Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 1690/13

In the matter between:

WARRANT OFFICER TP MATEMANE **First Applicant**

and

KERRY DRISCOLL *N.O.* **First Respondent**

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

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

Heard: 19 May 2016
Delivered: 25 May 2016
Summary: (Review – dismissal – intimidation – award reasonable in relation to the evidence)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant in this matter ('Matemane'), a Warrant Officer with 22 years of service, was found guilty of the following charges of misconduct and dismissed:

1.1 In terms of section 40 of the South African Police Service Act, 1995 (act 68 of 1995) read with the South African Police Service Discipline Regulations 2006, … you allegedly contravened Regulation 20(z) "commits any common law or statutory offence" namely intimidation. On 2011-08-04 at Rabie Ridge SAPS you told your Station Commander that what has happened at Rosebank SA PS will happen to him, and you were aggressively tapping his table and pointing at him with your index finger.

1.2 In terms of section 40 of the South African Police Service Act, 1995 (act 68 of 1995) read with the South African Police Service Discipline Regulations 2006, … you allegedly contravened Regulation 20 (s) "displays disrespect towards others in the workplace or demonstrate abusive or insolent behaviour". On 2011-08-04 at Rabie Ridge SA PS you told your Station Commander that he cannot do anything to you and he is unable to manage the station.

1.3 In terms of section 40 of the South African Police Service Act, 1995 (act 68 of 1995) read with the South African Police Service Discipline Regulations 2006, … you allegedly contravened Regulation 20 (f) "prejudice the administration, discipline or efficiency of a department, office or institution". On 2011-08-04 at Rabie Ridge SA PS you told your Station Commander that why he is calling members when there is a bad crime and did not call them when they had done the right things and appreciate a good word.

[2] When his unfair dismissal dispute was referred to arbitration, the arbitrator agreed that he was guilty of all three charges, but found that it was the charge of intimidation which justified his dismissal.

[3] The offence of intimidation as defined in the Intimidation Act is committed when:

"(1) Any person who-

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-

(i) assaults, injures or causes damage to any person; or

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person;…"

Principle factual disputes in issue and the evidence

[4] Essentially, there were three main factual issues in contention relating to this charge. Firstly there was a dispute about precisely what the applicant had said. Secondly, there was a dispute whether the station commander had felt intimidated by his conduct. Thirdly, there was the question whether the applicant had an innocent explanation for the remark he did make. There was also a related dispute about whether the allegedly intimidatory statement was uttered in the presence of all the officers who had gathered for the briefing session at the police station to discuss the spate of house break-ins the previous night, or whether it was made in the presence of a smaller group that remained behind after the others had dispersed.

[5] During the course of the arbitration and the previous disciplinary enquiry there were some variations in the accounts of what the applicant actually said. The essence of the applicant's case was that he claimed he said that what had happened at Rosebank "may happen" at Rabie Ridge. According

to the applicant he was alluding to an incident the previous year in which a Warrant Officer at Rosebank police station had been arrested for committing housebreaking whilst he had been on duty as a sector commander, and not to the murder of the Station Commander and shooting of another police officer at Rosebank police station by another SAPS member which had occurred only a few days before the meeting at Rabie Ridge SAPS.

[6] At 07H00 on 4 August 2011, the station commander at Rabie Ridge SAPS recorded the following brief misconduct report in the occurrence book:

> "Report Misconduct: Col K N Chittiah reports that he was debriefing the parade of D Relief ie that W/off Ramfumezi
>
> Members worked the night shift and there were four house robberies.
>
> An explanation was required from all deployed sector vehicles and W/off Matemane became aggressive in his response and defensive. Members were allowed to leave and Capt Ndobe and myself was intervening when Matemane threatened me by saying that what happened in Rosebank will happen at Rabie Ridge.
>
> Member then left the CSC and my office.
>
> I then requested the TRT to assist in neutralising the member. A criminal case of intimidation was opened and member to be charged."

(*sic*)

[7] At various points in his testimony at the arbitration Col Chittiah said that the applicant stated: "what happened at Rosebank, may happen here"; "what happened at Rosebank will happen to me", and "what happened in Rosebank it will happen to me and my management".

[8] The incident occurred in the context of the debriefing of the previous night's shift in which the station commander was looking for an explanation for the spate of house break-ins the previous night and ways to prevent its recurrence. When it came to the turn of the applicant, in whose sector there had been no incident the previous night, the station commander's evidence was that the applicant was defensive and did not want to be questioned. He accepted that there had not been a

housebreaking incident in the applicant's own sector but the responsibility for what happened the previous night was a team responsibility and the applicant was a senior person on that shift and for that reason he was also expected to give an account of what had happened. If there was a problem in one sector, it was not expected that members in other sectors would simply fold their arms because nothing was happening in their own sector.

[9] The applicant had challenged him on the accountability question, and had also accused him of never praising him when he had done a good job. When the station commander tried to get him to address the issue of the house break-ins the previous night, the applicant started banging on the table and pointing his finger at him. The applicant then stood up and started to walk towards him until he was standing in front of him which is when he uttered the contentious statement. Because the station commander felt threatened by his actions he also stood up in order to defend himself because he thought the applicant might do something even though he did not have a firearm on him. The station commander then asked other members to vacate the room apart from Captain Ndobe. Chittiah also called his supervisor, Major General Shabane, and the rapid response team to neutralise the situation as he considered it a high risk situation and that additional protection for himself was needed. Captain Ndobe escorted the applicant out of the office and he then made the entry in the occurrence book, after which the response team and his superior arrived which led to the arrest of the applicant.

[10] There was some discrepancy in his account about whether the offensive statement was made when all the other members of the previous night's shift were present or whether he asked them to leave when the applicant started to address him in an aggressive way, because he felt it was inappropriate for them to witness what he regarded as the applicant's insubordinate behaviour. Later in his testimony, Col Chittia elaborated that it was when the applicant started to say that he was incapable of managing the station that he felt he could not allow him to continue making such statements in the presence of junior members. When the contentious statement was made, he viewed it as a direct reference to the

shooting at Rosebank police station in the context of the applicant's preceding aggressive behaviour, even though he did not ask the applicant what he meant and even though the applicant did not attempt to explain what he meant

[11] In Captain Ndobe's statement which the applicant relied on in cross-examining Col Chittiah, he had said that the applicant had stood and hit Col Chittia's table and said that he (Col Chittiah) could not do anything to him and the incident which happened in Rosebank "will happen here". This made Ndobe afraid and he checked to see if the applicant had a firearm.

[12] On the applicant's account of the arbitration, he was explaining to the station commander in the briefing that previously there had been various meetings taking place on a weekly basis and that they were no longer working with the community. He also raised the issue that they should not only meet when there was a complaint but also when they had done well and it was this point that the station commander had got angry and dismissed the other members from the meeting. The station commander had then accused him of being aggressive and defensive and told him he was calling the response team and that he would sleep in the cells. According to his account, he had made the contentious statement before the other members dispersed and it was a reference to the incident of housebreaking committed by a member of Rosebank police station the previous year.

[13] During cross-examination, the applicant was tested on the explanation he had given for his statement at the disciplinary enquiry. At the enquiry he had claimed that when Col Chittiah became angry and accused him of being defensive and aggressive he told him that "you managers are used to open false cases against me and they are not going to work". He explained that this was a reference to previous complaints made against him arising from certain incidents which had never resulted in any action being taken against him. He then testified "Then I told him what happened at Rosebank even here it will happen." He modified the statements likely by saying that he stated what happened at Rosebank "…may also happen here". When he was asked to explain what he was referring to, he said

that a certain Mr Kekana at Rosebank police station was not treated well and it affected his mind and he went on to say:

> "He was a clerk at Rosebank police station. He was depressed. He shot his commanders and even shot himself. He committed suicide. He killed himself."

His representative at the enquiry then asked him what exactly he was referring to and he answered:

> "I was referring to the way they treated me and they were opening false cases against me. I am affected in my mind also… The way they treated me I was affected on my mind. After that he chased all other members. It was only me and Capt Ndobe left."

[14] The applicant just baldly denied any recollection of saying anything like this in the enquiry and his only explanation for what appears in the disciplinary enquiry transcript is that it might have been that it was a problem of translation because he was speaking in Sepedi himself.

The arbitrator's reasoning

[15] The crux of the arbitrator's reasoning on the question of whether or not he was guilty of the intimidation charge is contained in the following portion of her award:

> "The applicant has contended that he did not say that what happened at Rosebank would happen to Col. Chittiah, that the statement was uttered in the presence of all the members of the meeting and that he was not referring to the shooting incident which occurred at the Rosebank Station the arrest of a Warrant Officer Mampane for committing robberies whilst on duty. Col Chittiah was however adamant that the applicant said that what happened at Rosebank would happen to him (Chittiah) and his management. I agree with the applicant that Col. Chittiah's entry into the occurrence book does not reflect this exact statement. I am however of the view that the purpose of an entry into the occurrence book is to reflect the occurrence of an incident without necessarily recording specific details. I further agree that Nkobe's statement records the applicant is saying what happened in Rosebank would happen here. Although Nkobe was not called to testify at the arbitration it should however be pointed out that the applicant did not dispute the inclusion of one's statement in the bundle of

documents submitted by the respondent. More importantly, it was the applicant to refer to the respondents witness to K's one during cross-examination and did not at any point contend that the contents of the statement were inaccurate. The crisp issue in my view is whether this discrepancy in the exact words used renders Col. Chittiah's evidence as unreliable. My difficulty with this point is that even if I accept that what the applicant had said was "what happened in Rosebank may happen here" and not that it would happen to Col. Chittiah and his management, this does not in my view change the essential meaning of the statement made by the applicant.

This brings me to the issue of whether the applicant was referring to the arrest Warrant Officer Mampane as a possible explanation for the house robberies which occurred on the evening of 4 August 2011 or whether the applicant was referring to the shooting incident at the Rosebank Station which had occurred on 1 August 2011. There are a number of improbabilities which arise from the applicant's version given at the arbitration in this regard. Firstly, if the applicant had intended to raise the possibility that members might be committing the robberies and to use the arrest of Warrant Officer Mampane as an example it would surely be reasonable for him to have phrased his words differently to include the suggestion that the robberies may have been committed by members on duty. This is especially so as the arrest appears to have been infected almost a year prior to the incident in question and it is highly unlikely that the applicant would have been reasonably understood to have been referring to the arrest. The version in my view stretches reasonable credulity to far and is frankly opportunistic. Secondly when considering the timing of the statement, namely, that the applicant had just been informed that another allegedly false case had been opened against him, that the shooting incident at the Rosebank Station had occurred a mere two days previously and taking into consideration the applicant's apparent poor relationship with Col. Chittiah, it is highly improbable that the applicant was not referring to the shooting at the Rosebank Station. Thirdly, and most importantly even if Col. Chittiah had not asked the applicant to explain his statement at the time, the applicant was provided with numerous opportunities to do so at his disciplinary hearing. The applicant's sudden memory loss as to what he said at the hearing and his attempt to blame the

interpreter and then the respondent for fabricating his answers is disingenuous and highly improbable.

…

The question then is whether the statement constitutes intimidation. The labour appeal court in Adcock Ingram Critical Care v CCMA & others (2001) 22 ILJ 1799 (LAC) considered not only that the employee in that instance had been aware of the meaning that would be attached to his words but also the context in which they had been uttered. The court further held that the words did not have to be directed at a specific person to constitute a threat. In the present instance is I am persuaded, given my discussion above, that the applicant was fully aware of the meaning which would be attached to his words, namely, that a similar incident to the shooting at the Rosebank Station may occur due to his state of mind. The fact that the applicant had expressed his displeasure at Col. Chittiah only holding meetings in order to criticise members, which is common cause, supports the conclusion that the applicant intended to threaten, terrify and overawe Col. Chittiah. Taking into consideration the evidence of Col. Chittiah that the applicant had been banging the table and pointing at him, which I find more probable, I am further of the view that as the station commander at the Rosebank Station at been shot that Col. Chittiah, as the station commander at Rabie Ridge, was not unreasonable in drawing the conclusion that the applicant had threatened his safety. In the context of the shooting incident the Rosebank Station which occurred only two days prior to this instant, I am persuaded that the applicant's statement is sufficient to constitute intimidation. I am in addition of the view that the applicant's statement exceeded the bounds of reasonableness in the context..."

[16] The applicant had also challenged the procedural fairness of the enquiry on the basis of comments made by the chairperson of the disciplinary enquiry, Colonel Falk. It was claimed that his comments in his decision on sanction demonstrated unacceptable bias against the applicant. The passage of his decision on the question of sanction read:

"The employee committed very serious misconduct. There is a clear breach of trust the member cannot be trusted again. He is not a good example. The employee to the chairperson cannot be brought back to an acceptable standard. The employee did show no remorse, there was no indication on the employee that he wants to change. The behaviour of the employee was

totally out of line is also an embarrassment to the service and damages the image of the police. The misconduct makes a continued employment relationship intolerable. The employee with his remark made a lot of damage. The employee looks very unstable to the chairperson and gives an indication that he is a ticking time bomb just waiting to explode. The employer will run a risk to continue to employee the employee any longer. The employer has a responsibility to protect or his other members from any attack or threat similar to the Rosebank incident. The trust relationship is totally broken down."

(*sic* – emphasis added)

[17] The applicant's claim of bias was based on the emphasised portion of the passage above. After noting, that there is inevitably a degree of institutional bias in internal enquiries, which was unavoidable, the arbitrator dealt with this complaint of bias as follows:

"it appears that the applicant's contention is based on the reasons given by Col. Falk for his findings and sanctions. I agree that it was put to see if that he had not asked the applicant to clarify what he had meant when he made the statement. However, it is clear from the transcript of the disciplinary hearing that Col. Falk in fact ask the applicant on at least five occasions to explain what he had meant and what is intention had been when he uttered the words. During this exchange the applicant stated that he might end up being depressed of the alleged poor treatment did not stop that it if he was depressed he did not know what would happen… Taking into consideration the applicant's explanation at the disciplinary hearing, both during his examination in chief and during questions put by Col. Falk, I am not persuaded that Col. Falk was unreasonable in concluding that the applicant was "unstable". This is not to say that I accept Col. Falk made a medical finding with regard to the applicant state of mind, but merely came to a conclusion, based on the applicant's testimony that a reasonable person would have come to. I am further not persuaded that Col. Falk formed his decision that the applicant was indeed guilty of the charges until he heard the applicant's version as there is no material evidence before me that this was the case. Having considered the evidence of Col. Falk in the submissions by the parties I am not persuaded there is any basis that the chairman of the disciplinary enquiry was biased."

Main grounds of review

[18] At the hearing of the matter, the applicant's representative agreed that the principal issue for the court to determine was whether or not the arbitrator' findings in relation to the intimidation charge was one that no reasonable arbitrator could come to. On the central findings of the arbitrator in relation to this charge, the applicant argued that the evidence of Col. Chittiah was highly improbable and should not have been accepted by the arbitrator. This contention relates mainly to the reasons for Col. Chittiah asking other members to leave the room, the argument being that he would never have asked other members to leave the room if he had genuinely felt threatened.

[19] The argument is not a compelling one. Firstly, the thrust of Col. Chittiah's evidence was that the remark about what happened at Rosebank Station was only made after he had cleared the room and that he had cleared the room because he did not want other junior members to witness the applicant's insubordinate behaviour. The other steps taken by Col. Chittiah, namely of calling his supervisor and the response team clearly indicate that whatever had occurred he took the situation seriously enough to take those measures as well. Secondly, whether the statement was made before or after other members left the room, there is effectively no dispute that the applicant made a statement referring to what happened at Rosebank police station and raising the prospect that it could happen at Rabie Ridge, even if the precise wording of that statement was a matter of contention. Thirdly, there was the undisputed evidence of Nkobe in the disciplinary enquiry, which the applicant himself relied upon, which indicated that Col. Chittiah was not the only person who felt threatened by the applicant's utterance. There was more than ample evidence to justify the arbitrator favouring Col. Chittiah's version over that of the applicant, especially in the light of the applicant's amnesia regarding the reasons for his explanation for the statement which he gave in the disciplinary enquiry that was consistent with Col. Chittiah's and Nkobe's understanding of what he meant with the statement. The existence of inconsistencies about the precise wording of the applicant's statement and details of whether the

applicant struck the table with his first or with his forefinger were not sufficient to discredit the overall thrust of Col. Chittiah's version.

[20] To the extent that there were two conflicting versions of the precise sequence of events on that morning of the briefing, the significance of those differences does not materially affect the fundamental question the arbitrator had to determine in deciding on the intimidation charge, namely was the statement made by the applicant in the context of what proceeded it a statement which could reasonably be interpreted in a non-threatening way? I accept that in the *Adcock Ingram* case cited in the extract above by the arbitrator, the shop steward in question who had made a threatening comment had actually confirmed that his remark made in the context of a file on strike that there would be more blood on management's hands was intended as a threat, whereas in this instance the applicant never clarified his statement at the time he made it. Nonetheless, the arbitrator was not unreasonable in finding that it could only have been a reference to the shooting at the Rosebank police station a couple of days before the briefing session and that the applicant's later version, which completely contradicted the one he had given at the disciplinary enquiry, was too far-fetched to be believable. She also rightly inferred that the applicant's reference to the incident of Warrant Officer Mapana the year before must have been understood by him to have been a connection that nobody else in the room would have readily made given the recent nature of the events at Rosebank police station.

[21] Once it is accepted that the central finding of the arbitrator on the question of intimidation was not one that no reasonable arbitrator could reach, there is no justification for interfering with the arbitrator's findings on the substantive finding that the dismissal was appropriate. It would be reckless to suggest that no reasonable arbitrator could have reached the conclusion that dismissal was appropriate given the gravity of his misconduct and the possible implications of allowing him to remain as a serving member of the police force. It is indeed regrettable that the applicant should have ended his career on this note, but he made no attempt to make amends for his conduct and instead defended it in an implausible manner without any merit.

[22] On the question of the arbitrator's findings on procedural unfairness, the applicant contended that she overlooked the fact that Col. Falk had formed a negative opinion of the applicant in deciding that the chairperson had not been biased towards him. Firstly it is not correct that the arbitrator simply ignored the question as demonstrated by the extract from her award dealing with the question of bias, which is cited above. Secondly, although Col. Falk's statement about the applicant's perceived instability may have gone further than was necessary for the purpose of his findings, it is evident from the arbitrator's own analysis of the transcript and if one has regard to the whole of the Chairpersons decision, that in finding the applicant guilty and deciding that dismissal was appropriate he did embark on a careful analysis of the evidence and that those conclusions were not prefaced on taking a dislike to the applicant or on pre-judging him. If anything, those comments were his own honest observations based on what had transpired in the disciplinary enquiry. I am also persuaded that they did not inform his evaluation of the evidence before him, but were rather inferences he had drawn from that evidence, even if they were observations which were not necessary to make for his decision.

Costs

[23] The third respondent did not pursue the issue of costs but left the matter in the court's hands, accepting that the applicant remained unemployed since his dismissal. While this is the kind of matter where it might be argued that the review application was without merit and that an adverse cost award would be appropriate, in view of the respondent's magnanimous approach, I am not inclined to make an adverse cost award.

Order

[24] The review application is dismissed with no order made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M D Teffo instructed by Phaladi Attorneys
THIRD RESPONDENT:	MW Dlamini instructed by the State Attorney