judgement of WAGLAY DJP,

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MOLEMELA AJA

APPEARANCES.

For the Applicant	:	Adv. E A DE VILLIERS-JANSEN
Instructed by	:	State Attorney, Cape Town
For the first Respondent	:	Adv. J A Nortje
Instructed by	:	Wynand du Plessis
Date of Judgment	:	2 March 2012