IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1920/13

In the matter between:

NATIONAL COMMISSIONER OF POLICE **First Applicant**

NORTH WEST PROVINCIAL COMMISSIONER OF POLICE **Second Applicant**

and

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

MASHOODA PATEL N.O. **Second Respondent**

M.H BORAKE **Third Respondent**

R.B MOREO **Fourth Respondent**

J.M TSATSENG **Fifth Respondent**

T.M MADONSELA **Sixth Respondent**

M.P SEREO **Seventh Respondent**

Heard: **04 April 2016**

Delivered: **08 March 2017**

Summary: Review application in terms of section 145 of the Labour Relations Act 66 of 1995 – arbitrator disregarding partial *viva voce* evidence on irrational grounds, and thus depriving parties of a fair trial. Matter reviewed and remitted for a hearing *de novo*.

JUDGMENT

HOWES AJ

Introduction

[1] This is an application to review and set aside the arbitration award[1] (the award) issued by the second respondent, an arbitrator of the first respondent; in terms of which the second respondent found that the dismissal of the third to seventh respondents was substantively unfair. The second respondent (the Arbitrator) ordered that the South African Police Service reinstate the third to seventh respondents retrospectively effective from the date of their dismissal "*with no loss of service and on terms and conditions no less [sic] than those which prevailed at the time of their dismissal*." The third to seventh respondents were ordered to report for duty on 1 August 2013.

[2] The first and second applicants launched their review application in terms of section 145 of the Labour Relations Act[2] on or about 5 September 2013. Thereafter, they filed the record of the proceedings with the Labour Court on or about 4 February 2014 and their supplementary affidavit on or about 20 March 2014. The third to seventh respondents filed their answering and confirmatory affidavits on 3 April 2014. The applicants filed their replying affidavit on or about 20 May 2014.

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[1] Case number PSSS 521-12/13, dated 10 July 2013.

[2] 66 of 1995.

[3] The matter was set down for hearing on 14 January 2016. However, the applicants failed to place a proper record of the arbitration proceedings before me and accordingly, I granted the applicants a postponement so that they could remedy their failures. It was agreed in Court on 14 January 2016, that the matter would be set down for hearing on 15 February 2016, however, on the date in question, the applicants' counsel failed to attend the hearing and as a result, the applicants were required to seek a further postponement of the proceedings. The respondents legal representative was ready to proceed and requested that costs be awarded against the applicants in the event that I was inclined to grant the postponement. In assessing the matter, in particular, the previous postponement that I had afforded the applicants, I made the following order:

> "1. The matter is postponed to 4 April 2016;
> 2. The costs of the Respondent occasioned by this postponement are to be paid by the First and Second Applicants on an attorney and own client scale."

[4] The matter was argued before me on 4 April 2016.

Background Facts

[5] The third to seventh respondents were employed as police officers by the first and second applicants and they held various ranks within the South African Police Services. They were stationed at the Jouberton Police Station in the district of Klerksdorp.

[6] The third to seventh respondents were charged with various charges of misconduct and following an internal disciplinary enquiry they were dismissed from service after they were found guilty of *inter alia* corruption and a contravention of the Disciplinary Regulations of 2006. On appeal, the second applicant upheld the findings of the internal disciplinary chairperson. The third to seventh respondents were dismissed from service. With the assistance of their trade union, POPCRU, the third to seventh respondents referred an unfair dismissal dispute to the first respondent on or about 9 November 2012.

[7] The arbitration proceedings took place over the period of 26-27 March 2013 and 18-20 June 2013.

[8] On the first day of the arbitration, namely 26 March 2013, the Arbitrator read the signed pre-arbitration minutes (held on 22 January 2013) into the record.[3]

[9] The minutes reflected *inter alia* that the only admitted common cause fact was that the third to seventh respondents went to Mr Petrus Danki's (Mr Danki) address and an amount of R10 000 was handed over to the third respondent. The parties agreed that the issue in dispute was whether the actions of the third to seventh respondents constituted a statutory or common law offence. The Arbitrator was only required to make a determination on substantive fairness.

[10] On 26 March 2013, the applicants led the evidence of Captain George Letshwenyo and Warrant Officer Segopolo John Motlhaoleng. On 27 March 2013, the evidence of Warrant Officer William Kgotso Mokgitla was led and thereafter evidence in chief in respect of Mr Danki (an informant) was led and completed. Cross-examination of Mr Danki commenced,[4] however, his cross-examination was not completed when the matter adjourned for the day.

[11] Parties were required to reconvene on 18-20 June 2013.

The postponement application and the arbitrator's ruling on postponement

[12] On 18 June 2013, Mr Danki, who was still under cross-examination and who was the applicants' key witness failed to attend the arbitration proceedings. The applicants submitted that Mr Danki was not in attendance due to illness, however, they did not have a copy of his medical certificate to hand up. The Arbitrator stood the matter down to 19 June 2013 and requested that

[3] Transcript Volume 1 pages 3–4.
[4] Transcript Volume 3 pages 340–377.

Mr Danki's medical certificate be sent to the first respondent. On 19 June 2013, Mr Danki failed to appear at the arbitration and no medical certificate had been secured by the applicants. Mr Manyafane was afforded a brief opportunity to attend at Mr Danki's house to establish what the situation was, however neither Mr Danki or his wife were at the house. Only Mr Danki's daughter was at the house and she could not shed any light on their whereabouts.

[13] Mr Manyafane confirmed that he had in fact spoken with Mr Danki on 18 June 2013 and Mr Danki told him that he was not in a position to attend on 18 June 2013, as he had been suffering from sugar diabetes and had to seek medical help. He confirmed that he would be in attendance on 19 June 2013 and that he would bring the medical certificate with him.

[14] As a result of his absence, Mr Manyafane sought a postponement on the basis that *inter alia* Mr Danki was a key witness, that he had indicated that he was suffering from sugar diabetes, that his cross-examination was underway and that the applicants would be denied a fair opportunity of properly advancing their case as in the absence of Mr Danki's evidence, most of the evidence led would amount to hearsay. Furthermore, the applicants argued that fairness together with prejudice considerations dictated that a postponement should be granted.

[15] Mr Burger opposed the application for a postponement although he did concede that Mr Danki was a key witness.[5] The basis for the opposition was *inter alia* that there was no proof of incapacity; Mr Danki's whereabouts were totally unknown; his phone was off; and he had not made any contact despite being warned to be present on 18 June 2013 to continue with cross-examination. Mr Burger further submitted that if Mr Danki was not available that Mrs Danki should be called as she was also a witness for the applicants and he believed that there was no justifiable reason for her to be with her husband to hold his hand. He submitted further that the postponement

[5] Transcript Volume 4 page 383 at paras 6-7.

application was simply an effort to try and drag the proceedings out and to prejudice the respondents, especially in relation to legal costs.

[16] In response thereto, Mr Manyafane indicated that Mrs Danki could not be called as she had been with Mr Danki when he went to the doctor due to the severity of his disease. He further stated that per their conversation, Mr Danki confirmed that he would be present on 19 June 2013 and that he would bring his medical certificate with him. He submitted further that it was possible that Mr Danki's condition had deteriorated although he could not confirm this. He submitted that his absence should be interpreted as an indication that his health had deteriorated. Mr Manyafane was asked by the Arbitrator what guarantee he would provide to secure Mr Danki's attendance if the matter was to be postponed. Mr Manyafane indicated that—

> "I make the point that he is, will be available, but if he is not, because I cannot really guarantee you that much, if he is not in, then we proceed with this matter with or without his presence, but let me make, say to the Commission today that if the Commissioner grants me a remand of this matter, I will try my level best to make it a point that he is in the next occasion."[6]

[17] The Arbitrator then handed down her ruling on the postponement application on 19 June 2013. She refused the application for postponement[7] and in addition ordered that the costs pertaining to 18 June 2013, be paid by the applicants. I deal with the ruling on postponement, and reasons provided in the award, in due course.

[18] As neither Mr Danki or Mrs Danki were present to testify, the applicants had no option but to close their case.

[19] The third to seventh respondents then led their evidence on 19 June 2013 and 20 June 2013. The evidence of Constable Patrick Serero, Student

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[6] Transcript Volume 4 page 385 line 20-26.

[7] Transcript Volume 4 page 387 line 19 - 390 line 16.

Constable Tsholofelo Minkie Madonsela and Warrant Officer Herman Mandla Pule Borake was led on 19 June 2013. On 20 June 2013, the evidence of Constable Jackie Morabedi Tatsing and Constable Itumeleng Buti Moremo and Mr Pogisho Josiah Lebetsa (Sabata) was led. Parties agreed to submit written closing arguments.

Summary of the misconduct in question

[20] It is alleged that Mr Pogisho Josiah Lebetsa (referred to in the transcript as "Sabata") contacted Mr Danki to help him find a buyer for a diamond that he had in his possession. Mr Danki assisted Sabata in finding a buyer for the diamond and a meeting was set with the buyer on or about 27 December 2011. Sabata arrived at the meeting with Constable Patrick Serero ("Mpho" and further referred to as the "seventh respondent"). The buyer (a third party) subsequently purchased the diamond from Sabata for R30 000.00 and Sabata then gave R10 000.00 to Mr Danki as commission for helping him sell the diamond.

[21] Later that day however it is alleged that Mpho called Mr Danki and accused him of "robbing" Sabata and thereafter some of the other respondents arrived in a SAPS vehicle at Mr Danki's premises and he was asked why he had robbed Sabata out of R20 000.00. Mr Danki handed Mpho what he has at the time, which was the sum of R2000.00 in order to placate him, and Mpho left with his colleagues.

[22] Over the course of the next two days it is alleged that Mpho called and demanded more money from Mr Danki. In addition, Mpho stopped past the house while Mr Danki's daughter was at home and advised Mr Danki that in the event that he did not pay him R20 000.00, he would have him arrested.

[23] Following the telephone call from his daughter where she informed him that Mpho and some police officers had stopped past the house, Mr Danki contacted the police's organised crime unit and reported the diamond deal and the fact that threats were being made against him by police officers. The

organised crime unit then became involved and it was agreed that a trap would be set.

[24] The organised crime unit arranged for R10 000.00 to be made available for purposes of a trap. Mr Danki was then required to call Mpho and an arrangement was made to meet Mpho at Mr Danki's house at 8am. Police officers from the organised crime unit were then stationed in and around Mr Danki's home.

[25] At 8am a white van driven by the third respondent arrived. The third to seventh respondents were all present. The third respondent went into Mr Danki's house and sat at the dining room. The other respondents were waiting outside Mr Danki's premises. Mr Danki handed the money over to the third respondent. The third respondent counted the money and then he walked out of Mr Danki's house with the R10 000.00. It was at this juncture that the police officials from the organised crime unit arrested the third to seventh respondents on suspicion of corruption.

[26] The third to seventh respondents claimed, however, that they were there to arrest Mr Danki and his wife. However, they did not have any arrest warrants or a docket in their possession at the time (which would have been required in order to effect a lawful arrest). This was a key issue for determination at the arbitration.

The Arbitrator's key findings

[27] The Arbitrator found that the dismissal of the third to seventh respondents was substantively unfair. In brief, having dismissed the postponement application, the Arbitrator disregarded Mr Danki's *viva voce* evidence in its entirety, made adverse credibility findings against Mr Danki, disregarded other evidence of the applicant as inadmissible hearsay evidence, and preferred the version of the third to seventh respondents on the issue of whether they were attempting to arrest Mr Danki or extort a bribe from him. The Arbitrator duly ordered the retrospective reinstatement of the third to seventh respondents.

[28] It is not necessary to repeat the full grounds of review as pleaded in the review papers, due to the view I take on the decision to disregard material and relevant evidence. It is also not necessary to restate the test on review, as it is well established.

The decision to disregard Mr Danki's evidence in its entirety

[29] In my view this issue is determinative of the review application, and I deal with it upfront.

[30] Mr Danki's evidence was clearly of critical importance to the applicants' case – he was the only witness who could provide direct evidence of the central events underpinning the charge. Absent his evidence, the applicants' case was significantly weakened.

[31] Mr Danki testified at length as to the events in question, and was cross-examined on various aspects of his evidence at the previous sitting of the arbitration. The transcribed record of his cross-examination runs to some 37 pages.

[32] The reason why Mr Danki's cross-examination could not be completed, was because of his apparent illness, and the decision of the Arbitrator to refuse the postponement.

[33] The arbitrator's findings in this regard are as follows:

> "39. On account of the fact that the witness Mr Danki's version could not be tested, his evidence was not canvassed and does not form part of this award. His evidence is thus struck from the record."

[34] Having struck Mr Danki's evidence from the record, the Arbitrator proceeded to consider apparent contradictions in the initial reports made by Mr Danki to the organized crime unit, and concluded as follows:

> "96. … In respect of this matter, the complainant thereof [Danki] could not identify same correctly. The issue could not be clarified by the complainant thereof as he had abandoned his testimony. … It is on this basis that I find that the statement by Mr Danki was untruthful and should not have been taken into consideration by the respondent.
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> 97. It must also be noted that the testimony of the respondent's witnesses in respect of this aspect amounted to hearsay evidence and is disregarded."

[35] In summary, having decided to ignore Mr Danki's evidence in its entirety, the Arbitrator nonetheless made adverse credibility findings against him (at one stage referring to him as a "known criminal"). Furthermore, the Arbitrator rejected the evidence of the applicants' witnesses in this respect on the ground that it constituted hearsay evidence.

[36] It is clear that the decision to ignore Mr Danki's *viva voce* evidence had a material (if not decisive) impact on the outcome of the proceedings. Was the manner in which the Arbitrator dealt with Mr Danki's incomplete evidence reasonable? In my view it was not, for the reasons encapsulated in *Gaga v Anglo Platinum Limited and Others*[8], where Murphy AJA held that:

> "As regards the commissioner's ruling in respect of the similar fact evidence, that too was a reviewable irregularity. The exclusion of evidence that ought to be admitted will be either misconduct in relation to the duties of a commissioner or a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a) of the LRA. In the context of an unfair dismissal arbitration, similar fact evidence of a pattern of behaviour or serial misconduct will often be relevant to both the probabilities of the conduct having been

[8] [2012] 3 BLLR 285 (LAC) paras 45 and 46.

committed and the appropriateness of dismissal as a sanction. It may be more so where the alleged misconduct is characterised by an element of impulsivity, as often the case with sexual misconduct. There ordinarily would be a sufficient link or nexus between the earlier similar misconduct (if proved) and the disputed facts pertaining to a method of commission, or a pattern possibly revealed, to make that evidence exceptionally admissible. Given the nature of the evidence which the first respondent proposed to lead, and the fact that the allegations would have been known to the appellant, it would not have been unfair or oppressive to have allowed the evidence because the appellant had adequate notice and was in a position to deal with it.

The consequence, however, of the commissioner irregularly excluding the evidence in the present case, in the final analysis, is neutral or inconsequential in the adjudication of the issue of unreasonableness. Had the first respondent requested the labour court to remit the matter to the CCMA for the admission and hearing of the excluded evidence, the irregularity alone would have been sufficient for that purpose. By itself, it constituted an irregularity sufficient to set aside the award, because without more it resulted in the commissioner failing to have regard to material facts and thereby impeded a full and fair determination of the issues. In certain instances where evidence is irregularly not admitted by a commissioner, the only fair remedy may well be for the matter to be remitted to the CCMA. However, where, as in the present case, there is sufficient other evidence enabling the court to determine the fairness of the dismissal, then, in order to avoid further delay and prejudice to the successful party, the court should rather substitute its own decision for that of the commissioner. In which case, as now, the irregularity will serve only to strengthen the conclusion, based on the presence of other irregularities, that the arbitration was latently and procedurally flawed, and perhaps unreasonable in its outcome." (Emphasis added and footnotes omitted.)

[37] The decision taken by the Arbitrator to exclude Mr Danki's evidence in its entirety does in my view, amount to a gross irregularity in the conduct of the arbitration proceedings. In doing so, the Arbitrator denied the applicants a fair

hearing. The Arbitrator was in possession of Mr Danki's prior statements, she had heard his entire evidence in chief at the arbitration and a portion of his cross-examination. In addition, the applicants' other witnesses corroborated portions of Mr Danki's evidence and irrespective of the Arbitrator's view that their evidence amounted to hearsay evidence, she was at the very least, required to weigh and consider the evidentiary value of all of the evidence that was presented including hearsay evidence. In support hereof, I refer to *Matsekoleng v Shoprite Checkers (Pty) Ltd*[9], where Ndlovu JA held that:

> "Section 3(1)(c) of the said Act [Law of Evidence Amendment Act 45 of 1988] confers a discretion on a court (or Tribunal) in terms of admitting hearsay evidence if, in the opinion of the court (or Tribunal), as the case may be, it is in the interests of justice to admit such hearsay evidence. The fact that the respondent's representative would not have been in a position to cross-examine the author of, or deponent to, the affidavit if it was admitted, was not, in my opinion, a legally sound ground to have refused admission of the affidavit, in the light of section 3(1)(c). That aspect of the matter would only be relevant on the question of the evidential weight to be attached to the affidavit evidence concerned. As the matter stood, it did not appear that the Commissioner properly applied his mind on this issue, if at all. In my view, the Commissioner's failure in this regard constituted a serious misdirection and a gross irregularity, on the Commissioner's part in the conduct of the arbitration proceedings, which rendered the award reviewable and liable to be set aside.
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> In any event, it seemed to me that, by applying the pre-1988 strict common law rule against hearsay evidence on the admission of the affidavit, as the Commissioner apparently did, the Commissioner did not thereby "deal with the substantial merits of the dispute with the minimum of legal formalities" as required of him by section 138(1) of the LRA. In *Local Road Transportation Board and another v Durban City Council and Another* the Appellate Division (now the Supreme Court of Appeal (Holmes JA) stated:

[9] [2013] 2 BLLR 130 (LAC) at paras 41-3.

> "A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved from having his case fully and fairly determined."

> In my view, therefore, the failure by the Commissioner to apply his mind properly of the issue of admissibility of Mr Roberts' affidavit constituted a material error of law and a gross irregularity on the part of the Commissioner which prejudiced the appellant in her right to a fair hearing."

[38] Given that the decision to disregard the entirety of Mr Danki's viva voce evidence, and the rejection of the respondent's case on grounds of constituting hearsay evidence amounts to a reviewable irregularity, it is not necessary to deal with the further grounds of review.

[39] In light of the seriousness of the consequences of refusing the postponement, it is arguable that the refusal of the postponement does not amount to a proper exercise of the arbitrator's discretion. I do not need to make any findings on this issue.

Appropriate relief

[40] Having decided to review and set aside the award, I must now decide whether to replace the arbitration award with an award that I regard as fair based on the evidence before me, or whether I should remit the matter back to the CCMA for hearing afresh. It is trite that the Court has a discretion in this regard.

[41] Given the Arbitrator's failure to allow a full ventilation of the issues, the only possible remedy is to remit the matter back to arbitration afresh before a different arbitrator.

Order

[42] I make the following order:

1. The arbitration award issued under case number PSSS 521-12/13 dated 10 July 2013, is reviewed and set aside.
2. The matter is referred back to the Safety and Security Bargaining Council (SSSBC) for an arbitration hearing before a new and senior commissioner to be appointed by the SSSBC.
3. There is no order as to costs save for the order on costs previously granted on 15 February 2016, in favour of the third to seventh respondents.
4. The application in terms of section 158(1)(c) is dismissed, with no order as to costs.

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D Howes

Acting Judge of the Labour Court of South Africa

Appearances

On behalf of the Applicant:	K Mhango (Advocate)
Instructed by:	*State Attorney, Johannesburg*
On behalf of the Respondent:	PJ Greyling (Attorney)
Instructed by:	*Pieter J Greyling Attorney*