



## ARBITRATION AWARD

Panellist/s: Paul Kirstein  
Case No.: PSSS791-05/06  
Date of Award: 14-Jun-2006

CASE NUMBER: PSSS791-05/06

In the matter between:

**E CLARENCE**

Applicant

and

**SAPS**

Respondent

<b>ARBITRATION AWARD</b>
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### DETAILS OF HEARING AND REPRESENTATION

1.

The arbitration was set down on 22 May 2006 in Pretoria. The applicant was represented by Attorney W Kruger. The respondent was represented by Adv. CH Lombard, a legal officer in the employment of the respondent. A bundle of documents were submitted containing the following:

- Transcript of the disciplinary hearing;
- Ruling at the disciplinary hearing;
- Grounds of appeal;
- Appeal ruling.

The parties agreed that the transcript of the disciplinary proceedings constitutes the facts upon which a decision should be made at the arbitration. The parties agreed to submit written heads of argument.

## **ISSUE IN DISPUTE**

2.

The applicant contends that his dismissal on 22 August 2005 was substantively unfair. The procedural fairness of the dismissal is not in dispute.

## **SUMMARY OF EVIDENCE**

3.

At the disciplinary hearing the following witnesses testified:

- Van Wyk;
- Nel;

- Malamule;
- Mokobole;
- Clarence (applicant);
- Mulder.

4.

On 12 November 2004 Inspector Thoka did not report for duty. Inspector Thoka was fetched at home. It became apparent that Inspector Thoka was under the influence of alcohol. A blood test confirmed that the alcohol content in Inspector Thoka's blood was 0.23. Inspector Thoka was booked off duty and left the police station. Three ladies complained at the police station that Inspector Thoka was pointing a firearm at them. Instruction was given to pick up Inspector Thoka and secure the firearm. Malamule and the applicant located Inspector Thoka. Inspector Thoka refused to respond to the request of the applicant and pointed a firearm in their direction. Inspector Thoka disappeared into the veld. On request of the applicant various units responded to assist. Eventually Inspector Thoka was found with a firearm in his hand. The applicant and Inspector Van Wyk identified themselves and instructed Inspector Thoka to put down his firearm. The firearm was pointing in the direction of the applicant and Van Wyk. After verbal warnings and two warning shots Inspector Thoka still refused to put down

the firearm. According to the evidence of the applicant Inspector Thoka took in a standing position to fire. The applicant shot Inspector Thoka.

## **ANALYSIS**

5.

The applicant was found guilty of contravening Regulation 18(3) of the Police Regulations in that the applicant performed an act which constituted an offence in that he intentionally shot and killed Inspector Thoka. At the disciplinary hearing the witnesses corroborated each other on material aspects of the events leading up to the unfortunate event during the nightshift on 12 November 2004.

6.

The version that Inspector Thoka pointed a firearm at the applicant is consistent with the events leading up to the tragic death of Inspector Thoka. Members of the public complained about Inspector Thoka pointing his firearm. Malamule confirmed that Inspector Thoka pointed his firearm when he was initially confronted and refused to obey an instruction from the applicant. There is no reason to disbelieve the version that Inspector Thoka was warned and that two warning shots were fired. It is therefore accepted that the applicant acted in self-defence and had no intention to kill Inspector Thoka. The respondent failed to prove on a balance of probabilities that the applicant contravened Regulation

18(3) in that the applicant intentionally shot and killed Inspector Thoka. It is therefore determined that the dismissal was substantively unfair.

7.

The applicant seeks reinstatement. In terms of Section 193(2) of the LRA an arbitrator must require the employer to reinstate the employee unless the conditions set out in subsection 193(2)(a) to (d) are applicable. On the available evidence it cannot be determined that any of the conditions set out in the mentioned subsections are applicable. Therefore the request for reinstatement must be granted.

#### **AWARD**

8.

1. The dismissal of the applicant on 22 August 2005 was substantively unfair. The procedural fairness of the dismissal is not in dispute.
2. The respondent must reinstate the applicant with effect from the date of dismissal on the same terms and conditions applicable to the applicant at the date of dismissal without loss of any benefits.
3. The respondent must pay to the applicant the outstanding remuneration from the date of dismissal until the date of the arbitration within thirty (30) days of

the date of this award. If a dispute exists regarding the outstanding remuneration the matter must be set down for quantification.

4. No order as to costs.