IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA12/18

In the matter between:

THEMBINKOSI BOOYSEN	**Appellant**
and	
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**First Respondent**
COMMISSIONER T MALGAS-SENYE	**Second Respondent**
PROVINCIAL COMMISSIONER OF SAPS	**Third Respondent**
NATIONAL COMMISSIONER OF SAPS	**Fourth Respondent**
MINISTER OF SAFETY & SECURITY	**Fifth Respondent**

Heard: **17 November 2020**

Delivered: **30 March 2021**

Coram: Phatshoane ADJP Coppin JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Van Niekerk J) reviewing and setting aside the arbitration award of the second respondent ("arbitrator"), made under the auspices of the first respondent, the

Safety and Security Sectoral Bargaining Council ("Bargaining Council") in which she found the appellant's dismissal by the third and fourth respondents, collectively referred to as the South African Police Services (SAPS),[1] to be substantively and procedurally fair.

The Background

[2] The appellant was employed as a chef by the SAPS in Graaff-Reinet. He was charged with the following offences in terms of regulation 20(z) and (q) of the South African Police Discipline Regulations and dismissed:

(a) Charge 1: Regulation 20(z):[2] Commits any common law or statutory offence, by raping ["the complainant"] on 2012-08-22 at Chris Hani Village, Umasizakhe, Graaff-Reinet.

(b) Charge 2: Regulation 20(q) contravenes any prescribed Code of Conduct for the Service[3] or Public Service whichever may be applicable to him or her - did not protect and uphold the fundamental rights of [the complainant] in terms of the Code of Conduct but harmed her on 2012-08-22 at 18h35 at Chris Hani Village, Umasizakhe, Graaff-Reinet.

[3] The complainant accused the appellant of raping her on two occasions during the course of the same afternoon in a room at the back of her home. The complainant had just turned 16 years old at the time and was still in school. She lived with her mother and the appellant was their neighbour.

[4] The rape took place outside of the appellant's working hours. His defence to the charge was that he had consensual intercourse with the complainant on the day in question. The SAPS found the appellant guilty as charged at an internal disciplinary hearing and dismissed him. He referred an unfair dismissal dispute to the Bargaining Council. The arbitrator made an award upholding the appellant's dismissal as substantively and procedurally fair.

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[1] The third, fourth and fifth respondents are collectively referred to as the South African Police Services.
[2] South African Police Service Discipline Regulations (2006), GG 27983, GN R864, 31 August 2005 ("SAPS Discipline Regulations").
[3] Reference to South African Police Service

The Review

[5] The appellant challenged the arbitrator's award on review to the Labour Court. He sought an order reviewing and setting aside the arbitration award and substituting it with an order that the dismissal was substantively unfair and that he be reinstated with retrospective effect.

[6] The Labour Court found that the appellant's dismissal was substantively unfair as he did not rape the complainant as charged, and that it was more probable than not that the appellant had consensual intercourse with the complainant on a single occasion. On the question of remedy, the Labour Court held as follows:

> 'The [appellant] seeks to be reinstated. Section 193 of the LRA requires that in the case of a dismissal that is found to be substantively unfair, an employer must be required to reinstate or re-employ the employee unless the employee does not wish to be reinstated or employed, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable for the employer to reinstate or re-employ the employee. On his own version, the appellant had sexual intercourse with a 16 year old, a person barely above the age of consent. Although the appellant is not an officer in the SAPS, he is employed by the SAPS at the local police college. It is reasonable to assume in these circumstances that the local community identifies the [appellant] as a member of or associates him with the SAPS. What the [appellant] did, on his own version, is not compatible with the SAP's stated values and is likely to bring the SAPS into disrepute. In my view, a continued employment relationship would be intolerable or not reasonably practical. An award of compensation is more one that better fits the requirements of s 193.'

[7] The Labour Court, accordingly, made an order reviewing and setting aside the arbitration award and substituted it as follows:

> '1. The [appellant's] dismissal was substantively unfair.
>
> 2. The [appellant] is awarded compensation in the sum equivalent to 12 months remuneration, calculated at the rate applicable on the date of dismissal.'

[8] The appeal is limited to the Labour Court's conclusion that the appellant was not entitled to the primary relief of reinstatement in section 193(2) of the Labour Relations Act[4] ("LRA").

The parties' submissions

[9] The arguments advanced on behalf of the appellant is broadly that the Labour Court erred for the following reasons: The appellant was employed by the SAPS as a chef and that objectively, on the evidence, the trust relationship had not irretrievably broken down. There was no evidence presented by the SAPS, in the arbitration proceedings, that the relationship of trust had irretrievably broken down and that reinstatement was impracticable or inappropriate in the circumstances. In fact, the appellant had a long, clean service record of nine years and was found not guilty of statutory rape in the criminal trial. Consistent with this finding, the Labour Court found, on the evidence led at the arbitration, that the appellant had not raped the complainant but had consensual intercourse with her. As a chef working at the local police college, it could not be concluded that the appellant was unfit as a police officer and that the public's confidence in the police would be undermined.

[10] The SAPS argues to the contrary that although the appellant was not employed as a police officer, he was required to respect and protect the fundamental rights of women and children as provided for in the Constitution of the Republic of SA, 1996. By engaging in consensual sex with the complainant, who was barely sixteen years old at the time and was still a child as defined in the Children's Act,[5] he brought the SAPS into disrepute. Even though the appellant was not a police -officer, the incident itself negatively impacted the image of the SAPS, as Graaff-Reinet is a small town where news spreads quickly. All members of the SAPS are responsible for protecting and upholding the rights of individuals such as the complainant. It is, therefore, irrelevant that the appellant is not a police officer. The appellant

[4] No. 66 of 1995.
[5] No. 38 of 2005.

was required to act within the parameters of the employment relationship and not act in a manner that is likely to tarnish the image of the respondents.

The Appeal

[11] The starting point in determining whether the Labour Court erred in not ordering the SAPS to reinstate the appellant, is to look at how our courts have interpreted section 193(2) of the LRA which provides:

> '(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –
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> (a) the employee does not wish to be reinstated or re-employed;
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> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
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> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
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> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[12] In interpreting this section, this Court has held that where an arbitrator or the Labour Court finds the dismissal of an employee to be unfair then reinstatement is the primary remedy under section 193(2) of the LRA. In other words, if the exceptions to reinstatement in section 193(2)*(a)* to *(d)* do not apply, then the Labour Court or an arbitrator is obliged to require the employer to reinstate or re-employ the employee as the case maybe.[6] Thus, if the employer is opposed to reinstating an employee whose dismissal is found to be substantively unfair, then it must demonstrate that one of the exceptions to reinstatement applies. This would require the employer to present evidence concerning the question of the appropriateness of reinstatement in anticipation of a decision by the Labour Court or an arbitrator that the dismissal is unfair.[7]

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[6] *Adams v Coin Security Group (Pty) Ltd* [1998] 12 BLLR 723 (LAC).
[7] *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union and Others* [2012] 2 BLLR 142 (LAC) at para 29.

[13] It is, however, now settled law that the dominant consideration in the enquiry is not on "the legal onus but rather on the underlying notions of fairness between the parties".[8] Fairness, as held by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v CCMA,* must be "assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment".[9]

[14] The Labour Court or arbitrator has an unfettered discretion in terms of section 193(2)*(b)-(d)* of the LRA to grant a remedy.[10] This means that in exercising its discretion in terms of section 193(2)*(b)* and *(c)* of the LRA on the question of whether a continued employment relationship would be intolerable and/or reinstatement would be feasible, the Labour Court or arbitrator ultimately makes a value judgment on the evidence and facts before it.[11]

[15] The SAPS did not present any evidence at the arbitration proceedings in relation to the appropriateness of reinstatement on any of the bases set out in section 193(2)*(b)* and *(c)* of the LRA. The Labour Court, however, concluded that the appellant was not entitled to the primary remedy of reinstatement as it is not reasonably practical and a continued employment relationship would be intolerable. The appellant contends that these findings were not based on evidence (as none was led by the employer) but rather on the making certain factual assumptions. According to the appellant, the two assumptions are that: (a) although the appellant is not a police officer in the SAPS but a chef at the local police college in Graaff-Reinet, the local community identifies him as a member of the SAPS or associates him with the SAPS; and (b) the appellant's conduct is not compatible with the stated values of the SAPS.

[16] The question that arises is whether it was open to the Labour Court to make these factual assumptions (in the absence of evidence) in determining whether reinstatement was an appropriate remedy in terms of section 193(2) of the LRA. This Court has held in *Mediterranean Textile Mills (Pty) Ltd v*

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[8] *Dunwell Property Services CC v Sibande* [2012] 2 BLLR 131 (LAC).
[9] *Equity Aviation Services (Pty) Ltd v CCMA* [2008] 12 BLLR 1129 (CC) at para 39.
[10] *Equity Aviation* at para 48.
[11] *DHL Supply Chain (Pty) Ltd v NBCRFI* [2014] 9 BLLR 860 (LAC) at para 21.

SACTWU,[12] that even where no specific evidence is led by the employer as to the intolerability of a continued employment relationship or the impracticality of reinstatement, the Labour Court or arbitrator is obliged "to take into account any factor which…is relevant in the determination of whether or not such conditions exist". The conduct of the employee is a relevant factor which the Labour Court or arbitrator should take into account in this determination.[13]

[17] Despite the failure of the SAPS to lead evidence on the existence of the factors in section 193(2)*(b)* and *(c)* respectively, there were a number of factors on the record of evidence, presented in the arbitration proceedings, which the Labour Court was obliged to take into consideration in determining whether reinstatement was appropriate. These factors included that: (a) on the appellant's own evidence, he had consensual intercourse with a young girl, who had just turned 16 years old; (b) he did so while an employee of the SAPS at the local police college in Graaff-Reinet; and (c) the complainant was still a child as defined in the Children's Act (d) as a chef employed by the SAPS he was bound by the Code of Conduct for Public Servants[14] which requires all employees in the public service to "respect and protect every person's dignity and his or her rights as contained in the Constitution".[15]

[18] Thus, despite the fact that the appellant had consensual sex with the complainant, she was a child as defined in the Children's Act. The appellant was therefore obliged to protect her rights as provided for in section 28 of the Constitution, which include the right to be protected from "abuse or degradation", and to be treated "in a manner that takes account of her age".

[19] "Ensuring the safety and security of all persons" and "upholding and safeguarding the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution" are two core values of the SAPS. They are

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[12] *Mediterranean Textile Mills (Pty) Ltd v SACTWU* [2012] 2 BLLR 142 (LAC) at para 30.
[13] *Afgen (Pty) Ltd v Ziqubu* [2019] 10 BLLR 977 (LAC) at para 25.
[14] Code of Conduct for Public Servants, GN R825, GG 5947 of 10 June 1997.
[15] Article 2 of the Code of Conduct for Public Servants under the heading "Relationship to the Public". The South African Police Services Code of Conduct appears to apply to police-officers only. It has a corresponding provision (article 3(e)) which requires police-officers to "uphold and protest the fundamental rights of every person". See: Regulations for the South African Police Service Relating to the Code of Conduct for Members of the Service, GN 529, GG 27642 of 10 June 2005.

expressly stated in the preamble to the South African Police Services Act[16] ("SAPS Act"). Thus as correctly concluded by the Labour Court, by having intercourse with the complainant who was a minor, the appellant's conduct is incompatible with the stated values of the SAPS and is likely to bring the SAPS into disrepute. This conclusion of the Labour Court is not based on conjecture, as contended for on behalf of the appellant, but is founded in law and fact.

[20] The Labour Court was, furthermore, entitled to draw certain inferences or assumptions from the proven facts. One of these is that even though the appellant was not a police officer but a chef, his conduct in having intercourse with a child negatively impacted the image of the SAPS as the local community identifies him as a member of the SAPS or associates him with the SAPS. This was a reasonable assumption to make based on the evidence before him that the appellant worked as a chef for the SAPS at the local police college in Graaff-Reinet, at the time of having sexual intercourse with the complainant who was barely over the age of consent. It is not implausible or improbable in the circumstances for the local community to associate him with the SAPS.

[21] The appellant contends that the Labour Court was obliged to reinstate him as he was not found guilty of statutory rape. I do not consider this factor to be relevant to the question of remedy. What is relevant is that the appellant's conduct, in having sexual intercourse with a minor (whose rights the SAPS is obliged to protect), is likely to bring SAPS into disrepute, thus undermining the confidence of the public in the police. The conduct of this nature is not expected of an employee of the SAPS regardless of rank or designation. It is, in this respect, equally irrelevant that the appellant was employed as a chef by the SAPS at the local college in Graaff-Reinet, and not as a police officer.

[22] All things considered, I am of the view that it was fair, on the objective facts of this matter, for the Labour Court to conclude that the appellant's conduct is incompatible with the SAPS stated values and is likely to bring the SAPS into disrepute. By the same token, the Labour Court was justified in concluding

[16] No. 68 of 1995.

that the continued employment relationship with the appellant would be intolerable or not reasonably practical", and that an award of compensation as opposed to reinstatement is the appropriate remedy.

[23] For these reasons, the appeal against the order of the Labour Court must fail.

Costs

[24] I consider this to be a matter where it is just and equitable for each party to pay their own costs.

Order

[25] In the result, I make the following order:

1. The appeal is dismissed with no order as to costs.

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F Kathree-Setiloane AJA

Phatshoane ADJP and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:	Ms. E Van Staden Instructed by: Legal Aid SA
FOR THE THIRD TO FIFTH RESPONDENTS:	Ms. L. AH Shene Instructed by: The State Attorney

(Handed down electronically by email to the parties' legal representatives)