



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 37/2013

In the matter between:

IVAN MYERS

Applicant

and

**THE NATIONAL COMMISSIONER
OF THE SOUTH AFRICAN POLICE
SERVICE**

First Respondent

**THE PROVINCIAL COMMISSIONER
OF THE SOUTH AFRICAN POLICE
SERVICE: WESTERN CAPE**

Second Respondent

Heard: 11 October 2013

Delivered: 28 January 2014

Summary: Employee reinstated in position he held before dismissal – SAPS argues position no longer exists – offered alternative – whether SAPS in contempt of court.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Lt-Col Ivan Myers, was reinstated into “the position he held before” his dismissal by the Supreme Court of Appeal on 29 November 2012¹. The retrospective reinstatement followed a lengthy court battle since his dismissal six and a half years ago, in July 2007. But still it is not the end of his lengthy and costly journey.² The respondents (the national and provincial commissioners of the South African Police Service, or SAPS) have not reinstated him into the position he held before his dismissal. They say that is because the position no longer exists. Is the SAPS in contempt of court?

Background facts

- [2] The applicant was the commander of the Maitland Dog Unit in Cape Town. He was dismissed after 28 years’ service with the SAPS after he had “blown the whistle” in *Die Burger* about the condition of police dogs in his unit. The Labour Court reviewed and set aside his dismissal. SAPS appealed. The Labour Appeal Court upheld the appeal by a majority of two to one (Zondi AJA dissenting)³. Myers obtained special leave to appeal further to the Supreme Court of Appeal (SCA). In a unanimous judgment, the SCA overturned the judgment of the LAC and replaced it with the following order:

- “(i) [Myers’s] dismissal is declared to have been substantively unfair;
- (ii) The [SAPS] is ordered to reinstate [Myers] to the position he held before [his] dismissal;
- (iii) The order in (ii) above is to operate with retrospective effect to the date of dismissal;

¹ *Myers v National Commissioner of the SAPS and Others* (2013) 34 1729 (LAC).

² This application was heard on 11 October 2013, after a number of postponements at the request of the parties. At the conclusion of their arguments, the parties requested me to withhold judgment as they were still engaged in settlement discussions. On 4 December 2013 I issued a directive to the parties to indicate whether they had made any progress, as I would otherwise devote the time during court recess (17 December 2013 – 27 January 2014) to write the judgment. They indicated that they could not settle, hence this judgment was written during recess and only delivered in January 2014.

³ *National Commissioner of SAPS v Myers* [2012] 7 BLLR 688 (LAC); (2012) 33 ILJ 1417 (LAC).

(iv) [Myers] is given a final written warning valid for a period of 12 (twelve) months from the date of this order;

(v) No order is made as to costs.”

- [3] It is paragraph (ii) of that order that has led to the present application. Counsel for SAPS says that it cannot reinstate Myers “to the position he held before his dismissal”, as it no longer exists. Myers disagrees and argues that SAPS is in contempt of the SCA’s order.
- [4] At the time of his dismissal, Myers was employed at the level of a Superintendent⁴ as unit commander of the Maitland Dog Unit at salary level 10. At that stage, the SAPS operated two dog units – one at Maitland and one at Faure. After his dismissal and before the SCA judgment, the two units were amalgamated. The Maitland unit was classed as a “large dog unit” and the Faure one as a “medium sized unit”. The amalgamated unit is now known as the Cape Town K9 Unit. It still operates from Maitland, but it covers a bigger geographical area with greater responsibilities. The commander post of the amalgamated unit has, according to SAPS, been upgraded to one at salary level 12 at the rank of Colonel (as opposed to the rank of Lieutenant-Colonel at salary level 10 that Myers occupied at the time of his dismissal). Yet the current commander of the K9 unit, Lt-Col du Preez, is still employed at salary level 10.
- [5] Counsel for SAPS argues that Myers is not entitled to be appointed to the newly created post of commander of the amalgamated K9 unit; and that his previous post as commander of the Maitland unit no longer exists. Myers argues that the post still exists, but is now the bigger post of commander of the amalgamated dog unit. Level 10 is a salary level and not a “position”. He should be reinstated into the position of commander of the Cape Town Dog Unit; if that position now attracts a higher salary, so be it. The unit still operates from Maitland. The present incumbent was promoted to Superintendent – i.e. the same rank that Myers occupied at the time of his dismissal -- when she was appointed on 1 March 2010.

⁴ The demilitarization of the SAPS after the advent of democracy in 1994 has unfortunately been reversed again. The equivalent to a superintendent is now the rank of Lieutenant-Colonel.

- [6] On 5 December 2012 Myers's counsel sent a letter to the National Commissioner of SAPS (the first respondent) informing her of the order of the SCA and reminding her that Myers had to be reinstated retrospectively. On 11 December 2012 the Section Head: Legal Support attached to the National Commissioner's office instructed the implementation of the SCA judgment. However, on 19 December 2012 the Deputy Provincial Commissioner of SAPS wrote to Myers informing him that "your placement according to the ruling of the Supreme Court of Appeal is under consideration". He did not explain why that was the case, rather than simply implementing the order. Instead, he indicated that seven vacancies existed at post level 10. All of the posts fell under "visible policing" and not the dog unit.
- [7] Myers responded on 24 December 2012. He drew the Deputy Provincial Commissioner's attention to the order that he be reinstated "to the position he held before his dismissal". He stated that that was the position of Unit Commander: Cape Town Dog Unit.
- [8] Myers followed that letter up on 27 December 2012. He pointed out that his "placement" could not be "under consideration", as the SCA had ordered SAPS to reinstate him into the position he held before his dismissal – that is, as commander of the Dog Unit. His counsel also followed up with a further letter on 3 January 2013, stating that "the current incumbent in the Lt-Col post at the Dog Unit is Lt Cl Petro du Plessis and that she has shown a desire to be transferred from the post".
- [9] ON 10 January 2013 the Provincial Head: Personnel Management of SAPS, S Govender, responded, reiterating that Myers's "placement" is "under consideration" and simply offering him six of the same "visible policing" posts again, without addressing the concerns raised by Myers or his counsel.
- [10] Myers met with Govender on 10 January 2013. Govender explained that SAPS's interpretation of the order was that he should be placed in a superintendent's post at salary level 10. The Provincial Commissioner of SAPS then instructed Myers to report for duty at the Ravensmead police

station as Visible Policing Commander at salary level 10 with the rank of Lieutenant-Colonel.

- [11] Myers argues that the SAPS has not complied with the order of the SCA. He seeks an order holding the respondents, the national and provincial commissioners of the SAPS, in contempt of court.

Evaluation / Analysis

- [12] In order to consider whether the national and provincial commissioners of SAPS are in contempt of court, the principles outlined so succinctly by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*⁵ have to be considered. Principally, the question is whether SAPS has failed to comply with the order of the SCA; and, if so, whether the non-compliance is wilful and *mala fide*.
- [13] The prior question is how the SCA order should be interpreted in the light of the subsequent restructuring of the dog unit. The SCA ordered SAPS to “reinstate” Myers into the position he held before his dismissal.
- [14] The Constitutional Court in *Equity Aviation*⁶ interpreted the word “reinstate” to mean that the employee must be put back into the same job or position that he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is aimed at placing the employee in the position he or she would have been, but for the unfair dismissal.⁷
- [15] Section 193 of the LRA is instructive. It reads:
- “(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
- (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
- (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other

⁵ 2006 (4) SA 326 (SCA).

⁶ *Equity Aviation (Pty) Ltd v CCMA & Ors* 2009 (1) 390 (CC); [2008] 12 BLLR 1129 (CC); (2008) 29 ILJ 2507 (CC) para [36].

⁷ *Ibid* para [36].

reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.”

- [16] What is immediately apparent, is the distinction between an order to “reinstate” and an order to “re-employ”. Importantly for this case, a court may order the employer to re-employ the employee “either in the work in which the employee was employed before the dismissal or in other reasonably suitable work”. In the case of reinstatement, there is no such discretion. In other words, the employee must be reinstated into the same position, and not re-employed in some other position.
- [17] From the foregoing it appears that SAPS could not give effect to the SCA’s order by “placing” Myers in the position of Visible Policing commander at Ravensmead. That may be another position that equates “other reasonably suitable work” as contemplated in an order to re-employ; but that is not what the SCA ordered. It ordered the SAPS to reinstate Myers into the position he held before his dismissal, i.e. commander of the dog unit. But, argues SAPS, that position no longer exists.
- [18] What would Myers’s current position have been, had the SAPS not unfairly dismissed him?
- [19] The dog unit was restructured in 2009. The amalgamated Cape Town Dog Unit (or “K9 Unit”), still operating from Maitland, was established as a single unit. It was headed by a Superintendent at salary level 10. On 1 March 2010 a new commander was appointed after the post became vacant and was advertised. The new incumbent, a Captain at the time, was promoted to Superintendent (Lt-Col at salary level 10) at the time of her appointment. SAPS says that that post was upgraded to that of Colonel at salary level 12 and, according to SAPS, “will be implemented during the second phase of the restructuring process”. Yet it is common cause that the incumbent of the post, Lt-Col Du Plessis, is still employed at salary level 10.
- [20] There is a difference between a “job” or a “position” and the salary level or grade that that position attracts. That much is confirmed by the distinction

drawn in the SAPS Employment Regulations⁸ between a job, a grade and a salary level.

- [21] There can be little doubt that, had Myers not been unfairly dismissed, he would have continued in the post of commander of the Cape Town Dog Unit at Maitland, albeit in the guise of the restructured unit. His post may have been upgraded in terms of the SAPS “Resource Allocation Guide”; but he would have remained the incumbent. In those circumstances, the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that that post attracts, coupled with retrospective backpay.
- [22] The question remains whether the respondents are in contempt of court. I shall examine that question by considering whether the failure to reinstate Myers into the position of commander of the dog unit was wilful or *mala fide*.
- [23] I cannot find, on the facts before me, that it was either. SAPS believed that it had to “place” Myers in a position that attracted the same salary – i.e. at level 10 – as Myers earned at the time of his dismissal. The position of commander of the Maitland Dog Unit attracted that salary at the time of dismissal; the post of commander of the amalgamated Cape Town Dog Unit, on SAPS’s understanding, now apparently attracts a higher salary at level 12 (although the incumbent is still paid at level 10). Hence SAPS offered Myers alternative positions at salary level 10. The stance adopted by SAPS appears to me to be a *bona fide* one, although I do not agree that it is in compliance with the SCA order. And the non-compliance was not wilful; SAPS did attempt to implement the order as it interpreted the order.

Conclusion: contempt of court

- [24] In my view, SAPS has not complied with the order of the SCA. That order contemplated that Myers be reinstated into the post he would have occupied had he not been unfairly dismissed. That post, as presently

⁸ Government Notice R 973, 12 September 2008, Reg 1(f), 1(h), 26, 27 and 30.

restructured, is that of commander of the Cape Town Dog Unit (or K9 Unit) at Maitland. But the SAPS's non-compliance was not wilful or *mala fide*. It is not in contempt of court.

The way forward

[25] It would not bring this long-running dispute to a satisfactory conclusion, were the Court simply to dismiss the application to hold the respondents in contempt of court. Further guidance is needed.

[26] Given the view I have taken of the interpretation of the SCA order, I deem it in the interests of justice to order the respondents to comply with that order.

Costs

[27] The applicant, Myers, has had to incur significant costs in order to obtain justice. Even after the Supreme Court of Appeal had pronounced on his unfair dismissal, he did not obtain full redress as the order of that court contemplated. Eventually he represented himself. And I have found that the respondents are not in contempt of court. In those circumstances, law and fairness do not attract a costs order.

Order

[28] I therefore make the following order:

28.1 The application is dismissed.

28.2 The respondents are ordered to reinstate the applicant, Mr Myers, into the position of commander of the Cape Town Dog Unit (or K9 Unit) at Maitland with retrospective effect to the date of his dismissal.

28.3 No order is made as to costs.

Steenkamp J

APPEARANCES

APPLICANT: In person.

RESPONDENTS: EA de Villiers-Jansen
Instructed by the State Attorney, Cape Town.

LABOUR COURT