



**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C44/2022

Not reportable

In the matter between:

RICARDO SCHOUTEN

Applicant

and

**SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL (SSSBC)**

First Respondent

JANINE CARELSE N.O.

Second Respondent

**THE SOUTH AFRICAN POLICE
SERVICES (SAPS)**

Third Respondent

Date of Hearing: 20 February 2025

Date of Judgment: 29 May 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 29 May 2025.

Summary: (Application to review arbitration award in unfair dismissal proceedings (misconduct) – finding on substantive fairness reasonable – finding on procedural fairness unreasonable – award partially substituted).

JUDGMENT

LESLIE AJ

[1] This is an application, brought in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”), to review and set aside an arbitration award issued by the second respondent (“the arbitrator”) under the auspices of the first respondent (“the SSSBC”). The application is opposed by the third respondent.

[2] The applicant was formerly employed by the third respondent (“SAPS”) as a relief commander in the Crime Intelligence unit based at Disa Court, Bishop Lavis, Western Cape. He was dismissed on 15 December 2017 after being found guilty of being in unlawful possession of ammunition. The ammunition was suspected to be stolen property.

[3] The relevant facts leading to the applicant’s dismissal may be summarised as follows:

3.1 The applicant had a locker (comprising a filing cabinet and stationery cupboard) in the workplace which was exclusively for his use. It is common cause that only the applicant had the key to the locker.

3.2 Mr Johann Kruger gave evidence on behalf of SAPS. He was the commander of the Crime Intelligent unit and the applicant’s superior. He testified that on 9 May 2017, he was looking for photocopier toner around the workplace. He asked warrant officer Fick to assist him. Fick tried to search the applicant’s locker (who was not present at the time) but it was locked. He

managed to unlock it with a knife or a ruler. Upon searching the locker, Fick found boxes of live ammunition rounds. He drew Kruger's attention to this fact.

3.3 Kruger testified that, since the applicant was not authorised to be in possession of this ammunition, he reported it to management, who advised him to register a case, so that an investigator could be appointed.

3.4 The appointed investigator was Nadine Britz, who holds the rank of captain. She testified that forensic experts were called on to unpack the ammunition boxes from the locker, which totalled 1397 rounds.

3.5 Britz testified that she went to the applicant's house to take possession of his firearms. She found additional ammunition in his safe at home which he was not licensed to possess. She also found ammunition which was not properly stored in a bag in his garage.

[4] The applicant's defence consisted of a denial that any unlicensed ammunition had been found in his locker or at his home. He had not been present when this ammunition was allegedly found.

[5] The applicant did not dispute that, in the event that unlicensed ammunition had indeed been found by Fick and Britz, it would have been unlawful – and, by implication, his dismissal would have been substantively fair.

[6] The question before the arbitrator was therefore a straightforward dispute of fact. Was the ammunition found in the applicant's workplace and at his home, as alleged by Kruger and Britz, or was their evidence fabricated?

[7] The arbitrator, who was steeped in the hearing and heard the evidence of the witnesses first-hand, concluded that there was no basis on which to reject the evidence of Kruger and Britz.

[8] On review, the applicant bears an onus to satisfy the *Sidumo* (un)reasonableness test,¹ namely, in light of all the material properly before the

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

arbitrator, was his finding so unreasonable that no reasonable person could have reached it?

[9] The stringency of this test is amplified in a case such as the present one, which turns on an assessment of conflicting witness versions. The reluctance of appellate courts to upset the findings of a trial judge is based on the fact that the latter has advantages in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. This reluctance applies both to credibility findings and findings based on probabilities.² These principles apply with equal force where a litigant challenges an arbitration award on review.

[10] In *NUM v CCMA* (2013) 34 ILJ 945 (LC)³, it was held that a reviewing court: *“should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole.”*

[11] The applicant has not advanced any arguments capable of satisfying this stringent test in the present matter. On the contrary, the applicant approached the matter as if this application were an appeal. It is not sufficient to merely rehash arguments that were raised (and dismissed) at arbitration. Having regard to the evidence as a whole, there is no basis on which a reasonable decision-maker could not have accepted the evidence of Kruger and Britz over that of the applicant.

[12] The applicant pursued what I understood to be an alternative argument, namely that the seizure of evidence at his home had been conducted under a warrant that had been unlawfully issued. There is no merit in this submission. Even if the point had merit (which has by no means been established) it would have no bearing on the admissibility of evidence in a disciplinary hearing, as opposed to

² *Malan and another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) 221I-J; *R v Dhlumayo & another* 1948 (2) SA 677 (A) 705-6.

³ Para 31.

criminal proceedings. It would also have no bearing on the “admissibility” of the ammunition found in the applicant’s workplace.

[13] For these reasons, the applicant’s challenge to the arbitrator’s finding on substantive fairness cannot succeed.

[14] The question of procedural fairness stands on a different footing.

[15] More than five months after the initial discovery of the unlicensed ammunition, the applicant was issued with a notice of an expeditious process under Regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016 (“the Regulations”).

[16] Regulation 9 provides for an expeditious disciplinary process to be followed in circumstances where alleged misconduct is of a serious nature or falls within the ambit of Regulation 5(4) – which lists certain specified forms of misconduct.⁴

[17] Regulation 9(2) sets out the expeditious procedure to be followed in these circumstances, in the following terms:

“(2) The said person [i.e. the relevant supervisor] must–

- (a) on receipt of the full substantiated report satisfy himself or herself that the alleged misconduct is misconduct as contemplated in regulation 5(4) and that the nature of the misconduct justifies an expeditious procedure;*
- (b) if satisfied that the misconduct justifies an expeditious procedure he or she must notify the employee of the allegations of misconduct and instruct the employee to appear before him or her to answer to the allegations of misconduct. The notice must contain a description of the allegations of misconduct, that he or she has the right to be represented, the date and time when the employee must appear, and supporting documents and statements (if available). The notice period may not be less than five (5) calendar days, and it must be served in the manner set out in these Regulations. If not*

⁴ Of relevance for present purposes, this includes in part (y), “Any contravention of the Firearms Controls Act”.

satisfied that the misconduct justifies an expeditious procedure he or she must refer the matter back to the supervisor for it to be dealt with in accordance with the normal procedure;

(c) when the employee appears before him or her, he or she must inform the employee of the allegations of misconduct and allow the employee to defend himself or herself against the allegations (as provided in the expeditious procedure). The said person may take any steps deemed necessary to finalise the matter provided for in these Regulations;

(d) consider the evidence of the employee and make a finding within five (5) calendar days with regard to the alleged misconduct; and

(e) if he or she finds that the employee has committed the misconduct, after hearing mitigating and aggravating circumstances impose a sanction referred to in regulation 12.”

[18] In the present matter, the presiding officer of the disciplinary hearing had regard to the written statements of the SAPS witnesses. The applicant asked for an opportunity to question these witnesses in his defence. This request was refused. The applicant was afforded the chance to rebut the statements in his evidence. He was then found to have committed the misconduct in question – essentially on the basis of the SAPS witness statements.

[19] Prima facie, it was unfair to deny the applicant an opportunity to confront his accusers and to put questions to them. In a case such as the present one, which turns on a direct dispute of fact between the SAPS witnesses and the applicant, I do not see how the chairperson could have arrived at a fair outcome without hearing the witnesses and permitting cross-examination. There is no fair manner of weighing up and assessing written evidence in support of one version against oral evidence in support of an irreconcilable version.

[20] The sole basis on which the arbitrator concluded that the procedure was fair was that the Regulations embody a collective agreement reached between the police trade union and the employer. In my view, this is not a conclusion that could reasonably have been reached:

20.1 Firstly, Regulation 9(2) does not expressly exclude the right of an employee to call witnesses or to cross-examine SAPS witnesses. Nor does it do so by necessary implication. Regulation 9(2)(c) provides a discretion on the part of the chairperson to *“take any steps deemed necessary to finalise the matter provided for in these Regulations”*. In a proper case, such as the present, I see no reason why this would not include affording the employee an opportunity to call or cross-examine witnesses.

20.2 Secondly, if Regulation 9(2) were interpreted to exclude an employee's right to call and cross-examine witnesses, in the circumstances of this case that would render the procedure unfair – whether it had been agreed to by a trade union or not.

[21] The arbitrator's findings to the contrary are not reasonable. Her finding that the dismissal was procedurally fair falls to be reviewed and substituted with a finding that the dismissal was procedurally unfair.⁵

[22] The applicant is therefore entitled to compensation in respect of the procedural unfairness of his dismissal. In exercising my discretion in this regard, I am mindful of the fact that compensation is in the nature of a solatium, which should be commensurate to the injury (in this case, unfair treatment) suffered. I consider compensation equal to four months' salary⁶ to be fair, having regard to the applicant's length of service (which dates back to 1979) and the degree of the departure from a fair procedure, which was severe.

[23] As regards costs, there is no ongoing relationship between the parties and the applicant, who is an individual, has been substantially successful in the review. Costs should follow the result.

[24] In the premises, the following order is made:

⁵ This outcome is a foregone conclusion and it would serve no purpose to remit this question to a different decision-maker, particularly given the lengthy history of this matter which dates back to 2017.

⁶ The applicant's gross salary as at the date of dismissal was R35083 per month.

Order

[1] The second respondent's arbitration award issued under the first respondent's case number PSSS 761-17/18 dated 21 December 2021 is partially reviewed and set aside and substituted with a finding that the applicant's dismissal was substantively fair but procedurally unfair.

[2] The third respondent is ordered to pay the applicant compensation equivalent to four (4) months' salary in the sum of one hundred and forty thousand three hundred and thirty-two rand (R140332), less income tax, within 7 days of the date of this order.

[3] The third respondent shall pay the costs of this application.

Leslie AJ

Acting Judge of the Labour Court of South Africa

Representatives –

For the applicant: S Parker, Parker Attorneys

**For the third respondent: M A McChesney, instructed by the State Attorney,
Cape Town**