SACHS J ABRIDGED JUDGMENT

South African Police Service v Public Servants Association

[1] This case started as a dispute over how the word "may" should be interpreted in a provision in the Police Service Regulations. It developed into a wider enquiry on how regulations should be purposefully and contextually interpreted when they are designed to serve diverse purposes in a complex context.

[2] Regulation 24(6) of the regulations for the South African Police Service (SAPS), promulgated in 2000, reads as follows:

> "(6) If the National Commissioner raises the salary of a post as provided under subregulation (5), she or he *may* continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-
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> (a) already performs the duties of the post;
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> (b) has received a satisfactory rating in her or his most recent performance assessment; and
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> (c) starts employment at the minimum notch of the higher salary range." (My emphasis)

The National Police Commissioner (the Commissioner) on the one side, and the unions representing police officers on the other, found themselves in disagreement on how the sub-regulation should be understood and applied.

[3] The Commissioner claimed that although sub-regulation (6) vested a discretion in him when upgrading a post to allow an incumbent to remain undisturbed and enjoy a higher salary without competing for the newly regraded post, it did not oblige the Commissioner to do so automatically and mechanically. The police unions on the other hand insisted that the sub-regulation did not give a discretionary power to the Commissioner, but rather established that the ordinary process of filling posts through advertisement was not to be applied in situations where an incumbent employee is working satisfactorily in a post which is upgraded and carries a higher salary.

[4] It appears that disagreement on the issue of interpretation led to great uncertainty which in turn threatened to have a negative effect on the efficiency of the SAPS and the morale of its members. Many incumbents dissatisfied at not receiving automatic promotion when their posts were upgraded, resorted to arbitration.

[14] Considerable attention in this matter has been given to the way in which the word "may" should be interpreted.

The contextual scene

[17] Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, I examine the context in which the word "may" is used. The importance of context in statutory interpretation was underlined by Schreiner JA in *Jaga v Dönges, N.O. and Another* as follows:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context" as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting

> may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

[18] Schreiner JA went on to point out that whatever approach is adopted, the court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is "the risk of verbalism and consequent failure to discover the intention of the law-giver". He emphasised that "the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene".

[19] It is necessary to add that the contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework. The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa. Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated by section 1 of the Constitution and the Bill of Rights.

[20] Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.

The constitutional context

[21] A complicating matter in the present case is that regulation 26(4) has to be read in the context of not one but three different constitutional imperatives. The first is to enable the Commissioner effectively to carry out his or her specially identified constitutional mandate. It is to be noted that the Commissioner gets particular constitutional recognition, something not accorded to the soldier who heads the defence force, or the head of the intelligence services. The Constitution clearly envisages an important and active decisional role for the Commissioner, and regulation 24(6) must be read in the light of this factor.

[22] At the same time, however, the Constitution declares that everyone is entitled to fair labour practices. Inasmuch as the decisions of the Commissioner affect the employment of the persons whose work he manages, he is obliged not to act unfairly. Regulation 26(4) must accordingly be construed so as to promote respect for fair labour practices.

[23] A third dimension must also be borne in mind. The Constitution envisages the achievement of equality in a society still disfigured by grave imbalances related to race and gender. These imbalances are reflected in the SAPS itself. Representativity is especially important in a service that has to provide security to, and have a close connection with, all members of all communities.

The statutory context

[24] The Minister is obliged to determine a job evaluation system or systems that must be utilised as well as a range of job weights from the evaluation system for each salary range in a salary scale. The Commissioner is thereafter empowered to evaluate or re-evaluate any job in the police service. Regulation 24 as a whole is concerned with the consequences of the application of an evaluation process.

The factual context

[25] The evidence shows that the Act and the regulations were made in order to authorise and systematise the restructuring and the re-orientation of SAPS in the new constitutional order

brought about in the first place by the interim Constitution. The deponent for the Commissioner says in this regard:

> "The democratisation of South Africa in 1994 brought about a completely new dispensation in respect of the manner in which manpower in the then South African Police would be managed. Not only had it become necessary to amalgamate all the various police agencies into the new South African Police Service, but it had also become essential to introduce a new manpower management policy that would be uniformly fair and acceptable, and which would reflect the demographic distribution of the South African population."

[26] The South African Police as it existed in the pre-constitutional order had no mechanism for the systematic, continuous and regular evaluation of posts and their re-grading from time to time. Posts were regraded on an *ad hoc* basis. The new staffing management policy had to deal with this and did so by providing a detailed evaluation mechanism with an indication of how the consequences of evaluation are to be managed.

[27] The staffing management system had also to concern itself with promotions. In the pre-constitutional order, the South African Police had a

> "policy of promoting by class, [that is] in seniority in accordance with the year during which each rank group had joined the South African Police or in accordance with the year during which each rank group had completed officers training. This meant in practice that a group of inductees would progress in what can best be described as blocks."

To correct this problem, an interim promotion policy was put in place by SAPS as early as 1 September 1994. The promotion policy sets out extensively the pre-requisites that must be satisfied before a member of SAPS in one rank is eligible for promotion to another, criteria for promotion, as well as the process of promotion including the application by and evaluation of candidates.

[28] The difficulties surrounding the filling of upgraded posts began to be felt most acutely during the period 2000 – 2001 when 1333 vacant posts of superintendent were filled by the

application of the interim promotion policy. A large number of these advertised posts had been upgraded from that of captain to that of superintendent and were being occupied by SAPS members who held the rank of captain. Despite this, none of the posts for superintendent were filled without them being advertised. All the posts were advertised. Some of the captains who were the incumbents of the upgraded superintendents' posts and who had continued to occupy these posts even after they were upgraded, were promoted to those posts, while many were not. This resulted in a large number of grievances by those captains who had not been promoted to the superintendent posts they had occupied. The Commissioner concedes that many of these grievances proceeded to arbitration with awards being made against the Commissioner with the result that most of the captains were ultimately promoted to the rank of superintendent.

[29] The Commissioner decided to adopt a different approach when, after the new superintendents had been appointed, 3356 vacant posts of captain had to be filled. Because of the difficulties encountered during the superintendent promotions, the Commissioner decided not to advertise upgraded posts in relation to which the work was already being done by an incumbent but to promote that incumbent as if he or she was found to be suitable. When more posts were advertised in late 2001, it was decided not to fill upgraded posts at all. The filling of upgraded posts was suspended in 2002. It is therefore not surprising that the interpretation of a regulation concerned with the filling of posts upgraded consequent to an evaluation, became controversial.

Risk of retrenchment

[30] During the course of argument counsel for both sides vigorously debated the question of whether the reading favoured by the Commissioner would place incumbents of upgraded posts who were not successful after advertisement, in danger of retrenchment, and whether such retrenchment would signify unfair labour practices. Counsel for the Commissioner acknowledged during argument that there are indeed risks of job losses but given the absence of information on the record he could provide no further assistance to the Court. Whatever the position, the Commissioner is obliged to exercise his powers under regulation 24(6) in a manner which does not involve violation of the right of incumbents not to be subjected to unfair labour practices. The regulation must accordingly be interpreted with this in mind.

Reconciling the competing considerations

[31] It is evident that there are a number of constitutional, statutory and factual considerations which may be in tension with each other. In this respect it is salutary to consider the approach of this Court in *Port Elizabeth Municipality*[34] to the question of how to respond to questions raised when rights compete with each other. In that matter the rights of owners of land clashed with the rights of unlawful occupiers not to be arbitrarily deprived of a home. The Court said:

> "The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa*. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case."

In the present matter, too, an attempt should be made to balance out and harmonise as far as possible the competing considerations involved.

[32] In summary, the key factors are the following:

- SAPS is involved in a major process of restructuring aimed at giving the service greater efficiency and ensuring proper remuneration of its members on the basis of job evaluation and performance.
- The commissioner has a key role in directing this process.
- Transparency in career advancement ordinarily requires advertising of posts and open procedures.
- The specific purpose of the regulation is not to restructure the police force or to promote affirmative action but to ensure that posts are properly evaluated, so that those who hold them are paid in accordance with the work that they do.
- A real risk exists that an incumbent of a post that is upgraded and advertised could end up without a proper job even though he or she is performing in a satisfactory manner.

[33] It follows from above that the regulation must be read in such a way as best to harmonise two major considerations that could collide with each other. The first is the need to give the Commissioner the necessary flexibility to strengthen the leadership capacity of the service in a transparent manner. The second is the requirement that incumbents whose work is satisfactory should not be subjected to the anxiety of possibly losing their jobs simply because their posts are being upgraded.

[34] In my view, then, the regulations can and should be read in a way that neither produces the rigidity of outcome that would flow from the view of the majority in the Supreme Court of Appeal, nor carries the risk of consequent redundancy, implicit in the minority approach. It is indeed possible to harmonise flexibility of application with respect for appropriate job security. This can be achieved by acknowledging that the Commissioner does have a discretion whether to advertise or not, but that the discretion must in each case be exercised in such a way as to not lead to the loss of employment by a satisfactory incumbent as a consequence of the upgrading of his or her post. Nor should incumbents who are threatened with retrenchment because their posts have been upgraded, be obliged on a case by case basis to invoke administrative or labour law mechanisms to secure their positions in the service. Since retrenchment utilising the provisions of regulation 24(6) would be manifestly unfair, the regulation should be interpreted as a matter of law as requiring the Commissioner to exercise his discretion in a manner which does not lead to job loss. An incumbent whose work is satisfactory should not be subjected to the anxiety of losing employment simply because the work he or she is doing is considered to be worthy of an upgrade and better pay.

[35] It follows, then, that subject to the qualification mentioned below, “may” in the context of this case does not mean “must”. The Commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so. The declaration should, however, be qualified by a further declaration that the Commissioner’s discretion must be exercised in a manner which does not place an incumbent who is performing satisfactorily in jeopardy of losing his or her job in the service simply because his or her post is being upgraded.

[36] In the result, leave to appeal must be granted and the appeal must succeed in the terms mentioned above.

[37] The Commissioner was ordered to pay the union's costs in the High Court and the Supreme Court of Appeal. He did not ask for costs in this Court. The union contributed helpful arguments of a substantive nature in all three courts. It has been partially successful in that it has secured an interpretation that protected its members from the threat of any retrenchment flowing from the upgrading of the post in terms of regulation 24. In these circumstances it is appropriate that the costs orders in the High Court and the Supreme Court of Appeal should stand, and that the Commissioner bear the costs of the union incurred in this Court.