



**REPUBLIC OF SOUTH AFRICA**  
**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**  
**JUDGMENT**

**Not reportable**

Case no: D328/2013

In the matter between:

**ETHEKWINI MUNICIPALITY**

Applicant

And

**SOUTH AFRICAN MUNICIPAL WORKERS UNION  
 OBO OS MLAMBO**

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT  
 BARGAINING COUNCIL**

Second Respondent

**NONDALA N.O**

Third Respondent

**Application heard: 4 November 2014**

**Judgment delivered: 8 January 2015**

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**JUDGMENT**

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**VAN NIEKERK J**

## Introduction

- [1] This is an application to review and set aside an arbitration award made by the third respondent, to whom I shall refer as 'the arbitrator'. In her award, the arbitrator found that the dismissal of Mr. Mlambo ('the employee'), on whose behalf the applicant acts, was substantively and procedurally unfair. The arbitrator ordered that the employee be reinstated with retrospective effect.

## The material facts and the arbitrator's award

- [2] The evidence of each of the witnesses who testified during the proceedings under review is recorded in the award. It was not disputed that in July 2009, the employee was authorised to possess his service firearm but only while on duty or travelling to and from work, and that the firearm otherwise had to be kept in a safe in conformity with the applicable regulations. It was also not disputed that on 8 November 2009 at about 21h00 in Amaotana, the applicant was in possession of his firearm outside of working hours in contravention of the relevant authorization, and that a number of shots were discharged from the firearm, causing serious injury to one Sibusisu Ngiba.
- [3] Two charges were brought against the employee. Both related to a failure to comply with relevant conditions of employment, policies and practices. In particular, it was alleged first that the employee was in possession of a firearm contrary to the applicable conditions and secondly, that he had discharged a firearm or allowed it to be discharged in circumstances where bodily harm was caused to Ngiba.
- [4] The parties held a pre-arbitration meeting on 29 November 2012. It was agreed at that meeting that the employee was off duty at the time of the incident, that he was permitted only to carry his firearm to and from work, and at work and that a person in his position being off-duty is not permitted to carry a firearm in terms of the applicable policy. It was agreed that at the time of the incident, the employee

was in possession of a firearm. Specifically placed in dispute was the substantive and procedural fairness of the employee's dismissal, whether the presiding officer at his disciplinary hearing engaged in irregular conduct (and particular whether a reasonable decision-maker would have acted in a manner that he did by disregarding material facts of the case raised by the employee and his representative), whether the area in which the incident occurred was unsafe for police officials, whether the employee was robbed of his pistol by people in the neighbourhood, whether the 'alleged shooting' was not malicious intended to harm but purely in self-defence, whether the shooting occurred as a result of 'people who were trying to rob the firearm', whether the applicant 'was kicked out of trial while it was in process', and whether the disciplinary proceedings were way in excess of timeframe set out in the disciplinary code. The issue that the arbitrator was required to decide is recorded as 'whether the dismissal was procedurally and substantively fair'. I would pause to observe that the pre-arbitration minute, intended to reduce the scope of the issues placed in dispute, singularly failed to achieve that objective. What it does disclose however is an admission by the employee that he was in possession of a firearm at the relevant time in contravention of the applicable workplace rules.

- [5] To the extent that the arbitration award contains findings made by the arbitrator herself on the basis of the evidence before her, the arbitrator recorded, at paragraphs 121 and 122 of the award, that the 'just cause for discipline' at the heart of both charges was the possession and discharge of a firearm respectively. The arbitrator then proceeds to say the following:

'[123] The Respondent never submitted any documents mentioned in the charge sheet setting out the allegations against the Applicant other than the disciplinary procedure collective agreement as well as the firearm possession report relating to the applicant's application for a firearm permit, including such application.

[124] As a result, the arbitration hearing was deprived of the vital opportunity to know exactly what the documents mentioned in the charge sheet entail in order

to establish whether or not there was any grain of probable truth to the allegation that the Applicant has committed any breaches of the other documents (sic)...'

This observation appears to be of no consequence, since the arbitrator proceeds to say the following:

[127] I have accepted that there exists a rule at the Respondent's workplace which forbids police officials issued with a departmental firearm from carrying such firearm off duty in breach of the conditions of issue.

[128] Nowhere in the Applicant's application for a firearm permit is it stated that a police official who is found to have breached the conditions under which the departmental firearm has been issued would face dismissal as a sanction. I therefore find the Applicant could not have possibly have known that possessing his firearm while off duty would result in his dismissal from the employ of the Metro police within the respondent municipality. The finding by Von Bargaen that the Applicant knew that his position of the service firearm in breach of the conditions imposed on him for such position is further rebuffed of any legitimacy by the sanction imposed on the applicant's fellow colleague Constable SK Ndlovu (6596703) for committing similar misconduct...

[136] The Respondent also never led any evidence during arbitration to show that position of a departmentally issued firearm without authorisation while off duty constituted serious misconduct attracting dismissal at the time the Applicant committed such misconduct, and that such misconduct has since become to be regarded as a less serious offence...

[140] Since the Applicant has taken ownership of committing the misconduct is set out in charge one in the notice of the hearing, the real issue that I am required to decide is whether the sanction of dismissal was fair in the circumstances. I intend to come back to this issue in due course during the course of my analysis.'

[6] All of this can be reduced to a finding that since the employee had admitted in the pre-arbitration minute that he had been in possession of the firearm at the

relevant time in contravention of the applicable policies, he was guilty of the offence with which he had been charged; the only remaining issue being the appropriateness of dismissal as a sanction. Given the admissions made by the employee, this was a statement of the obvious.

- [7] In relation to the second charge against the employee, i.e. discharging or allowing the firearm to be discharged, the arbitrator correctly noted that the evidence before her disclosed a dispute of fact. She concluded after an assessment of the evidence that the evidence of Nzama and Ngiba was 'submerged in a deluge of improbabilities' and that the employee's version that his firearm went off during a struggle with members of the Ngiba family who were vying for control of his firearm after a fracas had broken out, was to be preferred. On this basis, the arbitrator found that the applicant had failed to prove that the employee had intentionally and unlawfully discharged or allowed his service firearm to be discharged thereby causing injury to Ngiba.
- [8] The arbitrator then turned to the question of an appropriate sanction. From paragraph 170 of the award, the arbitrator sets out the principles of progressive or corrective discipline. What the arbitrator then curiously embarks on a review of the decision by the chair of the disciplinary hearing to dismiss. This of course is the incorrect approach – the arbitrator was required to decide herself, by reference to all of the relevant factors and circumstances, on an appropriate sanction. This she does from paragraph 182 of the award, where she concludes that the act of voluntarily surrendering his firearm as soon as the Metro police arrived at the scene of the shooting '*...was a testament to the Applicant's willingness to embark on a one-way journey to mend fences with the respondent for his admitted misconduct. That served as a clear indication that he was prepared to make an effort at self-rehabilitation*'.
- [9] The arbitrator also takes into account that the employee remained actively involved in the business operations of the respondent throughout his time a

disciplinary process save for the period of his suspension and that she could find nothing in the *'summary of the findings made by Von Bargen any reference to the effect that the applicant admitted misconduct has rendered his employment relationship with the respondent intolerable, irreconcilable or unbearable. Neither was such evidence tendered during the course of the arbitration hearing'*. On this basis, the arbitrator concludes that the employee's conduct was hardly of such a nature that it could be said that it severely and irrevocably damaged the party's existing employment relationship, or has *'crossed the requisite threshold of interoperability of a continued employment relationship that will normally justify the imposition of dismissal as a sanction'*.

- [10] Another factor taken into account by the arbitrator in relation to the issue of sanction is the case of a Constable SK Ndlovu, who on 13 June 2012, was called to a disciplinary hearing in relation to a charge of possessing a departmental firearm while off duty on his rest day. It was not disputed that Ndlovu admitted the misconduct and was suspended from duty without pay for a period of four days. The arbitrator clearly considered the applicant's conduct to have been inconsistent and concluded, at paragraph 139, that:

'The employer cannot willy-nilly exercise discipline over its employees for similar misconduct depending on how the weather looks like on a particular day. The employer can equally not make together one group of employees and files of another. Discipline is to be applied indiscriminately across all employees who are alleged to have committed misconduct of a similar nature if the purpose of the exercise of discipline is to be achieved at a particular workplace.'

- [11] The arbitrator comes to the following conclusion:

'[192] I find that the Respondent has stretched the perimeters of the Applicant's admitted misconduct beyond breaking point solely in order to make the supposed seriousness of such misconduct to stick and to fit it with the cloak of just cause for discipline warranting the sanction of dismissal.'

[192] I therefore find that the sanction of dismissal was not a fair and appropriate sanction in the circumstances.

[193] I accordingly find that the Respondent has not discharged the onus to show on the balance of probabilities that the sanction of dismissal imposed on the Applicant for his admitted conduct was appropriate.'

[12] In relation to procedural fairness, the arbitrator found that Von Barga had not brought an open, objective and impartial mind on the disciplinary hearing and that the employee dismissal was accordingly procedurally unfair.

[13] In the result, the employee's dismissal, as I have indicated, was found to be both substantively and procedurally unfair and the employee reinstated with retrospective effect.

#### The grounds for review

[14] The supplementary affidavit filed by the applicant discloses the specific basis for review. In short, the applicant relies to a large extent on conduct-related grounds and in particular, that the arbitrator's finding was contradictory, inconsistent with the material before her and principle of rationality, that her finding lacked objectivity, that she failed to have regard to relevant evidence before her and made findings not based on the material evidence. The applicant's averments are all contained in the supplementary affidavit, and I do not intend to repeat them here. Of course, these grounds are not in themselves a basis to set aside the award, what is relevant is the extent to which they had the result of an unreasonable outcome.

#### The applicable principles.

[15] The legal principles to be applied are well established. The test for review focuses on the reasonableness of the outcome. *In Herholdt v Nedbank Ltd*

(2013) 34 ILJ 2795 (SCA) the Supreme Court of Appeal clarified the relationship between the constitutional requirement of reasonableness and the grounds for review in s 145(2) of the LRA. The concept of gross irregularity in the conduct of arbitration proceedings is not confined to the situation where the arbitrator misconceived the nature of the enquiry; it extends to those instances where the result is unreasonable. A result is unreasonable if and only if it is one that a reasonable arbitrator could not reach on all the material that was available. Material errors of fact, as well as the weight and relevance to be attached to particular facts are not in themselves a basis for an arbitration award to be set aside. These are relevant only if their consequence is to render the outcome of the proceedings under review unreasonable. In *Goldfields Mining South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC) the LAC confirmed this approach and held that it was the function of a reviewing court to ascertain whether the arbitrator considered the principal issue before him or her, evaluated the facts at the hearing and come to a conclusion which was reasonable to justify the decision to which he was she had come. What is to be avoided is an approach that invites the reviewing court to consider and analyse every issue raised at the arbitration and to regard a failure by the arbitrator to consider all or some of the issues, even if they are material, as rendering the award reviewable on the basis of a process -related review. It is apparent from this formulation that the threshold in a review application is set high, and as the LAC once observed, it is not often that an applicant in a review application will succeed.

[16] At paragraph [20] of the judgment, the court stated:

‘The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she



was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.'

[17] In the recent decision of *Head, Department of Education v Mofokeng and others* (JA 14 /2014, 1 October 2014) the Labour Appeal Court, per Murphy AJA, said the following:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the

process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on

the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

- [18] The test to be applied clearly maintains the distinction between a review and an appeal. The correctness of the commissioner's decision is not in issue, and the court is not entitled to interfere only because it would have come to a different conclusion on the same material. In other words, commissioners are allowed to be wrong. The applicable threshold also requires the court to overlook any lapses in reasoning on the part of the commissioner and to determine whether the outcome of the proceedings is nevertheless reasonable. But it does not follow, as Murphy AJA observed, that the court is required to engage in a reasonableness enquiry in relation to outcome where a commissioner fails to ask the right question, or where an irregularity or material error serves to constitute a material misconception of the nature of the enquiry. This is particularly so where the commissioner simply fails to address the question or questions raised for

determination in the proceedings under review, with the result that one or more of the parties are denied a fair hearing.

### Analysis

[19] At the outset, in relation to the finding of procedural unfairness, it is appropriate to record that much of the arbitrator's award is devoted to an attack on the conduct and decision by the chair the disciplinary hearing, Van Bargaen, who had found the employee guilty on both counts of misconduct and dismissed him. The terms of the award indicate that the arbitrator did not enquire, as she was obliged to do, whether the requirements of procedural fairness set out in the Code of Good Practice: Dismissal had been met. Instead, she was critical of Von Bargaen's decision on the merits and translated this criticism into a finding of an fair procedure. In particular, the language used in the award is indicative of an approach that suggests a review of the disciplinary hearing. For example, at paragraph 205, the arbitrator finds that Von Bargaen was simply 'going through the motions' of the disciplinary process, that he failed to apply his mind properly to the evidence before him and that he failed to bring an open, objective and impartial mind to bear to the decision that he was required to make. The merits of these findings aside (they are difficult conclusions to sustain given Von Bargaen's evidence), the approach adopted is indicative of a failure properly to appreciate the nature of the relevant enquiry. What the arbitrator ought to have asked is whether the employee was afforded a proper opportunity to make representations or state his case before any decision was made regarding the allegations of misconduct against him and an appropriate sanction for any misconduct found to have been committed. This is the nature of the right afforded by the Code, and all the arbitrator ought to have determined is whether the employee had been afforded this right.

[20] Insofar as the arbitrator is finding on substantive unfairness are concerned, the law is clear – the arbitration hearing is a hearing *de novo* and in the absence of

any agreement by the parties to incorporate any of the record of a domestic disciplinary hearing into the arbitration proceeding, the arbitrator is obliged to make a finding based on the evidence led before him or her. There is nothing in the pre-trial minute which indicates that the parties had agreed that any part of the record of the disciplinary hearing was to be introduced in evidence, and it was incumbent therefore on the arbitrator to decide the case by reference to the evidence led at the arbitration hearing.

[21] The arbitrator's analysis of the evidence is one in which she embarked on a comparison of the evidence before her and other documentation in the form of prior statements made by the witnesses. In particular, she compared the evidence proffered at the arbitration hearing with statements previously made to the South African Police Services shortly after the shooting incident. The arbitrator's findings on credibility are founded largely on a comparison of the evidence before her and the content of the statements. For example, at paragraph 142 to 150, the arbitrator rejects Sibisiso Ngiba's evidence on account of the discrepancies between that evidence, a statement made to the SAPS and what he stated at the employees disciplinary hearing. The fundamental flaw in this approach is that the record of the arbitration hearing does not disclose that any of these discrepancies were directly put to Ngiba, or that he was ever afforded a proper opportunity to respond to the inconsistencies on which the arbitrator ultimately relied. In other words, inconsistencies were identified (and credibility findings made) in circumstances where they had never been directly and expressly put to the witnesses concerned for comment. The arbitrator clearly after the event made comparisons between the evidence deposed to in the hearing and the documentation she had before her and made credibility findings on that basis.

[22] To the extent that the arbitrator's findings of credibility were underpinned by the findings of inconsistency in circumstances where the witnesses concerned were not afforded a proper opportunity to respond to alleged inconsistencies between

their evidence at the arbitration hearing and prior statements, the arbitrator made a case for the employee, which of course, she was not entitled to do. In my view, the conduct in this regard not to provide the parties of a fair hearing, is in itself a basis for the award to be reviewed and set aside.

- [23] More fundamentally however, by the arbitrator's own lights, she found the employee guilty of being in possession of a firearm in breach of the relevant regulatory provisions. While she considered that dismissal was too harsh a penalty for this act of misconduct, her finding is one in which the employee is not visited with any penalty at all for the misconduct found to exist. To the extent that the award under review comprises a finding of misconduct with no consideration of the penalty that ought appropriately to attach to that misconduct, the award does not represent a decision to which a reasonable decision-maker could come.
- [24] In short, in relation to procedural fairness the arbitrator misconceived the nature of the enquiry and that misconception resulted in the failure of a fair trial in respect of that issue. In relation to substantive fairness, the arbitrator made factual findings based on assessments of credibility in circumstances where the witnesses against him credibility findings had been made had never been afforded a proper opportunity to respond to any averments regarding the consistency between their evidence at the arbitration hearing and their prior statements. In relation to the charge of possession of a firearm in breach of the applicable regulatory measures, this was not a matter that was ever in dispute. In relation to the appropriateness of dismissal as a sanction for that misconduct, while the arbitrator considered that dismissal was too harsh a sanction, she failed to give any consideration to a sanction that was appropriate given the nature of the admitted misconduct. The consequence was that an employee found to have committed a serious act of misconduct (and which has serious and near-fatal consequences) escaped with no sanction at all. For these reasons, in my view, the decision reached by the arbitrator is one that falls outside of the bands of

decisions to which reasonable people could come on the available material. The award accordingly stands to be reviewed and set aside.

### Remedy

- [25] The court has a discretion to remit the matter to the bargaining council for a fresh hearing, or to substitute the arbitrator's award. The court is generally inclined to substitute an award if the whole of the record is before the court and little purpose would be served by remitting the matter for rehearing, the delay in finalising the matter would be unacceptable should the matter be remitted, or if there is some other compelling reason why substitution is not appropriate. In the present instance, I take into account especially that the employee was dismissed in 2009 and that the present application for review was heard almost exactly 5 years later. The record before the court is complete and it seems to me that little purpose would be served in remitting this matter for rehearing.
- [26] For the purposes of substitution, I intend only have regard to the arbitrator's finding that the employee committed an act of misconduct by being in possession of his service pistol on 8 November 2009. As I have indicated, the arbitrator's finding relies on two factors – that the employee was unaware that carrying his firearm in breach of the conditions of issue could result in dismissal, and that his employer had acted inconsistently by failing to dismiss Constable Ndlovu. There is nothing on the record to suggest that the employee was unaware that he is carrying a firearm in the circumstances that would not result in a disciplinary action, even dismissal. This was never in dispute. Insofar as the consistency argument is concerned, the case of Ndlovu was wholly distinguishable. In that instance, the employee concerned was charged with carrying a service pistol while off duty. The pistol had not been discharged, even less that any third-party been injured. It is not disputed that in the present instance, the employee's firearm was discharged in circumstances where serious bodily harm was inflicted on Ngida, who has been left to live with the physical consequences of what was ultimately an admitted breach of the rules by the employee. In any event, the

applicant's conduct could not properly be measured against an act that had not occurred at the time. Ndlovu was disciplined on 11 July 2012, more than two years and four months after the incident involving the employee. There could not have therefore have been any historical or contemporaneous inconsistency to justify any lesser sanction for the employee.

- [27] The facts of the present case are such that the employee knew and understood the rule regarding the position of a firearm without authority, the incident occurred while he was off duty, intentionally carried his firearm with him and he went to visit his mother in the Amaotana area, he had not sought the prior permission of his employer to carry the firearm in those circumstances, he breached the rule regarding the possession of firearms, he became involved in an altercation, during the course of that altercation, his firearm discharged two bullets in circumstances where a civilian, who was not one of the assailants, was seriously injured. What must weigh heavily against the employee is the fact that he took a conscious decision to carry his firearm into an area with a high crime rate in breach of the conditions of issue. It is beyond dispute that the employee's misconduct was serious and in my view, sufficiently serious to warrant the penalty of dismissal. Even if I were to grant the employee the benefit of the doubt in relation to the charges relating to the discharge of a firearm, the charge of unlawful possession of a firearm in the present circumstances and having regard particularly to its consequences, alone warrants dismissal. For these reasons, I intend to substitute the award made by the arbitrator with one that reflects the substantive and procedural fairness of the employee's dismissal.

### Costs

- [28] The court has a broad discretion to make orders for costs, according to the requirement of the law and fairness. The court does not ordinarily make orders for costs in circumstances where there is a collective bargaining relationship between the parties, and where a costs order might serve to prejudice that



relationship. In the present instance, there is no compelling reason to depart from that approach.

- [28] Finally, by way of an aside, I wish to make a comment about the procedure adopted in relation to the incident that gave rise to these proceedings. The shooting took place on the evening of 8 November 2009. On 19 November 2009, the employee was suspended on full pay. The employee was served with notice of the allegations against him only on 13 May 2010. The disciplinary hearing was scheduled to commence on 27 May 2010. The parties agreed to postpone the proceedings until July 2010 after the soccer World Cup tournament had ended. The enquiry did not proceed on 19 July 2010 on account of an application for the recusal of the presiding officer. On 28 July 2010 the union objected to the appointment of any official from within the Durban Metro Police to chair the enquiry. A presiding official was appointed only in December 2010. A second notice of a disciplinary enquiry was served in April 2011, and an enquiry scheduled for 19 April 2011. The union took issue with the second notice of an enquiry and declared a dispute on 6 May 2011. The matter was arbitrated on 22 July 2011, and an award handed down in October 2011. The disciplinary enquiry resumed on 17 October 2011 and adjourned to the next month at the union's request. The enquiry was again postponed a number of times during November on account of the unavailability of union officials and eventually got underway on 28 November. The enquiry dragged on into February 2012, and was concluded only on 2 April 2012 when the employee was dismissed. The appeal hearing was concluded only in September 2012, almost three years after the shooting. The manner in which the disciplinary process was managed is entirely inimical to the statutory purpose of expeditious dispute resolution. The parties appear to have conducted the disciplinary enquiry as if it were a criminal trial, with technical point taking, requests for postponements at every stage and a procedure more suited to the magistrates' court. The Act and the Code of Good Practice: Dismissal envisage a simple internal disciplinary process during which an employee must be afforded the right to respond to allegations of misconduct made by the

employer. I fail to appreciate why the parties (and the applicant in particular, ultimately the manager of the disciplinary process) allowed this matter to be conducted as it was. The consequent waste of time, money and other resources was ultimately for the account of the ratepayers of Ethekekwini.

I make the following order:

1. The arbitration award issued by the third respondent on 18 March 2013 under case number EMD 101202 is reviewed and set aside.
2. The award is substituted by the following:  
‘The applicant’s dismissal was substantively and procedurally fair.’
3. There is no order as to costs.

ANDRÉ VAN NIEKERK  
JUDGE OF THE LABOUR COURT

Representation

For the applicant: Hughes Madondo Inc

For the first respondent: Tomlinson Mnguni James