REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 60/08; 307/09

C 60/08

In the matter between:

RIAAN BOOYSEN	**Applicant**
and	
MINISTER OF SAFETY & SECURITY	**First respondent**
NATIONAL COMMISSIONER OF SAPS	**Second respondent**
PROVINCIAL COMMISSIONER OF SAPS	**Third respondent**
SOUTH AFRICAN POLICE SERVICES	**Fourth respondent**
COMISSIONER YVONNE BADI N.O.	**Fifth respondent**

C 307/09

PROVINCIAL COMMISSIONER M PETROS N.O.	**Applicant**
and	
DIRECTOR D JOUBERT N.O.	**First respondent**
RIAAN BOOYSEN	**Second respondent**

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Heard: **30 November 2011**

Delivered: **25 January 2012**

Summary: Legality review in terms of LRA s 158(1)(h) – review of decision by chairperson of disciplinary hearing refusing postponement of hearing where police officer suffering from post-traumatic stress disorder – review of decision by SAPS appeals authority overturning that decision.

JUDGMENT

STEENKAMP J

Introduction

[1] In July 2007, the South African Police Services ("SAPS") alleged that Commissioner Riaan Booysen ("Booysen") had committed fraud, corruption and perjury in the scope of his duties as a police officer. Four and a half years later, those allegations have not been tested. During that period, the dispute between the parties has been the subject of a part-heard disciplinary hearing that had been postponed 12 times; an internal appeal; two unfair labour practice arbitrations before the Safety and Security Sectoral Bargaining Council; three urgent applications before this Court; an urgent application in the High Court; and an appeal to the Labour Appeal Court. This Court is not called upon to decide on the merits of the allegations against Booysen, but merely whether the disciplinary hearing should now – four and a half years later – proceed.

[2] The reason for these delays are mainly to be ascribed to the fact that five psychiatrists and psychologists have all agreed that Booysen suffers from post traumatic stress disorder ("PTSD") and major depressive disorder. They all agreed that he is unfit for duties as a police officer and should be medically boarded. Where they differ, to a greater or lesser extent, is whether he is fit to withstand the rigours of a disciplinary hearing; and if so, when it could continue.

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[3] The disciplinary hearing was initially convened on 31 October 2007 before SAPS Commissioner Yvonne Badi ("Badi"). After a number of interventions that will be discussed more fully later, she ruled that Booysen was fit to continue with the hearing. That ruling was challenged in an urgent application before Cheadle AJ in this Court on 12 February 2008 under case number C 60/2008. Cheadle AJ ruled that the Labour Court did not have jurisdiction to hear the application.[1] That decision was overturned on appeal[2] on 1 October 2010 and referred back to this Court for a hearing on the merits. In the interim, Booysen had been dismissed in terms of the deeming provision in Regulation 18(5)(a)(ii) of the SAPS Regulations[3] ("the Regulations"). He lodged an internal appeal that was chaired by Director D Joubert ("Joubert"). Joubert overturned Badi's decision.

[4] SAPS, purportedly represented by Provincial Commissioner Mzwandile Petros, has applied to this Court under case number C 307/2009 to review and set aside the Joubert decision. Booysen persists in his application under case number C 60/2008. Although no longer urgent, Booysen seeks to have the ruling by Commissioner Badi that he was fit to participate in the hearing; and her subsequent ruling that he is deemed to have been discharged, reviewed and set aside. These two applications have been consolidated (by Lagrange J on 21 October 2011) and both applications were argued before me on 30 November 2011.

[5] For the sake of convenience, I shall refer to the applicant in C 60/2008 (the second respondent in C 307/2009) as "Booysen"; and to the applicant in C 307/2009 and the respondents in C 60/2008 as "SAPS", except where an individual (such as Commissioners Petros or Badi) need to be identified by name. Adv Robert *Stelzner* SC appeared for Booysen and Adv Norman

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[1] Reported as *Booysen v SAPS & another* (2009) 31 *ILJ* 301 (LC) and [2008] 10 BLLR 928 (LC).

[2] In *Booysen v The Minister of Safety and Security* [2011] 1 BLLR 83 (LC).

[3] Regulations for the South African Police Service, Notice No R643, published in *Government Gazette* No 28985, 3 July 2006.

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Arendse SC appeared for SAPS in these proceedings and in most of the preceding court proceedings.[4]

Background facts

[6] On 11 July 2007, SAPS served a notice on Booysen to attend a disciplinary hearing on 3 August 2007. SAPS alleged that Booysen had committed misconduct comprising fraud, corruption and perjury.

[7] The alleged misconduct arises from two incidents in which Booysen had allegedly paid two informers (from SAPS coffers) who had not been registered as such. SAPS formulated seven charges arising from these incidents, viz:

7.1 Fraud in respect of informer claims for the amounts of R20 000, 00 and R15 000, 00 respectively;

7.2 Failure to comply with SAPS National Instruction 2/2001 in respect of the registration and finances of informers;

7.3 Wilful or negligent mismanagement of state finances;

7.4 Prejudicing the administration, discipline or efficiency of a state department, office or institution;

7.5 Failure to carry out a lawful order or routine instruction without just or reasonable cause;

7.6 Giving a false statement of evidence in the execution of his duties; and

7.7 Committing a common law and statutory offence, namely fraud.

[8] The allegations arose from a report by Supt Pieter Viljoen, who had been appointed to conduct the investigation in March 2007. Booysen had been on sick leave from 16 February 2007 because of major depressive disorder and post traumatic stress disorder (PTSD).

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[4] They were assisted by Ms N van Huyssteen and Mr B Joseph respectively in these proceedings.

[9] Booysen was allowed legal representation at the disciplinary hearing. Due to his legal representative, attorney Edmund Booth, being abroad on 3 August 2007, the hearing was postponed to 31 October 2007.

[10] The hearing was to be conducted in terms of the South African Police Service Discipline Regulations, 2006[5] ("the regulations"). The regulations are based on a collective agreement between SAPS (represented by the National Commissioner) and all the unions admitted to the Safety and Security Bargaining Council (SSSBC). The regulations prescribe a disciplinary process that is far removed from the simple procedures envisaged by the Labour Relations Act[6] and is more akin to a criminal trial; but that is the collective agreement that the parties entered into and, unless and until it is amended, they must abide by it.

[11] In terms of regulation 13(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."

The offences listed in that annexure includes fraud.

[12] On 4 September 2007, the Provincial Commissioner of SAPS suspended Booysen without pay with effect from 31 August 2007. Booysen referred an unfair labour practice dispute to the Bargaining Council and launched an urgent application in this Court (under case number C489/07) to compel SAPS to continue paying him his remuneration and other benefits pending the decision of the Bargaining Council. The parties agreed that an order be granted to this effect; and on 22 November 2007 that order was further extended to January 2008.

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[5] Published under GN R643 in *Government Gazette* 28985 of 3 July 2006.

[6] Act 66 of 1995 ("the LRA").

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[13] The disciplinary hearing commenced on 31 October 2007. Despite the fact that Booysen was suffering from PTSD, it continued until 2 November 2007.

[14] On the third day of the hearing, 2 November 2007, while a witness was being cross-examined, Booysen experienced a “flashback”. Booysen was reminded of previous traumatic incidents that he had experienced in criminal investigations and that led to his PTSD. The hearing was postponed to 3 December 2007 and Booysen was hospitalised. It was then further postponed to 8 January 2008.

[15] On that day, Badi was informed that, in terms of the court order of 22 November 2007[7], she had to decide on Booysen’s medical fitness to attend the hearing. The hearing was rescheduled to 16 January 2008 to enable one of the psychiatrists, Dr Teggin, to re-examine Booysen on 14 January 2008.

[16] On 16 January 2008, after having heard the medical evidence of four practitioners, Badi requested a further medical report by an independent expert appointed by the South African Society of Psychiatrists, Prof DJH Niehaus. The hearing was adjourned to 6 February 2008.

[17] On 5 February 2008, Nieuwoudt AJ made the following order in respect of the urgent application heard in this Court on 31 January 2008[8]:

17.1 The decision by the employer (SAPS) on 31 August 2007 to suspend the employee (Booysen) without remuneration is varied to the extent that the continuation of the employee’s membership of Polmed[9] and the funding of his employer and employee contributions to Polmed are excluded from the decision;

17.2 The employer is directed to continue to fund the employer and employee contributions in respect of the employee to Polmed.

[18] The order was to operate until determination of the suspension dispute by the Bargaining Council.

[7] Case number C489/2007.

[8] Case C489/2007, relating to the suspension without remuneration in terms of regulation 13(2).

[9] The SAPS medical aid fund.

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[19] On 6 February 2008 Badi ruled that, despite his major depressive disorder and PTSD, Booysen's concentration and memory was not so impaired as to hinder or restrict his participation in the disciplinary hearing. She ruled that the hearing would commence, with Booysen in attendance, on 13 February 2008.

[20] On 12 February 2008 Booysen launched the urgent application under case number C60/08 that was heard before Cheadle AJ. Booysen sought to have the disciplinary hearing postponed pending the Court's decision to review and set aside Badi's ruling of 6 February 2008.

[21] Cheadle AJ, in an *ex tempore* judgment, ruled that this Court had no jurisdiction to hear the application. He provided further written reasons on 14 February 2008. SAPS appealed and the Labour Appeal Court eventually overturned the judgment on 1 October 2010. It is on the strength of that LAC judgment that the review application of Badi's ruling (under case number C60/08) was argued before me in November 2011.

[22] In the interim, matters developed further at the workplace. On 12 May 2008 the Bargaining Council (commissioner Bill Maritz) determined that Booysen's suspension without pay beyond the 90 day period stipulated by regulation 13(2)(d) was an unfair labour practice. SAPS reinstated Booysen's salary and benefits from 6 February 2008.

[23] However, at the next day scheduled for the continuation of the disciplinary hearing, 2 June 2008, Badi invoked regulation 18(5)(a)(i) to suspend Booysen without remuneration again, because he was not personally in attendance. Regulation 18(5) reads:

(a) In the event that the employee fails to appear at the disciplinary

hearing on any date to which the disciplinary hearing has been

postponed, or a date to which it was postponed in terms of

subregulation (3) -

(i) the employee shall, from the date of such failure to appear

or remain in attendance, be deemed to be suspended

without remuneration; and

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(ii) the chairperson must postpone the disciplinary hearing indefinitely, and the disciplinary hearing shall only reconvene at the instance of the employee concerned, after liaising with the *employer representative,* as contemplated in subregulation (l)(b): Provided that in the event that the employee fails to take steps to reconvene the hearing within two (2) months of such date, the chairperson must record such failure on the record of the disciplinary hearing, and the employee shall forthwith be deemed to be discharged from the Service in terms of regulation 15(1)(e).

(b) In the event of a hearing being reconvened in terms of subregulation (5)(a)(ii) the chairperson must summarily inquire into the reasons for the employee's failure to appear or remain in attendance at the disciplinary hearing and confirm or set aside the suspension as contemplated in subregulation (5)(a)(i).

(e) Notwithstanding paragraphs (a) and (b), the chairperson may, on good cause shown, at any time set aside a suspension contemplated in subregulation (5)(a)(i).

(d) Notwithstanding paragraphs (a) and (b), the chairperson may, upon good cause shown, decide that the employee must not be suspended and that the hearing be postponed to a later date.

[24] Booysen referred another dispute to the Bargaining Council, alleging that this suspension was an unfair labour practice. On 1 August 2008 the legal representatives for Booysen (Messrs Stelzner SC and Booth) and SAPS (Messrs Arendse SC and Joseph, and Ms Bailey) had a pre-arbitration meeting. Mr Booth tendered to represent Booysen at the disciplinary hearing in his absence "with reservation of his rights".

[25] Booth took steps to continue with the disciplinary hearing before the expiry of the 60 day period referred to in regulation 18(5)(a)(ii). It was scheduled

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to continue on 12 August 2008. At the hearing, Booth asked Badi to revisit her decision of 6 February 2008 that Booysen was fit to attend the hearing. She refused. Booth then brought an application for the hearing to continue in Booysen's absence. He explained that he would cross-examine the witnesses for SAPS on the instructions he had previously received from Booysen; and that he would lead Booysen's case by way of an affidavit that Booysen had previously deposed to and, if necessary, by leading further witnesses. Badi initially ruled that the hearing would continue at 14h00 the same day in Booysen's absence, after the parties' legal representatives had agreed in writing as to the process. However, the parties could not agree. Badi then ruled that the hearing had not been "reconvened" and that Booysen was deemed to be discharged in terms of regulation 18(5)(a)(ii). The record of the disciplinary hearing confirms that Booysen was dismissed in terms of that regulation.

[26] Booysen lodged an internal appeal against Badi's decision of 12 August 2008. He also referred an unfair dismissal dispute to the Bargaining Council. On 11 September 2008 the state attorney (Ms Colleen Bailey), on behalf of SAPS, confirmed in a letter to Booth that:

> "[Y]our client is entitled to appeal his dismissal in accordance with Regulations 17(3) and (4) of the prevailing Regulations for the South African Police Service (2006)".

[27] Director Joubert, as the appeals authority, upheld the internal appeal on 27 February 2009. It is that decision that SAPS wishes to have reviewed and set aside under case number C 307/2009.

<u>The Badi rulings</u>

[28] To summarise: Booysen seeks to have Badi's rulings of 6 February 2008 and 12 August 2008 reviewed and set aside. The ruling of 6 February was to the effect that Booysen was fit to continue with the disciplinary hearing or, as she put it, "fit to stand trial". The ruling of 12 August was to the effect that Booysen was deemed to have been discharged in terms of regulation 18(5)(a)(ii).

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The Joubert ruling

[29] SAPS seeks to have Joubert's ruling – in his capacity as its appeals authority – overturning Badi's ruling reviewed and set aside. The effect of Joubert's ruling is that Booysen is reinstated. He found that Badi erred in her finding of 6 February 2008 that Booysen was "fit to stand his trial"; the ruling of 12 August 2008 that Booysen was deemed to be dismissed, followed on the ruling of 6 February. In upholding Booysen's appeal, therefore, it appears – even though it is not spelt out – that SAPS should have reinstated Booysen. It did not do so and instead brought the application to review the Joubert decision under case number C307/2009.

Legal principles: legality

[30] Both applications for review are argued on the grounds of legality in terms of s 158(1)(h) of the Labour Relations Act.[10] Neither is an application to review an arbitration award in terms of s 145, ie the type of review that this Court customarily deals with.

[31] In *National Commissioner of Police & another v Harri NO & others*[11] I considered the effect of the Constitutional Court decisions in *Chirwa*[12] and *Gcaba*[13] on reviews in terms of this section in some detail. I do not propose to reiterate those principles here. Suffice it to say that, anomalous as it may seem, I remain bound by the decision of the Supreme Court of Appeal in *Ntshangase v MEC for Finance, KwaZulu-Natal & another.*[14] The actions of Badi and Joubert qualify as administrative action. That being so, it must be lawful, reasonable and procedurally fair.

[32] The test to be applied on review remains that outlined in *Sidumo*, ie whether the decisions of Badi and Joubert were so unreasonable that no

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[10] Act 66 of 1995 (the LRA).

[11] (2011) 32 *ILJ* 1175 (LC) paras [15] – [39].

[12] *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC).

[13] *Gcaba v Minister of Safety & Security and others* 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC).

[14] 2010 (3) SA 210 (SCA); (2009) 30 *ILJ* 2653 (SCA).

reasonable decision maker could have come to the same conclusion. That much appears from the SCA judgment in *Ntshangase.*[15]

The point of departure: Badi or Joubert?

[33] Booysen seeks to have the two rulings by Badi – relating to the continuation of the disciplinary hearing on 6 February 2008 and his dismissal by virtue of regulation 18(5)(a)(ii) on 12 August 2008 – reviewed and set aside. SAPS seeks to have the appeal ruling by its appeals authority i.e. Joubert - overturning Badi's decision, reviewed and set aside. If Badi's rulings are reviewed and set aside, Joubert's decision on appeal becomes moot. And if Joubert's decision on appeal is upheld, the Badi review becomes moot, as her decision of 6 February (and the consequent deemed dismissal on 12 August 2008) fall away.

[34] It appears to me to be the most sensible course of action to start at the end. Booysen has resorted to the internal appeal process of the SAPS. If the decision of the appeals authority is reviewable, the question remains whether Badi's rulings are open to review. But if the decision of the appeals authority is reasonable, *caedit questio.* The Badi rulings fall away; Booysen is reinstated; and another chairperson would have to decide whether he is now, some four years after her initial ruling, able to attend a disciplinary hearing.

The expert evidence

[35] The expert evidence submitted to the disciplinary hearing and considered by Badi and Joubert is important in order to form a view of the reasonableness of Badi's ruling on 6 February 2008 and the subsequent events.

[36] Booysen submitted the evidence of two expert witnesses: Dr EP Vorster, his attending psychiatrist; and Prof PP Oosthuizen, an independent psychiatrist and academic from the University of Stellenbosch. Both of them submitted written reports and gave oral evidence.

[15] *Supra* paras [15] – [16] (per Bosielo AJA), cited with approval in *Harri (supra)* para [34] – [39].

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[37] SAPS submitted written reports by Mr L Loebenstein, a psychologist; and Dr A Teggin, a psychiatrist. Teggin also gave oral evidence.

[38] Badi called for a further independent expert to consult with Booysen and to present her with his findings. The chairperson of the South African Society of Psychiatrists appointed Prof DJH Niehaus of the University of Stellenbosch.

[39] All of the experts are *ad idem* that Booysen suffers from major depressive disorder and PTSD, i.e. there is no suggestion that he is malingering or faking his condition. They also unanimously recommended that Booysen should be medically boarded.[16] Where they part ways, is whether and to what extent he is able to withstand the rigours of a disciplinary hearing.[17]

[40] Vorster, Oosthuizen and Niehaus (the independent expert appointed at Badi's behest) all agreed that Booysen could not be subjected to a continued disciplinary hearing. Their views were influenced by initial consultations with him as well as the event on 2 November 2007 at the initial stages of the hearing when Booysen suffered a major relapse and flashbacks brought about by the evidence of a witness that caused him to recall some of the traumatic events that caused his condition in the first place. This necessitated his hospitalisation.

[41] Dr Vorster was of the view that Booysen was medically unfit to attend a hearing for an indefinite period of time. This was because the hearing itself would generate further anxiety and tension; and that Booysen would be reminded directly or indirectly of past traumatic experiences that would impair the healing process.

[42] Prof Oosthuizen was of the opinion that Booysen's experience of anxiety would be ongoing and would affect his concentration, attention and memory; and that there was a pertinent risk of suicide. He was of the view that Booysen would be able to recover to the extent where he would be able to participate in a hearing at a later stage.

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[16] The reason that this has not happened is because SAPS wished to finalise the disciplinary hearing. Were he to be dismissed, he could evidently not be medically boarded.

[17] I use the present tense to describe the position as at February 2008. There is no evidence before me what the position is four years later. Depending on the outcome of this judgment, it may well be that Booysen has to undergo fresh tests to ascertain his present condition.

[43] Loebenstein, and initially Teggin, were of the view that Booysen could participate in a disciplinary hearing, provided that the inquiry –

43.1 was not "inquisitorial";

43.2 was not one in which Booysen was required to give evidence;

43.3 was not one in which he would be subjected to harsh cross-examination;

43.4 would not induce flashbacks or further panic attacks.

[44] At the continuation of the hearing on 6 January 2008, though, Teggin testified that he was now of the view that Booysen could participate in the hearing. Having initially noted in his consultation notes and in his report of October 2007 – confirmed in a joint report with Loebenstein in November 2007 - that Booysen's concentration was impaired, he now stated that he had "found no evidence of concentration impairment or memory impairment". He further testified that he had come to this conclusion without having performed any of the standard – and rather simple – tests that Vorster and Oosthuizen had recommended and used.

[45] During his cross-examination on 6 January Teggin suggested that a joint report by him and Oosthuizen – for whom he had high regard – would be useful. Oosthuizen was also prepared to do so. However, SAPS objected, stating that Teggin "was originally requested by the state and on behalf of the state to bring out a report" and that "this is our witness".

[46] The hearing was nevertheless adjourned to enable Teggin to consult with Booysen again and to produce a further report. Badi also requested a report from an independent psychiatrist, consequent to which Niehaus was appointed, consulted with Booysen and produced his own report.

[47] At the resumption on 16 January 2008, Teggin produced a third report, having consulted with Booysen again on 14 January. He formed the opinion that Booysen's psychiatric condition had improved, largely due to the correct dosage of medication. He was of the view that "Booysen's condition has plateaued and that little further in the way of symptom improvement can be expected in the future". He came to the conclusion that Boysen was medically fit to attend the disciplinary hearing.

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[48] Both Oosthuizen and the independent expert requested by Badi, Prof Niehaus, strongly disagreed.

[49] Niehaus gave evidence on 6 February 2008, having consulted with Booysen on 1 February. He agreed with Teggin that "...many people with psychiatric disorders are able to attend and defend themselves (advise their legal team) despite the psychiatric symptoms." He also agreed that a speedy conclusion to the dispute between the parties would benefit Booysen's general well-being. However, he pointed out that, in addition to the impact on the proceedings of the emotional liability and anger outburst associated with PTSD, further issues arose:

49.1 Re-living of the events with associated stress response. Niehaus disagreed with Teggin that it would be possible to conduct the hearing in a safe environment, as Booysen's trigger events are closely linked with the potential witnesses and presiding officer in the case.

49.2 Siginificant concentration difficulties demonstrated during his assessment of Booysen.

[50] In summary, Niehaus was of the opinion that Booysen's condition was of a marked degree and impairs his ability to partake fully in the hearing.

[51] Badi, however, came to the conclusion that Booysen was fit to participate in the hearing. It is that decision that was overturned by Joubert in the internal appeal.

<u>Is Joubert open to review?</u>

[52] Before considering the merits of the Joubert review, I need to consider two preliminary points relating to that application. The first is that the application was filed late and that SAPS (purportedly represented by Commissioner Petros) seeks condonation. The second is that Booysen takes issue with Petros's authority to bring the application.

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<u>Condonation</u>

[53] The affidavit filed by Commissioner Petros and the application for review in case number 307/2009 was brought out of time. The date of the finding on appeal by Joubert is 27 February 2009. The review application was delivered on 8 May 2009. Petros says the decision of the appeals authority was only "shown to him" after 2 March 2009. He states so in the passive voice, thus avoiding having to identify the person who allegedly showed it to him. (He also does not attach a confirmatory affidavit by that unnamed person). He further sets out a number of consultations between him, the state attorney and counsel over the following two months and alleges that there were "problems obtaining the record of proceedings before the appeals authority", although this is hearsay.

[54] These reasons are neither good nor sufficiently explained. However, given the length of time this matter has taken to reach a hearing on the merits of Badi's decision – and hence the decision of the appeals authority – some of which may be attributable to systemic delays, I believe it is in the interests of justice to decide on the matter after having fully considered all the evidence and arguments – all in all comprising some 1600 pages -- before me. In these circumstances condonation for the late filing of Booysen's answering affidavit is similarly condoned.

[55] The same applies to the replying affidavit, that was filed some 20 days late; and the heads of argument filed by counsel for SAPS, instructed by the state attorney. I pause only to note that it is an unhappily frequent occurrence in this Court that the state attorney pays scant regard to the rules relating to time limits and is all too often quite prepared to accept an adverse costs order, safe in the knowledge that the taxpayer will foot the bill.

[56] Condonation for the late filing of the founding and replying affidavits and the heads of argument for SAPS; and of Booysen's answering affidavit is granted. Costs will follow the result.

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Locus standi

[57] Booysen takes issue with the authority of Commissioner Mzwandile Petros, then Western Cape Provincial Commissioner of SAPS, to bring the application in the Joubert review (case number C 307/2009).

[58] The applicant in that review application is cited as "Provincial Commissioner M Petros N.O.". The deponent to the founding affidavit, Commissioner Petros, states that:

> 'I am the Provincial Commissioner of the Western Cape province, a Member of the Service established by s 5(1) of the South African Police Service Act 68 of 1995, as amended ("the SAPS Act"), having been appointed by the National Commissioner in terms of s 6(2) of the SAPS Act. My offices are at 25 Alfred Street, Green Point, Western Cape.
>
> I bring this application both in my official capacity (*nomine officio*) as Provincial Commissioner, and in a representative capacity (duly authorised) on behalf of the employer, the National Commissioner and the South African Police Service ("SAPS").'

[59] Petros further alleges that he is duly authorised by the "employer" as contemplated in the regulations to perform any function in terms of the regulations on behalf of, and in the name of, the National Commissioner insofar as it relates to members of SAPS employed in the Western Cape.

[60] Booysen challenged Petros's authority in his answering affidavit. He pointed out that SAPS had not been cited as a party; that there is no confirmatory affidavit by the National Commissioner; and invited Petros to prove his authority to act on behalf of SAPS. Petros did not do so in reply. Instead, he alleged:

> "The newly appointed National Commissioner, Mr Bheki Cele, has been briefed by the SAPS' legal advisers on this matter, and he has authorised me to continue representing him, and his office, in these proceedings. He supports the application. The relevant written authorisation will follow in due course."

[61] Despite this assertion, Commissioner Cele did not file a confirmatory affidavit. Petros deposed to the replying affidavit on 23 September 2009. The application was heard more than two years later. To date, the "written authorisation" that was foreshadowed in the replying affidavit and that

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would – so Petros stated under oath – "follow in due course", has not been presented to the Court.

[62] In the heads of argument filed by messrs *Arendse* and *Joseph* on 15 April 2011, they stated that:

> "Once the authority of a departmental officer to represent the State is challenged, it is incumbent upon the State to produce proof that such office is duly delegated, directed and authorised to represent it in the proceedings.
>
> In the circumstances, the relevant written authorisation will be produced at the hearing of this matter in due course, confirming the deponent's authority to institute and prosecute this review."

[63] This was not done in the subsequent seven months before the matter was heard; at the hearing on 30 November 2011; or at any stage thereafter prior to this judgment being handed down.

[64] In terms of the regulations, 'appeals authority' means a person or persons appointed by the National Commissioner to consider appeals and 'employer' means the National Commissioner or any person delegated by him or her to perform any function in terms of the regulations.

[65] The regulations do not provide for the delegation of the authority to appoint the appeals authority. It seems to me to follow that, if only the National Commissioner can appoint the appeals authority, it is only the National Commissioner that can have the authority to take that authority on review, as expressed by the maxim *delegatus delegare non potest.*

[66] In the face of Petros's failure to provide any delegation of authority for him to bring the application for the Joubert review, despite the pertinent challenge – and subsequent promise – to do so, the application by Petros under case number C 307/2009 should be dismissed on this ground alone.

[67] I shall nevertheless deal with the merits of that application in an effort to bring this matter to finality.

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Merits of the Joubert review

[68] Booysen appealed the Badi rulings of 6 February, 2 June and 12 August 2008 internally in terms of the regulations. These rulings were, respectively, that:

68.1 Booysen was fit to participate in the disciplinary hearing;

68.2 He was deemed to be suspended without remuneration in terms of regulation 18(5)(a)(i); and

68.3 He was dismissed in terms of regulation 18(5)(a)(ii).

[69] Regulation 17 establishes the appeals authority, comprising a person or persons appointed by the National Commissioner to consider appeals or, as in this case, a specific appeal. In this case, Director Joubert was appointed as the appeals authority.

[70] In terms of regulation 17(3) an employee may appeal a finding or sanction. Regulation 17(4) stipulates that the appeals authority must consider the appeal and, in the event that he decides that a hearing is required, he must notify the appellant of the date and place of the hearing.

[71] It is clear from regulation 17(4) that a hearing is not compulsory and that the appeals authority may decide the appeal without a hearing. He may uphold the appeal, reduce any sanction imposed, or dismiss the appeal. In this case, Joubert upheld the appeal.

[72] Mr *Arendse* submitted that Joubert was obliged to convene a hearing; that he did not do so; and that SAPS was not given an opportunity to be heard.

[73] Firstly, I cannot agree with the initial contention. Even though a hearing is often required or held in internal appeals, regulation 17(4) could not be clearer – the appeals authority has a discretion to convene a hearing or not. That regulation forms part of a collective agreement and the parties are bound by it.

[74] But in any event, as I pointed out to Mr *Arendse* during oral argument, it appears from the papers that the employer was given an opportunity to be heard.

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[75] Badi evidently submitted a document to the appeals authority with the heading:

> "Appeal in respect of disciplinary hearing: No 0406298-1 Director R Booysen: PC 511/2007.
>
> Reasons for judgement [*sic*] in terms of regulation 16(1) of the SAPS Discipline Regulations, 2006 for consideration by the Provincial Commissioner – Western Cape."

[76] In this document, Badi sets out her reasons for each of the rulings that formed the subject of the appeal, ie those of 6 February, 2 June and 12 August 2008.

[77] In his decision on appeal dated 27 February 2009, Joubert quotes the full reasons supplied by Badi verbatim under the heading, "Chairperson's response to the grounds of appeal". It is thus clear – contrary to Mr *Arendse*'s further submission – that the appeals authority did consider those submissions.

[78] It is further noteworthy that, in case number C60/08, Badi deposed to an affidavit in her official capacity "and also on behalf of the other respondents" – that is, the Minister of Safety and Security; the National Commissioner; the Provincial Commissioner; and SAPS. She places herself squarely in the employer's camp and it does not lie in the mouth of SAPS to say it was not given an opportunity to be heard by Joubert when he clearly considered Badi's response to Booysen's grounds of appeal that she placed before him.

[79] SAPS further contended that Joubert did not have jurisdiction to consider the appeal. Its reasoning is that Booysen was "dismissed by operation of law" by reason of regulation 18(5)(a)(ii) after Badi had ruled that the hearing had not been reconvened.

[80] The flaw in this argument is evident from its very premise. As counsel for SAPS submitted in their heads of argument, Badi ruled that the hearing had not reconvened; on the premise of that ruling, she made the further ruling that Booysen was deemed to be dismissed in terms of regulation 15(1)(e), as she clearly states in her reasons submitted to the appeals

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authority. It is thus clear that, in her own mind, Badi had no doubt that she had imposed a sanction of dismissal in terms of regulation 15(1)(e).

[81] That decision in itself was premised on Badi's ruling that the disciplinary hearing had not "reconvened" on 12 August 2008. As she states in her reasons to the appeals authority:

> "Reconvening meant that the appellant had to appear personally before the chairperson in order for the hearing to proceed. I rejected the proposal that we proceed in his absence as requested by Mr Booth. In the absence of Dir Booysen at the hearing I decided that we had not reconvened according to the Regulations and as a result thereof I involved [*sic*] the provisions of Regulation 15(1)(e)."

[82] This reasoning is not borne out by the wording of the regulation. The regulation envisages that the employee must "take steps to reconvene the hearing" within two months of a postponement. The employee has a right to be represented and, in this case, SAPS allowed him to use a legal representative, Mr Booth. Booth ensured that the hearing was reconvened within the requisite time period. Given his client's medical condition, he made a reasonable, if not ideal, proposal – ie that he would continue to represent Booysen, cross-examine SAPS' witnesses, lead the evidence of witnesses other than Booysen, and submit Boysen's earlier affidavit into evidence. I fail to see how a reasonable chairperson could not have considered this an attempt to – or steps to – reconvene the hearing on behalf of the employee.

[83] Having considered the grounds of appeal and Badi's response thereto, Joubert correctly pointed out that the appeal was not about the merits of the alleged misconduct. The first question, he said, was whether Badi made the correct decision when she made the ruling that Booysen was "fit to stand this trial".

[84] Joubert considered the medical evidence that was led before Badi. He concluded that she erred in her finding that Booysen was fit to continue with the hearing.

[85] In doing so, Joubert used the terminology of evidence being "more probably true" on a balance of probabilities, rather than simply assessing the weight of the medical evidence. In doing so, he did not, strictly

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speaking, use the correct legal test. But does that make his finding reviewable?

[86] I think not. His finding remains reasonable. The weight of the medical evidence before Badi – and especially that of the independent expert appointed at her insistence, Prof Niehaus – was clearly that Booysen was not in a state to attend the hearing at that stage. In dismissing all of the evidence bar that of Teggin's revised opinion, Badi acted irrationally; and when the appeals authority comes to the conclusion that she was "wrong", that is not, in my mind, an unreasonable conclusion.

[87] Having upheld the appeal with regard to the ruling of 6 February 2008, Joubert did not consider it necessary to deal with the other two grounds of appeal. Maybe he should have; but no other inference can be drawn than that he upheld the appeal as a whole, as the rulings of 2 June and 12 August followed on that of 6 February 2008. The result is that Booysen should have been reinstated.

[88] The ruling of the appeals authority overturning those of Badi is not so unreasonable that no other authority could have come to the same conclusion. The Joubert decision is not open to review.

[89] That makes it unnecessary to decide whether the Badi ruling of 6 February 2008 is reviewable, as it has been overturned. However, the question of costs in that review application (case C 60/2008) remains relevant.

<u>Is Badi open to review?</u>

[90] Firstly, it is important to note that the application in this matter (C60/2008) is no longer urgent; however, the "exceptional circumstances" that would have to shown to interdict a disciplinary hearing, as required by the Labour Appeal Court[18] need still be shown in order for the application for review in the normal course -- albeit one based on legality in terms of s 158(1)(h) of the LRA – were to succeed. This is so because the effect of a successful review application would be to hold that Badi should have postponed the disciplinary hearing, and for a court to order that that be done *in medias*

[18] *Booysen v The Minister of Safety and Security* [2011] 1 BLLR 83 (LC).

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res would only happen in exceptional cases. That is so because an employee has the dispute resolution procedures prescribed by the LRA to his or her disposal if he or she were to be dismissed following a flawed procedure.

[91] Secondly, I express an opinion on this matter merely insofar as it is relevant to costs. As explained above, I need not decide the Badi review, as the Badi ruling under review has been overturned on appeal by the appeals authority (Joubert) and that decision stands. My views in this regard are thereofore *obiter*.

[92] Badi summarily rejected the express view of the independent expert that was appointed at her behest, Prof Nienaber, that Booysen was not fit to continue with the hearing at that stage. She also rejected the views of Vorster and Oosthuizen and accepted that of Teggin (as revised) without a proper explanation.

[93] Badi placed much emphasis on the fact that Proff Nienaber and Oosthuizen were both associate professors at the University of Stellenbosch; and that they had both graduated from the University of the Free State. On the basis of these facts, and because Oosthuizen had mentioned to Nienaber in passing that he was due to consult with Booysen, Badi rejected Nienaber's evidence on the basis that he was not independent. Those facts could hardly point to any bias on the side of Nienaber. Academics of the standing of these experts have the benefit of academic freedom; they can (and do) freely disagree with their colleagues, and their professional ethics would not allow them to be swayed by collegiality or even personal friendships. Similar principles of etiquette and ethics apply to legal academics, counsel and judges.

[94] Exceptional circumstances existed. The hearing had already commenced with Booysen present, but an extraordinary incident led to him experiencing a flashback and resulting in his medical condition deteriorating to the extent that he had to be hospitalised. This had an effect on the expert medical opinions placed before Badi. She dismissed those opinions – bar that of Teggin – without proper consideration.

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[95] Interestingly, the Employment Appeal Tribunal in the UK dealt with the issue of an adjournment because of ill-health in a judgment handed down just over a week ago. In *O'Cathail v Transport for London*[19] Richardson J found that the refusal of the Employment Tribunal to adjourn a hearing was wrong in law.[20] The learned judge confirmed that the EAT [like this Court] will only examine adjournment decisions in limited circumstances; yet, where the fairness of the proceedings as a whole is endangered, it will consider whether the decision was fair. Applying *Teinaz v London Borough of Wandsworth*[21]*,* it was held that where an employee's presence is needed for a fair hearing, but he is blamelessly unable to attend because of a medical condition, the tribunal should usually grant an adjournment. The tribunal is entitled to be satisfied that the inability was genuine and the onus is on the employee to prove the necessity of the adjournment.

[96] Richardson J cited the dictum of Sedley LJ in *Terluk v Berezovsky*[22] with approval, even though that decision was not concerned with an employment dispute:

"18. Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In Gillies v Secretary of State for Work and Pensions [2006] UKHL 2, Lord Hope said (at §6):

'[T]he question whether a tribunal ... was acting in breach of the principles of natural justice is essentially a question of law.'

As Carnwath LJ said in AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579, §50, anything less would be a departure from the appellate court's constitutional responsibility. This 'non-Wednesbury' approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in R v S W London SBAT, ex parte Bullen (1976) 120 Sol.

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[19] Appeal no UKEAT/024/11/MAA (unreported, 13 January 2012).

[20] The employee in that case was suffering from anxiety and depression. However, the specific adjournment sought was because of a respiratory infection.

[21] [2002] IRLR 721; [2002] ICR 1471.

[22] [2010] EWCA Civ 1345 (25 Nov 2010), followed in *Osborn & Booth v Parole Board* [2010] EWCA Civ 1409.

Jo. 437; see also R v Panel on Takeovers, ex p Guinness PLC [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the Bullen decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention - for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial.

19. But, as Lord Hope went on in his next sentence in Gillies to point out, the appellate judgment

'requires a correct application of the legal test to the decided facts…'

Thus the judgment arrived at at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.

20. We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in Bullen, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was "the" fair one."

[97] I believe similar considerations apply in assessing the fairness of the proceedings in our law. Despite the fact that Booysen's inability to attend was genuine, based on the weight of the medical evidence, Badi refused his request for a postponement. That decision was unreasonable in the circumstances.

[98] Bearing in mind that the attack on Badi's ruling is based on review and not appeal, this Court should be slow to interfere. Nevertheless, the reasonableness of Joubert's decision – sitting as the internal appeals authority – is borne out by Badi's failure to apply the correct legal test when considering the medical evidence before her.

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[99] The Supreme Court of Appeal dealt with those principles in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[23] where it was said:

> '[I]t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed."'

[100] Applying this test to the facts before the court in *Louwrens v Oldwage*[24] Mthiyane JA remarked:

> 'The uncritical acceptance of the evidence of Professor de Villiers and the plaintiff's other expert evidence and the rejection of the evidence of the defendant's expert witnesses falls short of the requisite standard and the approach laid down by this Court in *Michael v Linksfield Park Clinic.* What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to each other, viewed in the light of the probabilities. I have already indicated why I found the evidence adduced on behalf of the defendant to be more acceptable than that of the plaintiff's witnesses and why the conclusion of the trial court cannot stand.'

[101] As a lay chairperson of an internal disciplinary hearing, in my view, Badi should have deferred to the weight of expert medical evidence and opinion before her. She did not do so. This meant that she acted irrationally. I would have been inclined to set aside her ruling on the basis of irrationality.

[102] That being the case, SAPS should carry Booysen's costs in case number C 60/08 as well.

Conclusion

[103] The Joubert decision in case number C 307/ 2009 is not open to review. The effect of this judgment is that Badi's rulings of 6 February, 2 June and 12 August 2008 are overturned.

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[23] 2001 (3) SA 1188 (SCA); [2002] 1 All SA 384 para [39].

[24] 2006 (2) SA 161 (SCA) para [27].

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[104] Booysen must therefore be reinstated retrospectively to the date of his dismissal with full benefits.

The way forward

[105] There is no evidence before this Court what Booysen's current medical condition is. In 2008 all of the psychiatrists and psychologists who provided reports and gave evidence were *ad idem* that he suffered from PTSD and major deperessive disorder. They did not agree on the question whether it was a chronic condition.

[106] While all of the experts were also in agreement that Booysen should be medically boarded, it is not in the public interest that employees who are alleged to have committed misconduct should be able to act with impunity. It may still be necessary to proceed with a disciplinary hearing. In that case, a new presiding officer will have to be guided by the expert medical opinions available in order to decide on an appropriate process. That could or may include a process along the lines of that proposed by Mr Booth. It could also, for example, provide for written questions to be put to Booysen and for him to be given an opportunity to provide written answers. It is not ideal, but the Code of Good Practice and the LRA provide for informal processes. Insofar as it does not conflict with the parties' own collective agreement embodied in the regulations, a way out can and should be found.

[107] Positions have become entrenched in the lengthy and costly litigation between the parties over the last four and a half years. The parties may also be well advised to enlist the assistance of a mediator, perhaps assisted by medical experts, in a final effort to bring this matter to a resolution.

The floodgates argument

[108] I expressed the opinion that employees who suffer from medical conditions – even if it came about through the nature of their very occupation – should not be able to use that fact on order to act with impunity and escape liability for misconduct.

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[109] It may be argued that the effect of this judgment would be that many police officers, when faced with a disciplinary hearing, will try to escape it by claiming PTSD.

[110] It is so that, as an unfortunate result of the violent society we live in, PTSD is not an uncommon syndrome amongst South African police officers. But in this case there were indeed "exceptional circumstances" – not only in the sense referred to by the LAC, but also in the sense that the circumstances of the disciplinary hearing itself were unique. The incident resulting in Booysen suffering a flashback only occurred when the matter was already part-heard. It is to be envisaged that, in many, if not most, disciplinary hearings, such an incident is unlikely to occur. The degree to which an individual may be incapacitated to the extent that Booysen was, will differ from person to person; in many cases, the unanimous legal advice may well be that the employee is fit to continue with a hearing. Our criminal courts are confronted with similar cases on a regular basis, and it is rare for a court to rule that an accused person in a criminal case is not fit to stand trial.

[111] Each case has to be considered on its own merits. I doubt, though, that this judgment will have the floodgates effect that concerns me.

<u>Costs</u>

[112] Booysen has been successful in the Joubert review. That makes the Badi review moot, but in the light of the view I have taken on Booysen's prospects of success in that application, he should not be burdened with the costs of that application either.

[113] I have noted earlier in this judgment that SAPS and the state attorney have adopted a somewhat lackadaisical approach in conforming to the time limits imposed by the LRA and the rules. Not only did they file a number of pleadings late, they also failed to abide by the undertakings given by them, Commissioner Petros and their counsel to provide the requisite authorisation delegating the authority to institute the proceedings in case number C307/2009 to Petros. This is also a factor relevant to costs. Unfortunately, it is the taxpayer that will ultimately bear those costs.

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Order

[114] In the result, I rule as follows:

114.1 The application for review in case number C 307/2009 is dismissed.

114.2 The respondents in case number C 60/08 and the applicant in case number C 307/2009 are ordered to pay Booysen's costs jointly and severally, the one paying, the other to be absolved; such costs to include the costs of two counsel where so employed.

Anton Steenkamp

Judge

APPEARANCES

APPLICANT (Booysen): RGL Stelzner SC and N van Huyssteen
Instructed by Edmund Booth.

RESPONDENTS (SAPS): N Arendse SC and B Joseph
Instructed by the State Attorney.

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