



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

Of interest to other judges

Case no: C 98/2022

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

MAUREEN DE BEER (N.O.)

Second Respondent

CIKISWA ANTOINETTE MANGALISO

Third Respondent

Heard: 13 February 2025

Delivered: 18 February 2025

Summary: (Review – Employee guilty of serious misconduct – Arbitrator reinstating employee with final written warning and period of suspension without pay – evaluation of sanction on review – Procedural unfairness – refusing employee representation by chosen representative and providing three hours to find an alternative in expedited proceedings)

JUDGMENT

LAGRANGE, JNature of the application

- [1] This is an opposed application to review and set aside an arbitration award in which the arbitrator found that SAPS had acted procedurally and substantively unfairly when it dismissed the third respondent, Ms C Mangaliso ('Mangaliso'), for misconduct. The arbitrator found her guilty of the misconduct she was dismissed for but found the sanction of dismissal was unfair and reinstated her, subject to a final written warning and denying her a period of about nine months' backpay in view of her misconduct.
- [2] SAPS was late in filing its review application and has applied for condonation. The condonation application was unopposed.
- [3] The transcript of the arbitration proceedings was not filed, but both parties were amenable to the application being determined on the basis of the factual narrative set out in the arbitrator's lengthy award. Material facts pertinent to the review application were not in dispute.

The condonation application

- [4] The award was handed down on 2 September 2021, which was varied on 8 November 2021 mainly to correct a patent omission in the relief awarded. The review application was filed on 7 March 2022. It should have been filed on 20 December 2021, so it was about 77 days or 11 weeks late, nearly three times longer than it should have taken, which is very excessive.
- [5] Owing to the applicant's seven stage standard operating procedure for approving the initiation of review proceedings, it took until 24 December 2021 for the National Commissioner to approve the launching of the application. It was already out of time by then. Owing to the annual shutdown, nothing was done until 17 Jan 2022, at which point the matter was handed to the state attorney. It took another month to appoint counsel

following a mandatory bidding process. Once counsel had been appointed in mid-February, it took a fortnight to finalise the papers.

- [6] It is trite that an applicant cannot work on the premise that its own internal processes can operate at their own pace, irrespective of the pressing need to file the review application timeously. However, given that about a month of the delay is attributable to the annual shutdown, which is a period the LAC has recognised as ordinarily being one in which normal work routines are disrupted, and given that there were no other lengthy periods of inactivity in processing the application, I accept that the applicant pursued the application at a steady if somewhat plodding pace. Accordingly, the explanation is acceptable, and the late filing should be condoned.

Factual background

- [7] Mangaliso, a police sergeant, was dismissed after being found guilty of a number of acts of misconduct listed in Regulation 5(4) of the SAPS Discipline Regulations¹. The charges arose from an incident which occurred during the Covid-19 pandemic. In summary, all the charges concerned breaches of unlawfully releasing her adult foster child ('Nosisi') from police custody², defeating the ends of justice³, and interfering with a police officer performing their duty by obstructing the processing of her foster child as an arrestee⁴, detrimentally affecting the image of the police⁵ by removing her foster child from the company of other women she was arrested with and for breaching the covid Disaster Management Regulations⁶ 11B(a)(i)⁷.

¹ GN R1361 in GG 40389 dd 01/11/2016.

² Aiding an escapee (regulation 5(4)(a)).

³ Regulation 5(4)(h).

⁴ Attempting to commit an offence warranting the institution of the expeditious disciplinary procedure provided in regulation 9.

⁵ Regulation 5(4)(x)

⁶ Gazette 43148, Gazette 43168, Gazette 43199, Gazette 43232 and Gazette 43240) (as amended by Gazette 43168 of 26 March 2020 and Gazette 43199 of 2 April 2020, Gazette 43232 of 16 April and Gazette 43240 of 20 April 2020

⁷ Viz: ***Restriction on the movement of persons and goods***

11 B. (1)(a) For the period of lockdown-

- [8] Police, who were on patrol, had arrested Mangaliso's adult foster daughter in the street for breaching the DMA regulations, which at the time restricted the free movement of persons. She was taken in a van to the police station together with other persons who had been apprehended for the same reason. Mangaliso got wind of the arrest and went to the police station.
- [9] The arbitrator found that the arrest of Nosisi was lawful, contrary to Mangaliso's contention. She found that when the van arrived at the police station, Mangaliso spoke to Nosisi when she exited the van and told her to leave. Mangaliso said he had told Nosisi, a car was waiting for her outside. The arbitrator found that on Mangaliso's own version she interfered with the work of her colleagues, by instructing Nosisi to leave when she was in the custody of arresting police officers.
- [10] The result is that Nosisi was simply released and her arrest was not processed as should have been the case in terms of police operating procedures. The arbitrator also found that Mangaliso's action had led to complaints from the other arrestees about Nosisi's preferential treatment. In addition, by coming to the police station instead of remaining at home, Mangaliso had failed to confine herself to her residence in contravention of Regulation 11B(a) (i) of the DMA regulations.
- [11] In relation to procedural fairness, the arbitrator did not accept that the disciplinary enquiry chairperson should have prevented Mangaliso's chosen representative from appearing because he had not been released from duty as a full-time shop steward and had not been locally elected. Although the chairperson had given Mangaliso a few hours to find an alternative representative, the person she obtained was not prepared to represent her.
- [12] The arbitrator found it was unfair, given the serious charges of the chairperson to deny Mangaliso the assistance of a shop steward who was ready and able to assist her. It was also unfair of the chairperson only

(i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving, or chronic medical attention;...

give her three hours to find an alternative representative, given the seriousness of the charges. In the circumstances, she ought to have postponed the enquiry. Accordingly, the arbitrator concluded that the manner in which she conducted the expeditious process was inappropriate and procedurally unfair.

[13] The arbitrator decided that the substantive question was whether dismissal was an appropriate sanction.

[14] The arbitrator reason that, even though Managaliso had prevented Nosisi from being processed, none of the persons arrested with her were ultimately held in custody but were issued with fines instead. Nosisi was also fined the following day. This was not a situation in which Mangaliso had assisted someone to escape from the police to evade justice. In the circumstances, a final written warning would have been fairer given her eleven years of service.

[15] The arbitrator concluded that the employment relationship was tarnished but not destroyed. She ordered the retrospective reinstatement of Mangaliso, but subject to a final written warning valid for six months after her return to work. Because she found her guilty of the misconduct, the arbitrator reduced the amount of backpay that would be due to Mangaliso by about 7 months.

Grounds of Review

[16] SAPS raised a number of grounds of review, which may be summarily expressed as follows:

16.1 The arbitrator failed to take account of Item 4(1) of the Code of Good Practice governing Dismissals.

16.2 The arbitrator misconstrued the relevance of Mangaliso's long service of eleven years.

16.3 The arbitrator failed to consider the fact that Mangaliso expressed no remorse for her conduct.

16.4 The arbitrator failed to consider the gravity of the misconduct Mangaliso had committed and failed to appreciate such misconduct ought to have resulted in her dismissal.

16.5 The arbitrator placed the employee's interest above that of the employer in assessing the fairness of the sanction

16.6 Instead of deciding if SAPS decision to dismiss Mangaliso was substantively fair, the arbitrator decided what she would have done in the employer's place.

16.7 The arbitrator also failed to consider that a failure to comply with a disciplinary procedure, in and of itself, does not necessarily mean that the failure was unfair, in the absence of the employee being able to demonstrate any prejudice, which was not the case in this instance.

[17] SAPS contends that these shortcomings meant that the arbitrator's findings on substantive and procedural fairness were ones no reasonable arbitrator could have arrived at.

The arbitrator's decision on the substantive fairness of the dismissal.

[18] The crux of the review clearly concerns whether the arbitrator's decision that Mangaliso's dismissal was unfair despite her being guilty of serious misconduct, and whether the alternative sanction she imposed was appropriate.

[19] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁸, the Constitutional Court crystallised the duty of an arbitrator when determining the fairness of a dismissal:

"[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course

⁸ (2007) 28 ILJ 2405 (CC)

consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

*[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer.*⁹ *The arbitrator had considered if the dismissal was an appropriate sanction."*

(emphasis added)

- [20] In considering the harm caused by Mangaliso's conduct, the arbitrator took a narrow view, even though she had found her guilty of detrimentally affecting the image of the police. The arbitrator seemed to be of the opinion that because the other arrestees were ultimately not detained and that all of them, including Notisi, were fined, therefore they were all treated equally, and so no real harm was done.
- [21] The difficulty with the arbitrator's approach is that it ignores the glaring disparity of treatment they received when they arrived at the police station. Notisi was instantly allowed to leave the van and was immediately separated from the other arrestees on their arrival at the police station. It was plainly evident to them that her preferential treatment took place as a

⁹ Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007)

result of an intervention by someone with a personal connection with Notisi, who was able to usurp the authority of the arresting officer, and exempt Nosisi's from the completion of the arrest procedure. It may be so that Notisi was subsequently fined, but it is difficult to believe that the other arrestees would have come away from that incident believing that SAPS treats all suspects equally. Moreover, there was no evidence the other arrestees would have learnt that Nosisi was subsequently issued with a fine.

- [22] Secondly, on the important question of preserving the trust relationship, the arbitrator had found that it had been tarnished, but could be restored and it would not be intolerable to reinstate Mangaliso. In arriving at this conclusion, the arbitrator made no reference to the prospect of Mangaliso abusing her position again in the future. What was before the arbitrator was a warrant officer of a number of years' experience, who had defended her actions on the basis that she believed that the arrest of Nosisi was invalid for one or more reasons, and therefore she was entitled to intervene on Nosisi's behalf even if this meant interfering with another policeman in the exercise of his duties as an arresting officer. There is nothing in the award that suggests Mangaliso acknowledged that it was not her place to determine whether the arrest was lawful nor that she ever conceded that she should have simply waited for Nosisi's arrest to be processed because she had no right to intervene in the arrest procedures owing solely to her personal connection with the arrestee. It is difficult to understand on what basis the arbitrator could have believed that Mangaliso would act differently in similar circumstances in future. Was it tenable to believe that Mangaliso would not abuse her authority again in future if she had a personal interest in the conduct of police business? In the absence of the slightest admission of wrongdoing, or even an acknowledgement that what she had done was completely inappropriate, it seems unreasonable to just assume she would not abuse her position and interfere with the work of other police if it was in her interest to do so. Mangaliso's rank and length of service made her conduct more serious, as she could reasonably have been expected to know not to interfere in

another police member's performance of their duties, especially for personal reasons.

- [23] It is understandable that Mangaliso would have been concerned to learn of Nosisi's arrest, just like any other person who hears of the arrest of a relative or friend would be. However, she knew what the arresting officer's responsibilities were in finalising the arrest process at the police station and that it was not her place to interfere. If she had merely spoken to Nosisi when she alighted from the van, she could have conveyed that she was there to support her and would wait for her, but she directly interfered to prevent her arrest process being completed.
- [24] It is true that Mangaliso had a clean disciplinary record, and that the impact of the dismissal on her would be serious, but in the light of the factors discussed above, it seems very unlikely any reasonable arbitrator could come to the conclusion that SAPS' decision to dismiss her was obviously an unfair one to take. The fact that the arbitrator would have imposed a more lenient sanction had she been the employer does not mean she was entitled to find the employer's decision unfair. It is sometimes a difficult to sometimes make, but it is important to bear in mind that it is the arbitrator's responsibility to first determine if the employer's decision was substantively fair. If not, then the arbitrator can consider what would be a more appropriate lesser sanction. The two enquiries are distinct, even though they can easily be conflated.

The arbitrator's decision on the procedural unfairness of the dismissal.

- [25] As SAPS argues, it is trite law that the mere fact a disciplinary procedure is not followed, does not ineluctably lead to the conclusion that the dismissal was unfair¹⁰. The primary consideration is whether there was some demonstrable prejudice suffered by the employee as a result of the procedural deviation. In some cases, assessing any prejudice might be easy, such as where an employee is denied access to a relevant document which could materially have affected their case. In other

¹⁰ See e.g. *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others* (2010) 31 ILJ 901 (LAC) at paragraph 41 and *Rand Water Board v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 ILJ 2028 (LC) at paragraph 9.

instances, such as this one, it may be difficult to demonstrate that rectifying the omission would necessarily have impacted on the outcome. However, the courts long ago abandoned the so-called “no difference” principle¹¹, which held that a procedural defect was irrelevant if it would not have affected the outcome.

[26] There are certain requirements of a fair hearing which are considered important enough to have been included in the Code of Good Conduct: Dismissal¹². One of those is the right to be assisted by an employee representative. In this instance, Mangaliso had arranged to be represented by a shop steward, but the chairperson disallowed the representative to appear, apparently because his appointment was not made in accordance with an agreement *inter alia* about where the representative was based. Assuming that was a legitimate disqualification, the question arises whether the chairperson acted fairly in giving Mangaliso to find someone locally and then not agreeing to postpone the enquiry when it became apparent three hours later she had not been able to arrange someone was willing and able to represent her that day. As a result, the hearing proceeded without Mangaliso being represented.

[27] The arbitrator’s view that this was procedurally unfair, is difficult to fault. Mangaliso was facing serious charges and just because she was unable, at short notice, to find a substitute for the representative she had arranged, she was deprived of a proper opportunity to find a substitute. This was not a case where she had been the cause of endless postponements and there was no reason advanced why it could not be postponed just once for the purpose of her finding another representative.

¹¹ See *SA Clothing & Textile Workers Union & another v Martin Johnson (Pty) Ltd* (1993) 14 ILJ 1033 (LAC)

¹² Item 4 of the code reads:

“Fair procedure

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”

The arbitrator's conclusion that this was procedurally unfair is one that another reasonable arbitrator could have reached. It is accordingly necessary to consider an award of compensation. In the circumstances of the seriousness of the charges, the fact that it was not Mangaliso's fault that her chosen representative could not appear and that there appeared to be no justifiable reason why the enquiry had to proceed without postponement, particularly as the employer's case was made out witness statements, I believe an appropriate award would be four months' remuneration.

Costs

[28] As Mangaliso had been successful in the arbitration hearing and considering the importance of the award to her, it would not be fair to award any costs against her for defending the award. Moreover, the employer has not been wholly successful. There is no reason in my mind to depart from the usual principle of not making any cost award in the circumstances.

Order

1. The late filing of the review application is condoned.
2. The finding of the Second Respondent in the arbitration award in case number PSSS 68-20/2 issued on 2 September 2021, and varied on 8 November 2021, that the Third Respondent's dismissal was substantively unfair is reviewed and set aside and replaced with a finding that it was substantively fair.
3. The relief awarded in paragraphs 63 to 65 of the award, is replaced with the following:
4. "The respondent must pay the applicant an amount of four (4) months remuneration as compensation for her procedurally unfair dismissal."
5. The payment in paragraph 4 above must be made within 30 days of this order.

6. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:

M Rantho instructed by State Attorney Cape Town

For the Respondent:

C May from BDP Attorneys

LABOUR COURT