THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 425/2012
Reportable

In the matter between:

IVAN MYERS **APPELLANT**

and

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

THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **SECOND RESPONDENT**

ADVOCATE COEN de KOCK (N.O) **THIRD RESPONDENT**

Neutral citation: *Myers v National Commissioner of the SAPS* (425/2012) [2012] ZASCA 185 (29 November 2012)

Coram: Mthiyane DP, Mhlantla and Pillay JJA and Plasket and Swain AJJA

Heard: **5 November 2012**
Delivered: **29 November 2012**

Summary: **Policeman – holding rank of Superintendent – with 28 years unbroken service with the South African Police Service – dismissed from employ for misconduct relating to issuing a media statement in breach of a Standing Order – whether dismissal reasonable in the circumstances.**

ORDER

On appeal from: Labour Appeal Court, (Waglay DJP, Molemela and Zondi AJJA sitting as court of appeal):

1. The appeal succeeds with costs.

2. The order of the Labour Appeal Court is set aside and replaced with the following:

'(i) The first respondent's dismissal is declared to have been substantively unfair;

(ii) The appellant is ordered to reinstate the first respondent to the position he held before the first respondent's dismissal;

(iii) The order in (ii) above is to operate with retrospective effect to the date of dismissal;

(iv) The first respondent 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. The order referred to in (iv) above shall come into effect on the date of this order.

4. Each party is ordered to pay its own costs in the Labour Appeal Court.

JUDGMENT

MTHIYANE DP (MHLANTLA, PILLAY JJA, PLASKET AND SWAIN AJJA CONCURRING):

[1] The appellant, Ivan Myers was a superintendent in the South African Police Service (SAPS) and the Unit Commander of Maitland Dog

Unit with 28 years unbroken service in the SAPS before his dismissal. On 18 June 2007 he was charged with misconduct following a media communication he made to 'Die Burger' newspaper concerning the condition of police dogs in his unit, without having first obtained authorisation from his commander or media liaison official. Consequently he stood accused of having contravened the standing orders and regulations of the SAPS. It was alleged that the communication prejudiced the administration, discipline and efficiency of the SAPS as contemplated in regulations 20(*f*) and (*i*) of the Regulations for the South African Police Service.[1] At a subsequent disciplinary hearing presided over by Commissioner Strydom the appellant was found guilty of misconduct as charged and dismissed from his employment with the SAPS with effect from 13 July 2007. He was also ordered to pay a fine of R500. The referral of the dismissal to the second respondent, the Safety and Security Sectoral Bargaining Council, for arbitration did not yield a different result.

[2] The appellant then referred the dispute to the Labour Court to review and set aside the decision dismissing him from his employment and ordering him to pay a fine of R500. He sought retrospective reinstatement in his employment as Unit Commander: Maitland Dog Unit with the full benefits that he would have received had he not been dismissed on 12 July 2007. The matter came before Ngalwana AJ who granted the application and made an order (a) reviewing and setting aside the appellant's dismissal; but (b) remitted the matter to the second respondent for a de novo hearing on an urgent basis before a commissioner other than the third respondent. The Labour Court found that the commissioner had misdirected himself in a number of respects

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

during the disciplinary proceedings. Amongst others the chairperson had relied on 'insolence . . . impudence, cheekiness, disrespect and rudeness' even though the appellant had not been charged with contravening regulation 20*(s)* which deals with insolence and disrespect.

[3] The first respondent appealed to the Labour Appeal Court with leave granted by that Court, against the judgment and order of the Labour Court reviewing and setting aside the arbitration award. In terms of the arbitration award the third respondent had found that the appellant's dismissal was substantively fair and dismissed the referral. Procedural fairness of the dismissal was not in dispute.

[4] The background facts leading up to the proceedings in both the Labour Court and the Labour Appeal Court are the following. As already stated the appellant was a Superintendent and Commander of the Dog Unit in Maitland with 28 years unbroken service in the SAPS and was only six years away from becoming eligible for early retirement when he was dismissed on 12 July 2007.

[5] During February 2007, the South African Police Union (SAPU) raised the issue of malnutrition of police dogs at Maitland Dog Unit with the SAPS management. While the appellant was on leave the daily rations for the police dogs in his unit were reduced from 700 grams of food to 500 grams on the instructions of the police management. The dogs noticeably lost weight and SAPU strongly believed that a change in the dogs' weight, which became evident immediately after the implementation of the instruction, was as a result of the reduction in their daily rations.

[6] Thereafter SAPU invited the appellant to a meeting at its offices since he was the Commander of the Unit. A journalist of 'Die Burger' newspaper who was also present at the meeting approached the appellant as the Unit Commander and invited him to explain the reasons for the situation at the Dog Unit. The appellant refused to comment before establishing if the issue raised by SAPU during his absence had been addressed by the police management.

[7] The appellant was concerned about the unfavourable media attention that the issue of dog malnutrition was attracting. He raised his concern with the Provincial Commander, Senior Superintendent Visser, and asked him to take immediate steps to prevent the story from making headlines in the media. The next day the story made headlines. It was inter alia reported that the situation was so bad that the police dogs were eating their own excrement. Members of the public reacted with shock and anger to the news of the condition of the dogs, both in print and electronic media.

[8] As Commander of the Unit concerned the appellant felt obliged to do something about the situation. On 21 February 2007, he interrupted his leave and returned to work. On his arrival he found the chief veterinarian of the SAPS and other senior police officers. The chief veterinarian told the appellant that they were about to hold a meeting concerning the dogs issue. The appellant asked to be part of the meeting but his request was turned down. He then left.

[9] Two days later, on 23 February 2007, he sent an e-mail to 'Die Burger' newspaper seeking to address the dogs issue and to point out

steps he had taken to resolve the problem. His article appeared in 'Die Burger' newspaper under the following headline:
'Maitland: Bevelvoerder Verbreek Swye: Rompslomp laat honde ly' (loosely translated the headline meant: 'Maitland: Commander Breaks Silence. Redtape allows dogs to suffer').

[10] The SAPS management did not take kindly to the article. The appellant was charged with contravening regulation 20*(f)* of the regulations in that he had by issuing the media statement, prejudiced the administration, discipline and efficiency of the SAPS.

[11] In the alternative, he was charged with contravening regulation 20*(i)* in that he had failed to carry out a lawful order or routine instruction without just or reasonable cause. Paragraph 4(4) of the relevant Standing Order 156 forbids communication with the media without the prior authorisation of a member's commander or a media liaison official in the SAPS. It reads thus:

'(4) No member may, on his or her own initiative or that of another member, approach or entertain any media for purpose of media coverage without the prior authorization of his or her commander.'

[12] Despite the appellant's plea of not guilty on both the main and the alternative charge, he was convicted on the main charge in that he had failed to follow the right channels when he issued the media statement. He was, however, acquitted on the alternative charge. The sanction imposed was one of dismissal with effect from 13 July 2007 and payment of a fine of R500.

[13] The appellant then approached the Labour Court to review and set aside his conviction and dismissal. The application was partially successful. As already indicated the Labour Court found that the arbitrator had committed 'a number of fundamental misdirections'. Amongst others it found that the arbitrator had conflated the main and the alternative charge. The judge found that the two charges under regulations 20*(f)* and *(i)* were not 'very much intertwined' as found by the arbitrator. The judge also found that the arbitrator had in the determination of the matter had regard to the appellant's conduct during the hearing, which the arbitrator described as evincing 'insolence . . . impudence, cheekiness, disrespect and rudeness'. The judge noted, correctly in my view, that the appellant had not been charged with contravention of regulation 20*(s)* which deals with insolence and disrespect.

[14] In the light of the above misdirections, amongst others, the judge considered himself at large to review and set aside the arbitration award and replace it with what he considered to be an appropriate order. Accordingly he made an order (a) reviewing and setting aside the arbitration award; (b) remitting the matter to the second respondent, the Safety and Security Sectorial Bargaining Council, and (c) directing the first respondent to pay costs.

[15] The first respondent successfully appealed to the Labour Appeal Court. By a majority (Waglay DJP with Molemela AJA concurring and Zondi AJA dissenting), the appeal was upheld with costs and the order of the Labour Court (Ngalwana AJ) was set aside and replaced with an order dismissing the appellant's application for review and setting aside of the

arbitration award. The appellant's cross-appeal was dismissed with no order as to costs.

[16] In a minority judgment, Zondi AJA found that the arbitrator was correct in finding the appellant guilty of misconduct in contravention of regulations 20*(f)* and *(i)* (with which the majority agreed) but that the sanction of dismissal was unfair and fell to be set aside (with which the majority disagreed). He held that the Labour Court's decision to review and set aside the award on the ground that it was not clear on which of the two charges the appellant was found guilty was wrong. In the result, he proposed the following order:

'1. The appeal succeeds and the judgment and orders of the Court a quo are set aside and replaced with the following:

1.1 the first respondent's [the appellant's] dismissal is declared to have been substantively unfair;

1.2 the appellant [the first respondent] is ordered to reinstate the first respondent [the appellant] to the position he held in its employment before the first respondent's [the appellant's] dismissal;

1.3 the order in 1.2 above is to operate with retrospective effect to the date of dismissal;

1.4 the first respondent [the appellant] is given a final written warning valid for a period of 12 (twelve) months from the date of this order;

1.5 no order is made as to costs.

2. Each party is ordered to pay its own costs.'

[17] The appeal to this court, with leave granted by this court, in essence raises two issues. The first is whether the appellant was correctly convicted of misconduct. The second is whether the dismissal was fair. The two issues will be dealt with in turn.

[18] As pointed out, the Labour Appeal Court upheld the finding of the third respondent that the appellant had contravened the provisions of regulations 20*(f)* and *(i)*. Regulation 20*(f)* provides that an employee will be guilty of misconduct if he or she:

'(f) prejudices the administration discipline or efficiency of a department, office or institution of the State.'

[19] The Labour Appeal Court found that the appellant had been correctly convicted of contravening regulation 20*(f)* because 'it was unreasonable for Myers to send to the media for publication a statement which created an impression that he was deliberately being silenced when there was no evidence to this effect and which in turn could only have the effect of undermining the SAPS and thereby prejudicing its administration and discipline'. As regards regulation 20*(i)* the Labour Appeal Court found that 'Myers, by releasing his statement for publication in the media without having first consulted with the relevant media liaison official, clearly breached regulation 29*(i)* and as such he was properly found to have committed misconduct of contravening regulation 20*(i)*'.

[20] In my view, both the majority and the minority judgments in the Labour Appeal Court were, for these reasons, correct in their conclusion that both charges were proved. The appellant's excuse that he was not aware of the relevant standing order requiring that he obtain prior approval before making his statement in the newspaper, is far from convincing.

[21] I turn to consider the question of the dismissal. In dealing with the question of the appropriate sanction the majority in the court a quo found

that the misconduct of which the appellant was convicted was serious. It correctly found that a media statement by an employee that undermines his or her employer cannot go unpunished. The court continued that where the employer serves the public and is expected to maintain a high degree of discipline within its ranks, then a media statement that undermines the employer displays a lack of respect for authority.

[22] The majority of the court also had regard to the fact that it was not dealing with a junior officer, but one who had been in service for 28 years and who occupied a very senior position as a commander of a unit. The court quite rightly remarked rhetorically that if persons in such positions fail to follow the rules and regulations, they cannot implement the rules and regulations and demand that their juniors respect them.

[23] In mitigation the majority accepted the fact that it was the appellant's unit that was the focus of attention and that he was probably best suited to be in the team to deal with the issues that were of public concern at the time and yet he was excluded. Having taken note of this valid observation the majority did not follow through and give recognition to it. It back tracked somewhat by stating that it was not for it to prescribe to the SAPS how it should deal with the issues that confront it. I do not agree. The majority was under a duty to have regard to this factor in mitigation of sanction just as it took into account the fact that the appellant had only had six years' service left before he was eligible for early retirement.

[24] There is also the question of absence of evidence that the relationship between the appellant and the SAPS had broken down to such an extent that continued employment was out of the question or no

longer possible. In fact the majority suggested, implicitly, that the appellant was best suited to deal with the dogs issue because it was his unit that was the focus of public attention.

[25] In aggravation the majority noted that although the appellant was aware that the SAPS management was addressing the concerns raised about the diet of the dogs, and despite being told that he could not be involved with the management in addressing the problem, he sought to challenge their authority without any regard for the rules that regulate his conduct at the workplace. The majority concluded that in this regard it could not accept that the arbitrator's decision fell outside the band of decisions to which reasonable decision makers could come. It concluded that while the dismissal was a harsh sentence it was not so unreasonable that it stood to be reviewed and set aside.

[26] In the minority judgment Zondi AJA took a different view. He held that the sanction of dismissal was too harsh and therefore unfair. The learned judge accepted that the appellant had contravened regulations 20*(f)* and *(i)*, by submitting his statement for publication by the media without first consulting with the relevant media liaison police official. He accepted that the appellant's conduct remained serious but found that it was not of such gravity that it made a continued employment relationship between him and his employer or superiors intolerable. He concluded that in the circumstances the dismissal should be set aside and be replaced with an appropriate sanction.

[27] In my view there is a lot to be said for the approach adopted by Zondi AJA. The fairness of the decision of the SAPS dismissing the appellant from his employment must be tested against the review standard

laid down by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 110. The test was formulated as follows:

'(I)s the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

Explaining the standard, the court said applying it would 'give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair'.

[28] It must therefore follow that to survive scrutiny the decision to dismiss must be 'reasonable' and reasonableness must be tested in the light of the facts and circumstances of a given case. In its judgment the majority in the Labour Appeal Court correctly recognised (in para 103) that the test for dismissal was the one set out in *Sidumo*. In my view, however, it erred in its application of the test to the facts in the present matter. In para 104 the majority accepted that the sanction imposed on the appellant was 'a harsh sanction' but then added that 'it is not so unreasonable that it stands to be reviewed and set aside'. The majority of the Labour Appeal Court, appears to have accepted that the decision was unreasonable, but not sufficiently unreasonable to warrant interference. This seems to be an application of the 'gross unreasonableness' test of the pre-1994 era. By adopting such a standard the court inadvertently imported a higher standard than that contemplated in *Sidumo*. Were this to be the test, it would mean that a dismissed employee seeking to set aside a dismissal would have to show not only that the decision-maker's decision is unreasonable but that it is 'so unreasonable' that it falls to be reviewed and set aside. That cannot be the test.

[29] Turning to the arbitration award I have already indicated that the application of the test requires one to look at the decision and how the decision-maker came to the conclusion to which he or she did. Of course it is important to bear in mind at all times that one is not dealing with an appeal but a review. One is concerned with how the decision was arrived at rather than the conclusion.

[30] In imposing the sanction that he did during the disciplinary hearing Commissioner Strydom had little or no regard to the mitigating factors. As observed by Ngalwana AJ in the Labour Court, he regarded as an aggravating factor what he described as an element of 'insolence . . . impudence, cheekiness, disrespect and rudeness', which was an irrelevant consideration in that the appellant was not even charged with contravening regulation 20(s) which deals with insolence. Significantly the majority in the Labour Appeal Court does not even refer to this misdirection in its judgment, which was pivotal to the imposition of the sanction of dismissal, because the Commissioner stated unequivocally that he regarded it as an aggravating factor.

[31] While the Commissioner had regard to the appellant's unbroken service of 28 years in the SAPS as proof that he knew the rules he violated, he omitted to make reference to this factor as equally relevant in the consideration of mitigating factors.

[32] Having regard to all of the above and the test in *Sidumo* a reasonable decision-maker would have had regard to all of the above factors and could not have come to the conclusion that the dismissal of the appellant was the appropriate sanction.

[33] In the result the following order is made:

1. The appeal succeeds with costs.

2. The order of the Labour Appeal Court is set aside and replaced with the following:

‘(i) the first respondent’s dismissal is declared to have been substantively unfair;

(ii) the appellant is ordered to reinstate the first respondent to the position he held before the first respondent’s dismissal;

(iii) the order in (ii) above is to operate with retrospective effect to the date of dismissal;

(iv) the first respondent 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. The order referred to in (iv) above shall come into effect on the date of this order.

4. Each party is ordered to pay its own costs in the Labour Appeal Court.

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	A A Oosthuizen SC (with him J A Nortje) Instructed by: Wynand du Plessis Attorneys, Cape Town Claude Reid Attorneys, Bloemfontein
For Respondent:	E A de Villiers-Jansen Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein