THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 890/11

In the matter between: Reportable

PROVINCIAL COMMISSIONER, GAUTENG
SOUTH AFRICAN POLICE SERVICE **First Appellant**

THE NATIONAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICE **Second Appellant**

and

MERRIMAN CYPRIAN XOLANI MNGUNI **Respondent**

Neutral citation: *Provincial Commissioner, Gauteng: SAPS v Mnguni* (890/11) [2013] ZASCA 2 (22 February 2013)

Coram: MPATI P, LEWIS, MALAN and PETSE JJA and MBHA AJA

Heard: 13 November 2012

Delivered: 22 February 2013

Summary: **Employment law – dismissal of State employee – whether dismissal may still be challenged in high court on common law grounds.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam AJ sitting as court of first instance):

(a) The appeal succeeds with costs, which shall include the costs of two counsel.

(b) The order of the court below is set aside and the following is substituted:

'The application is dismissed with costs.'

JUDGMENT

MPATI P (LEWIS, MALAN and PETSE JJA and MBHA AJA CONCURRING):

[1] During November 2005 the respondent, who held the rank of inspector in the South African Police Service (SAPS), stationed at the Booysens Police Station, Johannesburg (Booysens), was charged, together with five of his colleagues, with five counts of misconduct. It was alleged, in respect of each count, that they had contravened regulation 20(z)[1] of the South African Police Service Discipline Regulations[2] (the Regulations). The disciplinary tribunal found him not guilty on counts 1, 4 and 5, but guilty on counts 2 and 3 despite his plea of not guilty. It had been alleged, in the latter two counts, that the respondent had, on 13 August 2005 (count 2) and 15 July 2005 (count 3), received money from members of the community or prisoners, at or near Booysens, to release prisoners unlawfully from police custody. Having found the respondent guilty, the disciplinary tribunal imposed a sanction of dismissal from the police service.

[2] The respondent appealed against both the guilty verdict and the sanction

[1] The sub-regulation reads: 'An employee will be guilty of misconduct if he or she, among other things, -
. . .
(z) commits any common law or statutory offence.'

[2] Published in GN R643, *GG* 28985, 3 July 2006.

imposed on him, but the appeals authority, established in terms of regulation 17, dismissed his appeal on 11 August 2008. On 20 March 2009 he instituted review proceedings in the North Gauteng High Court, in terms of rule 53 of the Uniform Rules, seeking the following relief:

'1. Calling upon the respondents to show cause why the decision of the first respondent [appeals authority] given on 11 August 2008, confirming the outcome of the disciplinary hearing in terms of which the applicant was found guilty on 15 January 2007 of a contravention of regulation 20(z) of the [Regulations], and a sanction of dismissal was imposed, should not be reviewed and corrected or set aside, and an order upholding the appeal be substituted for the decision of the appeals authority, and

2. . . .

3. that the second and third respondents [the present appellants] pay the costs of this application;

4. further and/ or alternative relief.'

An amended notice of motion was delivered on 27 May 2009 giving notice that the following order would be sought at the hearing of the matter:

'1. That the decision of the First Respondent, dated 11 August 2008, to dismiss the appeal of the Applicant against the finding of guilty of a contravention of Regulation 20(z) of the South African Police Services Regulations and the imposition of the sanction of Dismissal, be reviewed and set aside;

2. That the First Respondent's decision be replaced with a finding that the Appeal of the Applicant be upheld;

3. Costs of the application;

4. Further and/or alternative relief.'

The review application was successful and the court a quo (Bam AJ) granted the following order on 19 October 2010:

'1. The applicant's application for the review of the proceedings before the disciplinary hearing and the confirmation thereof on appeal by the first respondent succeeds.

2. The proceedings are reviewed and set aside.

3. Respondent is ordered to pay the applicant's costs.'

This appeal, with leave of the court below, is against that order.

[3] In his founding affidavit the respondent averred that Director K Mohajane, in his

capacity as chairperson of the appeals authority, 'performed a quasi-judicial function and that his decision is therefore subject to review'. The only ground of review relied upon was that the chairperson of the appeals authority 'has failed to apply his mind to the relevant issues and the evidence led at the disciplinary hearing and that the reasons for his decision to dismiss [the] appeal are vague'. The issue on appeal, therefore, is whether the decision of the appeals authority was reviewable in the high court and, if so, whether the appeals authority had committed any irregularity that was capable of being reviewed.

[4] One preliminary issue requires mention. It is clear from the order sought by the respondent, before and after the delivery of the amended notice of motion, that no order was sought to set aside the proceedings before the disciplinary tribunal. Assuming that the conclusions reached by the court below were unassailable, the correct course, it would seem, would have been for the court to set aside the decision of the appeals authority and to refer the matter back to it, to be heard by another presiding officer, or, if it was appropriate in its view, to substitute that decision with its own.

[5] The evidence led in the disciplinary hearing to prove the charges of misconduct levelled against the respondent may be summarised as follows. The main witness, Mr Clifford Njoni (Njoni), a Zimbabwean citizen, testified that during February 2005 he met a man called Alex from the Special Assignment[3] investigative team after he had contacted them during 2004. He informed Alex that members of the police force at Booysens were soliciting bribes from persons who sought to secure the release of detainees held there and that he wished to expose them by capturing their activities inside the police station by means of a 'spy camera'. Njoni referred to the policemen involved as 'the raiding squad'. He called Alex between April and May 2005 after he had seen the raiding squad. Alex provided him with a hidden camera and an amount of R300 with the instructions that he should enter Booysens, locate a detainee and

[3] 'Special Assignment' is a television programme which usually reports on investigations conducted by journalists on various aspects of societal interests.

thereafter offer a bribe of R300 to the police to secure the release of the detainee. He entered the police station but was unsuccessful in his bid to secure the release of a detainee on that occasion.

[6] On a second occasion, between July and August 2005, he managed to film a transaction he negotiated with two of the respondent's colleagues, who were charged with him, which culminated in him securing the release of a certain male detainee in exchange for a payment of R300. He was again successful on a subsequent occasion when he negotiated with two other police officers, who were also charged with the respondent, for the release of a female detainee in exchange for payment of R300. On a third occasion Njoni filmed a transaction in which the respondent was involved. Njoni testified that upon his arrival at Booysens he went to the room where detainees were kept and saw a woman whom he knew as Nomhle – they worshipped at the same church. He then requested and obtained permission from the respondent to speak to her. He told Nomhle that he had come for her, that is, to secure her release. Thereafter he went outside and stood near the door, where he was approached by the respondent, who enquired from him how he wished to be assisted. Njoni told the respondent that he had come for his sister for whom he had brought money, being R300. The respondent then instructed him to wait outside. After a while the respondent approached him and instructed him to hand over the money, which he did, handing over a R100 note at a time. As he was doing so the respondent uttered the words: 'Put more. Put more.' After the full amount was handed over, the respondent released Nomhle. Both Nomhle and Njoni went to where Alex had been waiting in a motor vehicle and Njoni handed the camera to him. No receipt was provided on any one of the occasions when money changed hands between Njoni and the police officers.

[7] Charles Johnson (Johnson), the area head of detectives in Johannesburg, testified that on 7 September 2005 he received an instruction from the Area Commissioner that he should view a video footage of a television broadcast that had been shown on Special Assignment during the previous evening. He was to view the video footage in the presence of officers from Booysens. The purpose was to identify members who were shown on the footage to have been involved in criminal activity, so that criminal and departmental investigations could be instituted. Johnson proceeded to Booysens where he viewed the footage with two senior officers. He testified, in short, that the video footage showed persons handing money over to police officers on

various occasions and thereafter detainees were released. One of them was a female. The police officers involved were identified and Johnson subsequently conducted the necessary investigations in accordance with his instructions.

[8] According to Johnson an arrested person may not pay money to an investigating or arresting officer, except in certain circumstances such as, for example, where the suspect has been charged with a minor offence in respect of which an admission of guilt fine may be paid. But, in terms of the SAPS Standing Orders, certain procedures must be followed. In his evidence the respondent admitted that he received R 300 from Njoni, but said the money (presumably paid as an admission of guilt fine) was meant to secure the release of a man who, according to Njoni, had been charged with drinking (presumably in public). The respondent said that because he could not find a person with the name and description given to him by Njoni he gave the money back to Njoni. He also testified that his superior, Superintendent Maubane, allowed them to take money from arrested persons if paid at their offices, which they were then required to pay over at the charge office later.

[9] The video footage referred to above was viewed during the proceedings before the disciplinary tribunal. It appears to have been an edited version of the recordings made by Njoni, with certain portions having been left out.

[10] As has been mentioned above, the disciplinary tribunal found the respondent guilty on two of the charges levelled against him. The notice of appeal to the appeals authority contained the following grounds of appeal in respect of the guilty verdict:[4]

'1. The presiding officer erred in finding that the [SAPS] proved on a preponderance of probabilities that the appellants did indeed commit an act of corruption and therefore contravened [regulation] 20(z) of the South African Police Service Disciplinary Regulations.

2. The presiding officer further erred in accepting the evidence of the witness Clifford Njoni notwithstanding material contradictions in his evidence.

3. The presiding officer further erred in not taking into consideration that the said witness had a motive to implicate the appellants falsely.

[4] The respondent and his colleagues also appealed against the sanctions imposed on them.

4. The presiding officer further erred in that the video footage was accepted as correct notwithstanding the fact that the video footage which was relied upon was an edited version which could not be relied upon.

. . . .'

The two further grounds were simply that the disciplinary tribunal should not have rejected the defence versions, which were corroborated by witnesses, and that it should have found that the case against the respondent and his colleagues had not been proved. It appears that a document headed 'SUPPLEMENTARY NOTICE OF APPEAL/ARGUMENT ON BEHALF OF THE APPELLANTS' was subsequently submitted to the appeals tribunal.

[11] In dismissing the appeal the appeals authority held, inter alia, that the argument that there were material contradictions in Njoni's evidence was vague as the respondent and his colleagues had failed to point to any such contradictions; that they had failed to specify what motive Njoni had to falsely implicate them and that it could find no reason why the disciplinary tribunal should not have accepted the evidence of the video footage. In this court it was argued, on behalf of the respondent, that the appeals authority made no reference to the supplementary notice of appeal and therefore did not apply its mind to the issues raised in it. The court below observed, correctly in my view, that the so-called supplementary notice of appeal 'contains argument and does not comply with what is required of a notice of appeal'. The court had no further regard to the document, except to point out that the appeals authority had not replied to a question posed in it. In any event, on a reading of Njoni's testimony one struggles to find any contradictions at all.

[12] Expanding on his only ground of review (quoted in para 3 above) the respondent averred, inter alia, that Njoni was a single witness who approached Special Assignment with a grudge against the raiding squad; that Njoni had a clear motive to falsely implicate him and members of the squad, which was to stop the police from arresting illegal immigrants; that Njoni had himself entered the country illegally and had been arrested by the same squad; that he (Njoni) and others had, without the knowledge of the police, embarked upon a trapping operation which started in April and ended in

August 2005, and that the video images were of little value as it was common cause that he had accepted the money that was given to him by Njoni. The appeals tribunal, so the respondent continued, should have considered these factors and allowed his appeal. By failing to do so, he concluded, the appeals tribunal 'must have failed properly to apply [its] mind when considering the appeal'.

[13] In his replying affidavit the respondent amplified his case in the following terms:

'I contend that I did not enjoy a fair disciplinary hearing because the evidence presented by the employer in order to prove the charges against me consisted solely of an illegal and uncontrolled entrapment operation conducted by an illegal immigrant, the only witness implicating me, whose declared motive was to stop the police from "harassing illegal immigrants.

It is contended that this amounted to an abuse of process and integrity of the system of administration of justice.'

He accordingly contended that Njoni's evidence 'should have been rejected as unreliable and too dangerous to sustain a conviction'.

[14] In opposing the review application the appellants contended that the criticisms raised by the respondent were not proper grounds of review, but appeal grounds and that the respondent was in any event 'properly convicted'. In addition, the appellants raised four points *in limine*, with which they persisted in this court. The first was that the court below had no jurisdiction to entertain the dispute, because an employee who wishes to set aside his dismissal must, in terms of the Labour Relations Act 66 of 1995 (LRA), refer the dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council having jurisdiction. The second was that in order to review and set aside the decision of the appeals authority the respondent had to prove that the decision was administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The appellants contended that the decision was not administrative action as contemplated in PAJA. The third point *in limine* was that the review proceedings were brought more than seven months after the appeals authority had made known its decision, which was outside the period of 180

days prescribed in s 7(1) of PAJA.[5] The fourth was that it was not competent for the respondent to seek to review the decision of the appeals authority whilst the decision of the disciplinary tribunal remained unchallenged.

[15] As to the first three points *in limine* the court below accepted the respondent's averment, in his founding affidavit, that the appeals authority had performed a quasi-judicial function, as well as his contention that the review application was based on irregularities in the performance of that function. The court held that in formulating his case the respondent 'throughout based his complaint on the quasi-judicial functions of either the disciplinary tribunal and/or the [appeals authority]' and that '[t]here can be no doubt that the procedure before the disciplinary tribunal and the [appeals authority], was "quasi-judicial process" falling under the provisions of rule 53 of the rules of court'. With regard to the delay in launching the review proceedings, the court below mentioned that the respondent's explanation 'centre[d] on a pecuniary problem as a result of his dismissal . . .'. It found the explanation to be 'reasonable and acceptable' and that the delay was not unreasonable in the circumstances.

[16] In his replying affidavit the respondent had, of course, disavowed any reliance on administrative action under PAJA and on the fair labour practice provisions of the LRA. Indeed, relying on the decisions in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) and *National Director of Public Prosecutions v Tshavhungwa; Tshavhungwa v National Director of Public Prosecutions* 2011 (1) SA 141 (SCA), counsel for the respondent submitted in this court that the latter's dismissal did not constitute administrative action. It is for that reason that reliance on PAJA was disavowed. That the dismissal of the respondent and the confirmation thereof by the appeals authority did not constitute administrative action is indeed common cause.[6] The question, however, is whether the respondent has a separate, or residual, right to challenge the decision of the appeals authority, in the high court, on common law grounds of review.

[5] The respondent's appeal was dismissed on 11 August 2008 and the review proceedings were instituted on 20 March 2009.
[6] See, eg, *Chirwa*, paras 142 and 150; *Gcaba*, paras 64-67 and *Tshavhungwa*, para 22.

[17] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) the Constitutional Court (per O'Regan J) observed that '[t]he extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution'.[7] But the court was there considering the relevance or otherwise of common law grounds of review when a court deals with the review of administrative action. Four years earlier, and with reference to a statement made by Hefer JA in *Commissioner of Customs and Excise* v *Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/*a *Renfreight* 1999 (3) SA 771 (SCA), that judicial review under the Constitution and under the common law are different concepts, the Constitutional Court said the following in *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC):

'The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.'[8]

[18] Responding to a contention that common law grounds of review can be relied upon by a litigant and, if this is done, the matter must then be treated as a common law matter and not a constitutional matter, Chaskalson P, for a unanimous court, said:

'I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own

[7]Para 22.
[8]Para 33.

highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[9]

The court's emphasis – in para 51 of the judgment – that judicial review of the exercise of public power is inevitably a constitutional matter suggests, according to Professor Cora Hoexter, 'a greatly reduced role for common-law review, which today is essentially confined to the realm of private law'.[10]

[19] As I have mentioned above, the court below upheld the respondent's contention that the appeals authority had performed a quasi-judicial function and that its decision was therefore subject to review. The classification of acts or decisions of functionaries into judicial or quasi-judicial on the one hand, and purely administrative on the other, was used by our courts in order to determine whether the functionary was obliged, when exercising his or her powers, to observe the rules of natural justice, particularly the *audi alteram partem* principle, and therefore to determine the justiciability of those acts or decisions.[11] This classification was jettisoned even before the dawn of the new (constitutional) era[12] and has been characterised as a 'flawed exercise'.[13] The attempted invocation of the classification by the respondent is of no assistance in resolving the issue in this appeal.

[20] I agree with counsel for the appellants that what we are dealing with here is quintessentially a labour issue. The Regulations in terms of which the disciplinary and appeal procedures that led to the dismissal of the respondent were conducted were promulgated by the Minister for Safety and Security pursuant to the provisions of s 24(1)*(f)* of the South African Police Service Act 68 of 1995. The subsection empowers the Minister to make regulations regarding 'labour relations, including matters regarding suspension, dismissal and grievances'. The Regulations are a product of an agreement

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[9] Para 44.
[10] *Administrative Law in South Africa* 2 ed (2012) at 117.
[11] See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 762F-H.
[12] See *Traub*, n 11 above, at 762H-763J; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10F-11B.
[13] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 90.

reached between the National Commissioner of SAPS, as employer, and all the unions admitted to the Safety and Security Sectoral Bargaining Council (reg 2). Their purpose is set out in reg 3, and is, inter alia, to support constructive labour relations in the police service, to ensure that supervisors and employees share a common understanding of misconduct and discipline, to provide a user-friendly framework in the application of discipline, and to prevent possible arbitrary actions by supervisors towards employees in the event of misconduct. Clearly, therefore, the disciplinary and appeal procedures that culminated in the respondent's dismissal, including the dismissal itself, involve employment relations, which are expressly regulated by s 23 of the Constitution[14] and s 185 of the LRA.[15]

[21] The dismissal meant that the respondent's contract of employment was terminated. Flowing from that three separate claims could potentially have arisen: one for infringement of his right not to be unfairly dismissed or subjected to unfair labour practices, the other being a common law right to insist upon performance of a contract and the third, the respondent being a member of the public service, for infringement of his right to just administrative action.[16] Reliance on the third, which could have been pursued in either the High Court or the Labour Court, was, of course, disavowed. The potential common law claim, which could also have been pursued in either the High Court or the Labour Court, was never in issue at all. Reliance on the first, a potential claim for infringement of the rights created by s185 of the LRA, enforceable only in the Labour Court, was also disavowed.[17]

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[14] Section 23(1) provides that '[e]veryone has the right to fair labour practices'.

[15] Section 185 provides:

'Every employee has the right not to be–

(a) unfairly dismissed; and

subjected to unfair labour practices.'

[16] See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras 11, 12 and 37.

[17] See *Makhanya* above, n 16, para 18 and sections 157(1) and (2) of the LRA, which read:

(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, arising from–

(a) employment and from labour relations;

. . . .'

[22] In *Chirwa* the appellant, Ms Chirwa, relying on the provisions of PAJA, sought an order, in the High Court, setting aside her dismissal from her employment with Transnet. Skweyiya J, in whose judgment the majority of the court concurred, said the following:[18]

'The reasoning employed by the Appellate Division in [*Administrator, Transvaal v Zenzile* 1991 (1) SA 21(A)] cannot be faulted save to point out that the judgment was delivered in a particular context whereby State employees were not able to access processes aligned with natural justice principles in the forum of the old Labour Relations Act in instances concerning employment disputes. This, of course, has changed since the adoption of the present Constitution and the LRA. Section 185 of the LRA confers the rights not to be unfairly dismissed or subjected to unfair labour practices, both of which extend to employees of the State, including the employees of Transnet.

The decisions in *Zenzile* and [*Administrator, Natal v Sibiya* 1992 (4) SA 532 (A)] were made in circumstances where public sector employees were not accorded such rights in terms of the labour legislation applicable at the time. In the absence of such rights being afforded to them there was, in my view, a judicial duty on the judicial officers to extend protection to State employees. As the previous paragraph makes clear, the LRA has changed the content of that duty.'

In *Zenzile* the respondents (three public service employees), who were employed temporarily in a full-time capacity and whose service contracts were terminable on 24 hours' notice on either side, were summarily dismissed on the grounds of alleged misconduct without having been afforded any hearing. They had been part of a group of 130 employees who were dismissed following involvement in a work-stoppage. In dismissing the appeal against an order setting aside the dismissals this court held that the failure of the appellants to apply the *audi* principle constituted a procedural impropriety vitiating the decision to dismiss the respondents for alleged misconduct.[19]

[23] *Sibiya* involved a retrenchment rather than a dismissal. The two respondents were also public service employees employed temporarily in a full-time capacity, whose

[18]Paras 38 and 39.
[19] At 39A-B.

contracts of employment were terminable on notice of one month. They were members of a group of 29 workers who became redundant. They were given the requisite one month's notice and their employment ended at the end of the notice period. However, at no stage were they given a hearing. This court, in dismissing the appeal against an order setting aside the dismissals, held that the case was one 'in which elementary fairness required that the respondents should have been accorded a hearing before the appellants took their decision to dismiss [them]'.[20] In both *Zenzile* and *Sibiya* the dismissals, as in the present matter,[21] involved the exercise of public power.

[24] The essence of the sentiments expressed by Skweyiya J in *Chirwa* – in the two paragraphs quoted above – is that there is no longer any justification for the courts to come to the assistance of State employees in labour related matters, such as dismissals, by invoking the common law principles of natural justice. The learned judge continued (at para 40):

'State employees not only have all the benefits of the protection of the LRA, but also have the right to approach the civil courts for relief under PAJA and are thus in a preferred position.'

Thus the Constitutional Court, in *Chirwa*, and this court, in *Makhanya*, have both intimated that State employees are no longer able to challenge decisions of their employer to dismiss them by way of common law review. The judgment of the Constitutional Court in *Pharmaceutical Manufacturers* makes it plain that the common law principles that previously provided the grounds for judicial review of public power have largely been subsumed under the Constitution.

[25] Mr Du Plessis, on behalf of the respondent, submitted in this court that any functionary who is fulfilling a quasi-judicial function must be fair and the process, or proceedings, must be in accordance with justice. I have held above that we are here concerned with what is quintessentially a labour issue. Fairness in labour practices is guaranteed in s 23 of the Constitution and s 185 of the LRA, which also assures every employee the right not to be unfairly dismissed. Stripped of all excess, the respondent's complaint is essentially one of unfair dismissal which ought to have been pursued in

[20] At 539F-G.
[21] See *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 138.

the Labour Court, which has exclusive power to enforce fair labour practice rights.[22] It follows that the respondent's claim for a common law review, in the High Court, of the appeal tribunal's confirmation of his dismissal was bad in law and falls to be dismissed.

[26] In the respondent's heads of argument and before us Mr Du Plessis raised a constitutional issue based on the supremacy of the constitution and the rule of law as provided for in s 1(c) of the Constitution. He submitted that Njoni and the producers of Special Assignment operated with a hidden camera within the precinct of the Booysens police station without the knowledge or consent of the SAPS; that they flouted the penal provisions of several statutes and that they thereby violated the rule of law. Therefore, so it was argued, Njoni's conduct was unlawful and whatever material he had gathered for the television programme was 'valueless' to prove the commission of any offence in the disciplinary hearing. When it was pointed out to him that the constitutional issue was never raised before the court below Mr Du Plessis contended that he was raising a point of law which he was entitled to do for the first time on appeal.

[27] It is indeed open to a party to raise a new point of law on appeal for the first time, with the proviso that it does not result in unfairness to the other party; that it does not raise new factual issues and does not cause prejudice.[23] In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Ngcobo J said the following (para 39):

'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved' and that '[i]t would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial'.[24]

In objecting to the point of law being raised for the first time on appeal counsel for the

[22] *Makhanya*, above, n 16, para 18.
[23] See *Naude v Fraser* 1998 (4) SA 539 (SCA) at 558A-E and the cases there cited. See also *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) para 44.
[24] Footnotes omitted.

appellants submitted, firstly, that the admissibility of Njoni's evidence was never challenged before the disciplinary tribunal. Secondly, counsel argued that whether Njoni had flouted certain penal provisions of various statutes was a factual enquiry which the court below was not called upon to consider.

[28] A perusal of the papers in this matter reveals that the factual basis upon which the respondent wishes to introduce the new point of law is glaringly absent from both his founding and replying affidavits, which, together with the answering affidavit in motion proceedings, constitute the pleadings. The ramifications of the admissibility of Njoni's evidence were never canvassed and investigated by the disciplinary tribunal. Indeed, no objection to the evidence was ever raised. As to whether he had flouted penal provisions of certain statutes Njoni might very easily have given a perfectly acceptable explanation to negative that assertion if it were contained in the respondent's papers before the court below. Clearly, a consideration of the new point of law would involve unfairness to the appellants.

[29] In the result, the following order is made:

(a) The appeal succeeds with costs, which shall include the costs of two counsel.

(b) The order of the court below is set aside and the following is substituted:

'The application is dismissed with costs.'

_____

L Mpati

President

APPEARANCES

For Appellants:	G I Hulley (with R Liphosa) Instructed by: The State Attorney, Johannesburg The State Attorney, Bloemfontein
For Respondent:	P J du Plessis Instructed by: BDK Attorneys, Johannesburg Symington & De Kok, Bloemfontein