THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1235/16

In the matter between:

POPCRU OBO TEBOGO MAKHETLE **Applicant**

and

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

MAREE *N.O* **Second Respondent**

SOUTH AFRICAN POLICE SERVICE **Third Respondent**

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

Heard: **5 September 2019**

Delivered: **18 September 2019**

Summary: **Review application – charges of receipt and possession of stolen property in terms of common law and sections 36 and 37 of General Law Amendment Act 62 of 1955 – failure to put a version to the employer's witness is fatal – when a suspect denies possession, he cannot offer an explanation for possession as an alternative defence once possession is successfully proven.**

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JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant, Police and Prisons Civil Rights Union (POPCRU), launched this application on behalf of its member, Mr Tebogo Makhetle (Mr Makhetle), seeking an order reviewing and setting aside the arbitration award issued by the second respondent, Ms E Maree (arbitrator), under case number PSSS230-13/14, dated 13 May 2016. The arbitrator found that the dismissal of Mr Makhetle was substantively fair.

[2] The third respondent, South African Police Service (SAPS) and fourth respondent, the National Commissioner of the South African Police Service (National Commissioner) are opposing the application in defence of the award.

Background

[3] Mr Makhetle was employed by SAPS on 27 June 2006 as a police officer. He was dismissed on 13 June 2013 consequent to a disciplinary enquiry. At the time of his dismissal, he held a rank of Constable and was earning R9500.00 per month.

[4] The charges against Mr Makhetle were couched as follows:

> 'Charge 1
>
> In terms of section 40 of the South African Police Act, 1995 (Act 66 of 1995) read with the provisions of South African Police Disciplinary Regulations of 2006, you are hereby charged with serious misconduct in that you allegedly contravened Regulation 20(z) of the said regulations commit any common law offence receiving of stolen property. On 1 August 2012, you were found in possession of a robbed digital Nikon camera at Deipkloof area.
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> Charge 2
>
> In terms of section 40 of the South African Police Act, 1995 (Act 66 of 1995) read with the provisions of South African Police Disciplinary Regulations of 2006, you are hereby charged with serious misconduct in that you allegedly

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contravened Regulation 20(z) of the said regulations commit any statutory offence in terms of section 36 of the General Law Amendment Act, 62 of 1955 possession and receipt of stolen property. On 1 August 2012, you were found in possession of a robbed digital Nikon camera at Deipkloof area.

Charge 3

In terms of section 40 of the South African Police Act, 1995 (Act 66 of 1995) read with the provisions of South African Police Disciplinary Regulations of 2006, you are hereby charged with serious misconduct in that you allegedly contravened Regulation 20(z) of the said regulations commit any statutory offence in terms of section 37 of the General Law Amendment Act, 62 of 1955 receiving stolen property without reasonable cause. On 1 August 2012, you were found in possession of a robbed digital Nikon camera at Diepkloof area.'

[5] Mr Makhetle was found guilty of all charges and accordingly dismissed. He unsuccessfully appealed the verdict and the sanction. POPCRU referred the unfair dismissal dispute to the first respondent, Safety and Security Sectoral Bargaining Council (SSSBC). The dispute remained unresolved after a conciliation hearing. The dispute was accordingly arbitrated at the request of the applicants, hence the impugned award.

Arbitration proceedings

[6] The case of SAPS was mainly that Mr Makhetle was found in possession of a Nikon digital camera (camera) that had been stolen from the family of Ms Ntsiki Madela (Ms Madela), the complainant, in an armed robbery.

[7] Ms Madela testified that her family was a victim of an armed robbery and amongst the items that were stolen was a camera. A robbery case was duly opened at Mondeor Police Station. About a month later, she received a call from someone she grew up with who informed her that there were three guys who were selling a camera which contained her family pictures. She was informed that the three guys were on their way to pawn the camera at the pawnshop in Diepkloof, Zone 5, opposite 'Bara' taxi rank.

[8] Ms Madela requested assistance from the police officers from the Johannesburg Metropolitan Police Department (JMPD) to follow the lead to the pawnshop. Indeed, the JMPD police officers escorted her. Upon arrival at

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the pawnshop, she saw the three suspects sitting on a bench and Mr Makhetle was in the middle. The owner of the pawnshop held the camera. The JMPD officer, Mr Neo Motseke (Mr Motseke), was the one who interrogated the suspects. When they were asked as to who was pawning the camera, Mr Makhetle identified himself as the owner and took out his SAPS card. His explanation was that he got the camera from a guy who owed him money and he was pawning it in order to obtain his money.

[9] Ms Madela looked at the photos in order to confirm whether indeed the camera belonged to her family. She was shocked to see the pictures of her family members. Mr Makhetle and the other two gentlemen were arrested and taken to Diepkloof Police Station.

[10] Mr Makhetle was known to the SAPS police officers at Diepkloof Police Station and they showed an interest in the matter. The three suspects, Ms Madela and the JMPD police officers were all taken to a room where further interrogation took place. Mr Makhetle told the SAPS police officers that he got the camera from a person who owed him money. Mr Makhetle was allowed to make a call and he spoke to a person about the camera and an arrangement was made to arrest that person. Mr Motseke refused to allow Mr Makhetle to join the SAPS police officers to pursue the alleged owner of the camera. The SAPS went on a chase but did not come back with the said person. Mr Makhetle and two suspects were then taken to Mondeor Police Station where they were detained.

[11] Ms Madela made a statement under oath which was part of the criminal docket submitted during the arbitration proceedings. The statement gave a broad account of what transpired at the pawnshop and does not mention who was in possession of the camera.

[12] Mr Motseke, on the other hand, testified that he found the camera in Mr Makhetle's possession who subsequently identified himself as the person who was pawning the camera. He conceded during cross-examination that someone amongst the suspects did explain that the camera was received from a person who owed him money. However, he denied that Mr Makhetle specifically mentioned that, his friend, Mr Letlotlo Seoke (Mr Seoke), was the person who had received the camera from a person who owed him money.

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[13] Mr Motseke also confirmed the events that took place at Deipkloof Police Station. He was adamant that the reason he did not join the SAPS chase on the person who gave the camera to the suspects is because he thought they were Mr Makhetle's friends and were assisting him. He conceded that the sworn statement that he made as an arresting police officer did not give a detailed account of the events of the day.

[14] Mr Makhetle, on the other hand, testified that he was requested by his friend, Mr Seoke, to accompany him to pawn a camera. Mr Seoke informed him that he got the camera from Mr Vilakazi who owed him money. This is the explanation that he gave to the JMPD police officers at the pawnshop and subsequently to the SAPS police officers at Diepkloof Police Station. Mr Seoke was allowed to call the owner of the camera, Mr Vilakazi, in order to arrest him. Mr Vilakazi agreed to meet with him. Mr Motseke refused to allow him to join the chase on Mr Vilakazi. The SAPS police officers went to Mr Vilakazi's house. Mr Vilakazi escaped when he saw the police motor vehicle. The SAPS police officers came back with Mr Vilakazi's identity document which was found in the motor vehicle he used to escape which he later abandoned after hitting a wall.

[15] They were detained at Mondeor Police Station. Upon his release, he pursued Mr Vilakazi and assisted in his arrest in connection with the robbery at Ms Madela's place. However, Ms Madela could not positively identify him as one of the suspects who robbed her family.

[16] Mr Seoke corroborated Mr Makhetle's evidence in as far as the ownership of the camera. He testified that he was the one pawning the camera and that he had received it from Mr Vilakazi. It was his driver's licence that was with the pawnshop owner as he was the one pawning the camera. He, however, hazily remembered the incidents of the day in question but seemed to recall that Mr Vilakazi was subsequently pursued by the SAPS officers from Diepkloof Police Station.

Arbitrator's findings

[17] The arbitrator accepted the evidence of Ms Madela and Mr Makhetle that the camera was with the pawnshop owner when Ms Madela and the JMPD

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officers entered the pawnshop. In essence, she rejected the evidence of Mr Motseke that he had found the camera with Mr Makhetle when he searched the suspects.

[18] The arbitrator also accepted the unchallenged evidence of Ms Madela that Mr Makhetle had identified himself as the one pawning the camera when he was asked by Mr Motseke and went on to show him his SAPS card. When Mr Makhetle was questioned about the camera at Diepkloof Police Station, he told the SAPS officers that he is a loan shack and was pawning the camera to recover the money he had loaned to someone who owned him money.

[19] Mr Motseke confirmed that it was Mr Makhetle who was pawning the camera. He conceded that an explanation was tendered as to how the camera came to the possession of one of the suspects but denied that Mr Seoke's name was specifically mentioned. His cross examination concentrated on his refusal to join the SAPS police officers to pursue Mr Vilakazi.

[20] Also, the arbitrator discounted the evidence that Mr Seoke was the one who had received the camera from Mr Vilakazi and was the one pawning it simply because that version was not put to Ms Madela. The evidence of Mr Seoke was also rejected as being strange because he could not recall the details of the events that took place on the day in question. He did not recall seeing Ms Madela at the pawnshop despite the detailed account that was given by Mr Makhetle and Ms Madela. Also, the events that took place at Diepkloof Police Station seem to have been purged from his memory. He could not even recall making a call to Mr Vilakazi as suggested by Mr Makhetle or how much money did Mr Vilakazi owe him.

Analysis

[21] The commissioner was clearly faced with two conflicting versions. Before getting into the credibility of the respective witnesses, the arbitrator correctly considered the inherent probabilities of the two versions and took into account that the critical parts of Mr Makhetle's version had not been put to Ms Madela.

[22] Ms Madela clearly testified that the three suspects were at the pawnshop. She successfully identified the camera that was being pawned as belonging to her family. Among the three suspects, the person who answered the question

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posed by JMPD officers was Mr Makhetle and he identified himself as the person who was pawning the camera. Mr Makhetle also confirmed the version that he was pawning the camera to the SAPS officers at Diepkloof Police Station and that he had received it from a person who was owing him money as a loan shack.

[23] Ms Madela conceded that a call was made to the person who gave Mr Makhetle the camera but she was adamant that it was Mr Makhetle himself who had made that call and not Mr Seoke. She also conceded that there was a chase on Mr Vilakazi by the SAPS police officers without success. However, Mr Makhetle's version that the SAPS officers came back with Mr Vilakazi's ID and that she screamed when she saw it as she could identify him as one of the suspects who robbed her family was never put to her. Also, it was not put to her that Mr Soeke was the person who was pawning the camera.

[24] It is clear from the record that the cross-examination of Ms Madela was superficial and unhelpful. Her unchallenged evidence became the bedrock of the arbitrator's finding that Mr Makhetle was indeed in possession of the camera.

[25] Section 36 of the General Law Amendment Act[1] (the Act) reads as follows:

> "Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[26] Whist section 37 provides:

> 'Absence of a reasonable cause for believing goods properly acquired
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> (1) (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section 1 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such

[1] Act 62 of 1955.

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> acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except insofar as the imposition of any such penalty may be compulsory.'

[27] What is clear from the above provisions is that the elements of the offence are that there must be possession of stolen or suspected to be stolen property without giving reasonable account of possession or without reasonable cause to believe that at the time of acquiring it, it belonged to the person it was received from. Also, to be found guilty of the common law offence of receiving, a person must have acquired or received the stolen property knowing it to be stolen.[2]

[28] In this instance the arbitrator, having accepted that Mr Makhetle was indeed in possession of the property that had been stolen, the next enquiry was about the explanation or evidence on the circumstances that prevailed at the time of the acquisition of the property.

[29] In these proceedings, counsel for the third and fourth respondents, Ms Baloyi, submitted that, having denied possession, it was impermissible for Mr Makhetle to then offer any explanation for his possession consequent to SAPS successfully proving possession. Mr Magoshi, Mr Makhetle's attorney, conversely submitted that the explanation on how the camera came to Mr Makhetle's friend, Mr Seoke, mainly challenged the allegation that he was in possession thereof. However, to the extent that he was found to be in possession, then his explanation should suffice to prove that he had no reason to suspect that the camera was not Mr Vilakazi's and the fact that he went out of his way to assist in his subsequent arrest, must count in his favour.

[30] Mr Magoshi's submission is untenable for the following reason: The applicant's evidence in this regard clearly points to Mr Seoke as the person who received the camera from Mr Vilakazi who owed him money. As such, there was no

[2] *Milton South African Criminal Law and Procedure* 3 ed vol II Common-Law Crimes (Juta, Cape Town 1996) at 664-6; Snyman Strafreg 4 ed (Butterworths, Durban 1997) at 525-6.

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explanation as to the circumstances regarding Mr Makhetle's receipt or possession of the camera as he categorically disavowed any knowledge of the camera. Put differently, the explanation on the circumstances that prevailed when the stolen property was received must be preceded by an admission, at least, that the suspect was in possession thereof. Therefore, I agree with Ms Baloyi that an explanation cannot be offered as an alternative defence in the event that possession is successfully proven.

[31] Mr Makhetle was clearly ill-advised in denying possession when it is clear that he had some explanation to offer.

[32] I am satisfied that the arbitrator's evaluation of the evidence is sufficiently detailed and shows that she correctly accepted the evidence of Ms Madela and discounted the parts of Mr Makhetle's version that had not been tested with Ms Madela. Her conclusion that, on a balance of probabilities, Mr Makhetle was guilty of the offence of being in possession of stolen property in terms of common law and sections 36 and 37 of the Act cannot be faulted.[3]

[33] The transgression Mr Makhetle was found guilty of is serious as the 'receipt of stolen goods is a vital link in the chain of gainful disposal of the spoils of criminality'.[4] To make matters worse, Mr Makhetle was a law enforcement officer and, as such, it was incumbent upon him to assist in eradicating the trade in stolen goods which would in turn reduce the primary crimes of robbery and theft.

[34] In the circumstances, the sanction of dismissal was clearly justifiable.

Conclusion

[35] I am accordingly satisfied that the award falls with the band of reasonable wards as extensively spelt out in *Sidumo v Rustenburg Platinum Mines*[5] and expounded in various *dicta* of both the Supreme Court of Appeal (SCA) and

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[3] See: *Ndlazi v S* (CA&R272/2016) [2017] ZAECGHC 23 (23 February 2017) 'contravention of section 36 if the finder forms a reasonable suspicion after the goods were found in the accused's possession; provided that, at that stage, the goods are still in his possession and he is unable to give a satisfactory account of such possession.'
[4] See: *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 12.
[5] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.

the Labour Appal Court (LAC).[6] Accordingly, the review application stands to be dismissed.

Costs

[36] It is trite that costs do not follow the result in this Court, especially in this instance as there is persisting collective agreement relationship between POPCRU and SAPS.

[37] In the circumstances, I make the following order:

Order

1. The review application is dismissed.

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

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[6] See: *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

Appearances:

For the Applicant: Mr M.Magoshi of Majang Incorporated

For the Third and Fourth Respondents: Advocate S Baloyi SC

Instructed by: The State Attorney-Johannesburg

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