



Not reportable

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

Case no:C322/2021

In the matter between:

SIMPHIWE MATYHOLO

Applicant

and

**THE SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

First Respondent

**COMMISSIONER GORDON
EDWARDS**

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

Date of Hearing: 27 June 2025

Date of Judgment: 29 September 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 30 September 2025.

JUDGMENT

BARTHUS AJ

Introduction

- [1] The Applicant launched a review application on 1 June 2022 against the Second Respondent's ("Commissioner") arbitration award dismissing the Applicant, an Inspector, Traffic Services, for assaulting a member of the public.
- [2] The Applicant objected to the late filing of the Third Respondent's answering affidavit. The answering papers were 4 months late.
- [3] The Third Respondent's explanation for the delay was primarily focused on difficulties related to securing legal services. Every period of delay was not explained in the founding papers for condonation but was more fully described in the replying affidavit.
- [4] The Applicant argued that the case for condonation (as in any application) should have been made out in the founding papers and not in reply.
- [5] The Respondent did not address the court on prospects of success in its papers, save to assert that the Applicant has not made out a case to succeed in the review application. Prejudice against the Applicant was not dealt with either. The application for condonation and the review were heard together.
- [6] The Respondent did not make out a case for condonation that meets the requirements to satisfy such an indulgence, and the condonation application is therefore deficient.

Contextual Background

- [7] Turning to the merits of the review application, the Applicant was charged with assaulting, threatening, and stabbing (this relates to the third charge and was disputed by the Applicant) a member of the public for the theft of a television set he believed had been stolen by the member of the public. These events transpired while the Applicant was off duty.
- [8] The Applicant conceded up front that *“the findings made by the Commissioner on the evidence fall within the band of reasonableness.”* There is, therefore, no need to delve into the reasonableness of the findings on the merits since there is no challenge to this portion of the award.
- [9] The Applicant's grounds of review are summarised as follows:
- a) The Commissioner erred in finding that there was a nexus between the misconduct and the employment relationship despite a lack of evidence produced by the Third Respondent in this regard. the Applicant relied on the case of *Edcon Limited v Cantamessa and Others*,¹ and argued that it was incumbent on the Employer to lead evidence that the conduct complained of had the effect of destroying or seriously damaging the relationship of the employer and employee.
 - b) The Commissioner entered the fray by considering Regulations and Legislation which were not submitted by the Third Respondent and for which the Applicant was not given the opportunity to make submissions, thereby committing an irregularity.
 - c) The Commissioner failed to state expressly that the Applicant's dismissal was substantively and procedurally fair, and therefore the Commissioner misconstrued the nature of the dispute.

The Applicant argued that the Commissioner's reference to Regulations and the Code of ethics to conclude that *“there existed a causal link between the offence committed and the type of work of the Applicant as a peace officer”*, was irregular

¹ (2020) 41 ILJ 195 (LC)

since it was not presented in argument by the Third defendant but by the Commissioner entering the fray.

Discussion

[10] The Commissioner, in his award, dealt comprehensively with the connection between the offence committed and the employment relationship. In the Edcon case (which was cited by the Applicant before the Commissioner), the Court held that: *"... Therefore, having a good name is an essential asset or quality of Edcon to the general public. Inasmuch as Buyers of Edcon can often remain anonymous to the general public, once their identities are exposed to the general public, it must only be in a positive and not negative environment or circumstance; otherwise, such disclosure imposes a risk that the name of Edcon may be brought into disrepute. Therein lay the connection between the conduct of Ms Cantamessa with the relationship she had with her employer. She had to avoid being a controversial employee in the public's eyes where she could be associated with Edcon."*

[11] The Court further held that Cantamessa's conduct exposed Edcon to a risk of reputational damage, and the fact that no damage was proved by Edcon was not a valid defence.

[12] Similarly, in this case, the Applicant, as a municipal member and a law enforcement officer, had an obvious duty not to conduct himself in a manner that would bring the Third Respondent into disrepute and especially not to engage in the unlawful act of assault, where he was a custodian of public peace and law and order. Within this context, the Third Respondent did not need to prove that the employment relationship had been destroyed. This is so because of the established nexus between the misconduct and the nature of the employment. Third Respondent submitted that the Applicant cannot be trusted to perform the duty of a Traffic/Peace officer after having taken the law into his own hands. The conclusion is logical.

- [13] It is therefore reasonable that the Commissioner had difficulty understanding the Applicant's assertion that it was incumbent on the Employer to lead evidence that the misconduct destroyed or seriously damaged the employment relationship.
- [14] The Third Respondent cited the Municipal Systems Act in its submissions before the Commissioner, but not the SAPS Regulations nor the provisions of the National Road Traffic Enforcement Code (NRTEC).
- [15] The Commissioner's reference to Regulation 22 of the SAPS Regulations², Schedule 2 of the Municipal Systems Act 32 of 2002³ and the NRTEC⁴ was to establish whether any internal regulations and or legislation existed which would have regulated the Applicant's off-duty conduct.
- [16] The question then is whether the Applicant, who was a Policeman for 8 years and a Traffic Officer for 13 years, could be held to the standard of a law enforcement officer while off-duty as prescribed by the Act, Regulations and NRTEC and whether the Applicant should, in any event, have been aware of the code of conduct. The question can only be answered in the affirmative.
- [17] In the present case, the Commissioner found that the Applicant, through his conduct, acted in a manner that breached Regulations and legislation, and that, as a law enforcement officer, he should not have been guilty of breaking the law. Of course, it is trite that a court or arbitrator may *mero motu* raise a question of law even if neither of the parties has pleaded it. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for

² The Regulation prohibits behavior unbecoming or improper, which would undermine the confidence of the public in the police.

³ Schedule 2(d) of the Act provides that a staff member of the Municipality must at all times act in the best interest of the Municipality and in such a way that the integrity and credibility of the Municipality is not compromised.

⁴ The Code provides that engaging in action on or off duty that brings the Road Traffic Enforcement Authority into disrepute or impairs the operation of efficacy of the Road Law Enforcement Authority is prohibited.

the decision of the case⁵. In the present matter, the arbitrator was seized with determining whether there was a link between the Applicant's off-duty conduct and his responsibilities as an officer of the law- this was a central issue to the dispute and formed part of the Applicant's defence to the charges against him.

- [18] Finally, in the award, the Commissioner set out the onus in dismissal disputes and clearly understood that it was incumbent on the Third Respondent to show that the dismissal was substantively and procedurally fair. The Applicant takes issue with the fact that in his conclusion, the Commissioner does not specifically state that the dismissal was procedurally and substantively fair, but instead states, "*In the premises, the Applicant's claim of unfair dismissal is dismissed.*" Despite the clumsy wording, what can be easily inferred from the award is that the Commissioner found the dismissal both substantively and procedurally fair and from the award, it is clear that the Commissioner did not reverse the onus as suggested by the Applicant's attorney.
- [19] Moreover, the Applicant was legally represented by Mr Aarninkhof, who did not raise any material issues in respect of the procedural fairness of the dismissal.
- [20] It is trite that adjudicating the severity of misconduct in context is a power conferred on an arbitrator. The law is clear: the choice of sanction made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion⁶. In this matter, there is no demonstrable evidence that no reasonable arbitrator could have reached the conclusion reached by the arbitrator. The result is that there is no irregularity in how the arbitrator assessed the appropriateness of the sanction and/or fairness of the dismissal.
- [21] In conclusion, therefore, I am satisfied that the Commissioner understood the nature of the enquiry he was called to determine, properly evaluated the

⁵ Fischer v Ramahlele (203/2014) [2014] ZASCA 88 (4 June 2014)

⁶ See *TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* 2019 (40) ILJ 150 (LAC) at para 21; and *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2000 (2) SA 24 (CC) at 178 and 179.

evidential material placed before him and reached a conclusion which falls within a band of reasonable decisions and is correct on the law.

In the premises, the following order is made:

- [1] The Third Respondent's condonation application is dismissed.
- [2] The review application is dismissed.
- [3] There is no order as to costs.

A handwritten signature in black ink, appearing to be 'Barthus', with a large, bold, black rectangular stamp or redaction mark placed over the middle of the signature.

Barthus AJ

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Brett Aarkinkhof
Instructed by Aarkinkhof Attorneys

For the Respondent: Adv Daniel Nyathi
Instructed by Hanekom Attorneys