



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 39/2019

In the matter between:

SOUTH AFRICAN POLICE SERVICE

Appellant

and

POPCRU obo KD MMATLI

First Respondent

BARGAINING COUNCIL

Second Respondent

MULIMA DENGA N.O

Third Respondent

Heard: 27 August 2020

Delivered: 13 November 2020

Summary: SA Police Service --- Regulation 20(z) of SAPS Disciplinary Regulations 2006---Dismissal for misconduct---Employee guilty of misconduct if he inter alia commits common-law or statutory offence--- Irrelevant that member acquitted in the criminal trial---Sufficient under the SAPS Discipline Regulations, 2006 that SAPS prove on a balance of probabilities that member committed act.

Coram: Coppin JA, Murphy AJA and Kathree Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Lallie J) which dismissed the review application against the arbitration award of the third respondent (“arbitrator”) made under the auspices of the second respondent, the Safety and Security Sectoral Bargaining Council (“Bargaining Council”), in which he found that the first respondent’s (“Const. Mmatli”) dismissal was substantively unfair.

Background

[2] Constable Mmatli was employed by the appellant, the South African Police Service (“SAPS”) as a constable stationed at the Johannesburg Public Order Police Unit in Diepkloof. Const. Mmatli killed and shot Mr Simpiwe Sitele (“the deceased”) on 1 April 2013 at his home in Dobsonville. The SAPS brought the following charges against him:

‘Charge 1: Murder

You allegedly contravened Regulation 20(z) of the South African Police Services Discipline Regulations 2006, in that at or near Dobsonville during 2013/04/01 you committed a common law offence namely murder in that you unlawfully and intentionally killed a human being Mr Simphiwe Sitele by shooting him with your service pistol in the head.

Charge 2: Endangering the lives of others

You allegedly contravened Regulation 20(e) of the South African Police Services Discipline Regulations, 2006, at or near Dobsonville during

2013/04/01 in that you endangered the lives of others by disregarding circulars or Regulations when you fired your service pistol towards a human being and it resulted in the killing of Mr Sipiwe Sitele.

Charge 3: Firing a service pistol

You allegedly contravened Reg 20(q) of the South African Police Service Discipline Regulations 2006, at or near Dobsonville during 2013/04/01 in that you contravened the said Code of Conduct of the SAPS by firing a service pistol towards a human being and resulting in the killing of Mr Sipiwe Sitele.

- [3] Const. Mmatli was found guilty of charges 1 and 3 at a disciplinary hearing and subsequently dismissed. He referred an unfair dismissal dispute to the Bargaining Council. Conciliation was unsuccessful and the dispute was referred to arbitration.
- [4] Warrant Officer Miya testified on behalf of SAPS at the arbitration hearing. He testified that on 1 April 2013, he was assigned to the scene of a shooting in Dobsonville, between 09h30 and 10h00, which turned out to be Const. Mmatli's house. He interviewed Const. Mmatli and conducted an inspection of the scene.
- [5] Warrant Officer Miya said that Const. Mmatli informed him, during the interview, that he was in his bathroom preparing for work between 03h00 and 04h00 when he saw the figure of an unknown man (who, it later turned out, was the deceased) walking pass his bathroom window. Const. Mmatli shouted at the deceased and went outside to investigate but the deceased had fled his yard. He then went back into his house. On his way out again, he noticed the deceased peering over the boundary wall into his yard. Const. Mmatli suspected that the deceased was a threat to his life, and he shot and killed him with his service firearm. He fired a single shot. The bullet struck the deceased in the forehead, killing him instantly.
- [6] On investigation, Warrant Officer Miya found a single empty cartridge inside Const. Mmatli's house and a metal rod, measuring more than a metre, in his yard. His investigation also revealed that the deceased had sustained a bullet wound to his forehead. Close to the deceased body was a plastic bag with women's cosmetics, toothpaste and petroleum jelly. Elsewhere on the

premises, he found a pair of sports shoes, and an odd one. The partner to the odd shoe was found outside Const. Mmatli's yard.

- [7] Warrant Officer Miya expressed his opinion on many issues during his testimony, including that the deceased could have intended to use the metal rod to assault Const. Mmatli and that his life was in danger "because he was ready to go to work. By the time he turned, may be the deceased would have jumped the wall and hit him". Warrant Officer Miya also expressed the view that the area, where the incident took place, was a "very dangerous place".
- [8] Sergeant Nyalungu also gave evidence for the SAPS. He was requested to go to the crime scene to collect forensic evidence and take photographs. He described a photograph he had taken at the crime scene, as depicting an indentation in the soil, which would have been created by the metal rod that fell from the deceased's hands when he was shot. He testified that the deceased's head and shoulders were visible above the boundary wall, which he measured to be 70cm high. Since the deceased height was 68cm, he had to climb the wall to look over it into Const. Mmatli's yard. He found scratches on the deceased's body which, in his opinion, he would have sustained when he fell off the wall after being shot. He said that on examining the firearm which Const. Mmatli used to shoot and kill the deceased, he observed that it took 15 rounds but only 14 rounds were still in it; as one round had been used.

The Arbitration Award

- [9] The arbitrator found, on the basis of the testimony given by Warrant Officer Miya and Sergeant Nyalungu, that Const. Mmatli's "life and that of his family were threatened and in danger", hence he was justified in shooting the deceased. In reaching that conclusion, he reasoned that the testimony given by Warrant Officer Miya and Sergeant Nyalungu, for SAPS, did not prove that Const. Mmatli transgressed any rule or was guilty of any act of misconduct that justified his dismissal.
- [10] The arbitrator accordingly found that Const. Mmatli's dismissal was substantively unfair and ordered that he be reinstated.

In the Labour Court

[11] The Labour Court noted that the test for review as set out in *Herholdt*¹, viz. whether the arbitrator reached a decision which a reasonable decision-maker could reach on the evidence before the arbitrator. To succeed, it had to be shown that the arbitrator “either misconstrued the inquiry he had to conduct in that he conducted the incorrect enquiry or conducted the correct inquiry incorrectly”.²

[12] Applying these principles to the facts of the case, the Labour Court held that the arbitrator had not misconstrued the inquiry or conducted the inquiry incorrectly. In arriving at this conclusion, it reasoned as follows:

‘The manner in which the arbitrator stated the dispute before him does not support the [SAPS]’ version that he misconstrued the enquiry he had to conduct. He stated in clear terms that he had to determine the fairness of [Const. Mmatli’s] dismissal for misconduct. The [SAPS] further failed to establish that the arbitrator conducted the inquiry incorrectly because, as the award reflects, he dealt with the issue before him. He considered the evidence that was led. He considered provisions of section 192(2) of the LRA which required the [SAPS] to prove the fairness of the [Const. Mmatli]’ dismissal. He based his decision on the fact that the [SAPS] had failed to discharge the onus on the evidence before him. The arbitrator’s decision that the [SAPS]’ witnesses led evidence which proved that [Const. Mmatli] did not commit the acts of misconduct which led to his dismissal is supported by the record. The arbitrator cannot be faulted for reaching the conclusion as it is based on evidence led on behalf of the [SAPS]. [Const. Mmatli] correctly argued that his failure to testify did not render the award reviewable. The [SAPS] failed to lead evidence implicating him in any misconduct. The need for [Const. Mmatli] to rebut the [SAPS]’ version did not arise ...’³

[13] The Labour Court, accordingly, held that the arbitration award fell “within the bounds of reasonableness” and there was, therefore, “no legal basis to have it reviewed and set aside”.⁴ It, consequently, dismissed the review application.

¹ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA).

² *Labour Court Judgment* para 8.

³ *Labour Court Judgment* at par 9.

⁴ *Labour Court Judgment* at par 9.

[14] The appeal lies against the dismissal of the review application with leave of this Court.

The Appeal

[15] It was not in dispute, at the arbitration hearing, that Const. Mmatli shot and killed the deceased with his service firearm in the forehead. Indeed, his legal representative admitted as much during the hearing when he said, “the shooting is not in dispute but was [Const. Mmatli] warranted to shoot at that particular time...was the shooting justifiable?”.

[16] The common cause facts support the inference that Const. Mmatli unlawfully and intentionally killed the deceased in contravention of regulation 20(z) of the South African Police Service Discipline Regulations, 2006⁵ (“Regulations”) which provides that an employee will be guilty of misconduct if he or she commits a common law or statutory offence. Thus, on the common cause facts alone, the SAPS was entitled to dismiss Const. Mmatli for misconduct as a result of murdering the deceased.

[17] However, to avoid that consequence, Const. Mmatli raised the defence of justification. He contended that because of special circumstances, he was justified in killing the deceased. Consequently, in order for Const. Mmatli to succeed on this defence, the arbitrator had to be satisfied on a balance of probabilities that he was justified in murdering the deceased.

[18] Since the basis for his defence of justification remained peculiarly within his knowledge, Const. Mmatli bore an evidentiary burden to support it.⁶ In other words, he was required to lead evidence to rebut the case of the SAPS that he murdered the deceased in contravention of regulation 20(z) of the Regulations.

[19] To the contrary, however, both the arbitrator and the Labour Court adopted the view that the SAPS bore the onus to prove that the employee was not justified in shooting and killing the deceased. They based their view on an incorrect

⁵ GG 27983, GN R864, 31 August 2005.

⁶ *Mabaso v Felix* 1981 (3) SA 865 (A).

understanding of the provisions of section 192 of the LRA.⁷ Section 192(2) of the LRA does not place any onus on the employer to disprove a defence of justification. It merely places an onus on an employer to prove that a dismissal was substantively and procedurally fair. Insofar as the substantive aspect of a dismissal is concerned, this means simply that the employer must have dismissed an employee for a reason that is fair. It does not mean, as contended for on behalf of Const. Mmatli, that the SAPS bears the onus to disprove his defence of justification. Const. Mmatli bore the evidentiary burden to lead evidence in support of the defence of justification. In the absence of such evidence, there was no onus on the SAPS to disprove his defence.

[20] The arbitrator found that the two witnesses, who testified on behalf of the SAPS, adduced evidence that proved justification. He was wrong in drawing this conclusion for several reasons. The first being that he misconceived the nature of the testimony of Warrant Officer Miya and Sergeant Nyalungu. Principally in this respect, he accepted Warrant Officer Miya's testimony of what Const. Mmatli had told him as primary evidence of Const. Mmatli's version. However, neither Warrant Officer Miya nor Sergeant Nyalungu was present at the scene of the incident when Const. Mmatli shot and killed the deceased. They could only give testimony on what they observed at the scene of the crime and what Const. Mmatli informed them had transpired. However, what he said to them remained hearsay evidence until confirmed by Const. Mmatli under oath. Needless to say, Const. Mmatli elected not to testify at the arbitration hearing.

[21] In any event, on the version given by Warrant Officer Miya in his testimony, virtually none of the elements of private defence were present. For that defence to succeed, the arbitrator had to be satisfied, on a balance of probabilities, that Const. Mmatli had been the subject of an unlawful attack by the deceased, which had either commenced or was imminent, and that the means used by him to avert the attack was reasonable and commensurate with the nature and

⁷ Section 192 of the LRA provides:

'(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

extent of the threat.⁸ None of these elements was present on the version provided by Const. Mmatli to Warrant Officer Miya.

- [22] This notwithstanding, the arbitrator concluded that Warrant Officer Miya's evidence proved that Const. Mmatli was justified in shooting and killing the deceased. Not only did he reach this conclusion without examining the legal principles applicable to such a defence, but he did so on hearsay evidence which was inadmissible. Had he applied the correct test, he would have found that a reasonable person in the position of Const. Mmatli would not have shot and killed the deceased. There was accordingly no evidence before him that supported the finding that Const. Mmatli's life or that of his family was in danger and that he was justified in shooting and killing the deceased.
- [23] That Const. Mmatli was acquitted of the charge of murdering the deceased in the criminal trial, is irrelevant to the question of whether Const. Mmatli is guilty of misconduct under the Regulations. It was sufficient, under the Regulations, for the SAPS to show on a balance of probabilities that Const. Mmatli had committed the common law crime of murder. This was established on the common cause facts alone
- [24] The shooting and killing of a civilian without just cause constitute misconduct of a very serious nature. It is not consistent with the obligations of a police officer who is required, in terms of the SAPS Code of Conduct,⁹ to, amongst other things, exercise the powers conferred upon him or her in a responsible and controlled manner and uphold and protect the fundamental rights of every person. Such misconduct detrimentally affects the image of the police and brings it into disrepute, thus undermining public confidence in the police service. The SAPS was, therefore, justified in dismissing Const. Mmatli from the service.
- [25] That being the case, the Labour Court should have found that the arbitrator's decision was one which no reasonable arbitrator could have arrived at. The Labour Court, accordingly, erred in concluding that the arbitration award fell

⁸ Jonathan Burchell, Principles of Criminal Law, 5th Edition, p122.

⁹ Regulation for the South African Police Service Relating to the Code of Conduct for Members of the Service, GN 529, GG 27642 of 10 June 2005.

within the bounds of reasonableness and there was “no legal basis to have it reviewed and set aside”.

[26] For these reasons, the appeal must succeed.

Costs

[26] I consider this to be a matter where it would be fair and just not to make a costs order against Const. Mmatli in both the review application as well as the appeal.

Order

[27] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside and substituted with the following order:
 - ‘ (a) Paragraph 2 of the award of the third respondent is set aside and substituted as follows:

“2. The dismissal of Constable KD Mmatli was substantively and procedurally fair.”
 - (b) There is no order as to costs.’

F Kathree-Setiloane AJA

P Coppin JA and Murphy AJA concur

APPEARANCES

FOR THE APPELLANT:

Mr G I Hulley SC

Instructed by The State Attorney,
Johannesburg

FOR THE FIRST AND SECOND
RESPONDENTS:

Ngada Attorneys

Instructed by Ngada Attorneys

LABOUR APPEAL COURT