



Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

CASE NO. C383/2024

In the matter between:

MINISTER OF POLICE N.O.

First Applicant

THE NATIONAL COMMISSIONER OF THE SOUTH

AFRICAN POLICE SERVICE N.O.

Second Applicant

And

BRIGADIER M A HARTZENBERG N.O.

First Respondent

CONSTABLE K TOMBOER

Second Respondent

CONSTABLE S S VAN HEERDEN

Third Respondent

CONSTABLE D H FILANDER

Fourth Respondent

Heard: 16 September 2025

Delivered: 13 November 2025

Summary:

Second to Fourth Respondents were employed as police officers by the Applicants, and were found guilty of serious acts of misconduct, *inter alia* kidnapping, assault

causing grievous bodily harm, and conduct detrimentally affecting the image of the SAPS.

The First Respondent, having conducted the disciplinary enquiry in terms of an expeditious process as provided for in the Police Service Discipline Regulations, imposed sanctions of suspension without pay in respect of each charge. Applicants sought the review and setting aside of the sanctions imposed, and the substitution of the sanction of dismissal in respect of Second to Fourth Respondents.

The court considered the two-stage test to be applied in review applications and the proper approach to be taken in the case of penalty reviews, i.e attacks on the decision of the arbitrator to either uphold or not to uphold the sanction of dismissal after having found the employee guilty of misconduct.

Having considered the evidence available as well as the law relating to the breakdown of trust or intolerability in a continued employment relationship with a government employer like the SAPS, the court found that the arbitrator had misdirected himself in finding that the employment relationship between Applicants and Second and Third Respondents had not irretrievably broken down.

Second Respondent having in the interim resigned from the Applicants' employ, no order was made in this regard. As to Third Respondent, the sanction of suspension without pay was reviewed and set aside and substituted with the sanction of dismissal. No order was made in regard to Fourth Respondent.

JUDGMENT

ABRAHAMS AJ

INTRODUCTION

1. This matter comes before me as an unopposed review application.
2. First and Second Applicants are the officials responsible for the oversight, control and management of the South African Police Service in terms of ss 205 – 207 of the Constitution and the South African Police Service Act, No. 68 of 1995.
3. First Respondent was appointed as the delegated authority / chairperson of a disciplinary enquiry held as an expeditious process in terms of Regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016 ("the Regulations"), to hear charges of serious misconduct brought against the Second to Fourth Respondents.
4. Second to Fourth Respondents were, at the material time, police officers in the employ of Applicants.
5. Second to Fourth Respondents were found guilty of various charges by the First Respondent who imposed a sanction of suspension without pay on each charge.

6. The Applicants now seek to review and set aside the sanction imposed by the First Respondent, and the substitution thereof with the sanction of dismissal in regard to Second to Fourth Respondents.

BACKGROUND

7. The background facts are briefly as follows:

- 7.1. Second to Fourth Respondents ("the employees") were at the relevant time employed by the Applicants as police officers stationed at the Atlantis branch of the SAPS;
- 7.2. On 13 November 2023 the employees were on duty and in full uniform, on a shift from 18h00 to 06h00 on 14 November 2023;
- 7.3. At around 02h30 the employees went looking for a Mr L Bova ("the complainant") whom Second Respondent ("Tomboer") had allegedly seen on SAPS CCTV footage in the vicinity of his (Tomboer's) personal vehicle which was parked at the police station, whose battery had been stolen;
- 7.4. The employees found Mr Bova at home at about 02h30 and informed him that he had to go with them. Mr Bova was placed in the back of the van, in which he found two of his friends who had already been picked up;

7.5. The employees then drove with the complainant and his friends to a secluded area where Tomboer and Third Respondent ("Van Heerden") assaulted the complainant in front of his friends while Fourth Respondent ("Filander") allegedly looked on and did nothing to stop the assault;

7.6. I mention for the sake of clarity that the evidence establishes that Fourth Respondent's presence in the vehicle was unrelated to the above events: she was being given a lift home from the police station in order to fetch food, and was unaware of (and played no part in) the decision to proceed to the complainant's house and place him in the back of the van.¹ The evidence establishes that she was under the impression that the suspects at the back of the van were going to be taken to the police station to be processed, and it was only during the course of this first assault on the complainant that she became aware that something was amiss;²

7.7. The complainant was placed back in the van, and after some further driving he was taken to another secluded area where Tomboer and Van Heerden continued to assault the complainant by hitting him with, *inter alia*, the butt of a firearm and a hockey stick, and allegedly shooting the complainant in the leg;

¹ Record p 179

² Record p 181 - 182

7.8. The complainant was left in the bushes and the employees returned to the police station. The complainant's friends were told to clean up the complainant's blood from the back of the van and go home;

7.9. The complainant was found injured in the bushes the next day by his family and taken to hospital. A case of attempted murder, kidnapping and torture was registered under Atlantis CAS 315/11/2023;

7.10. It must be noted that none of the employees saw fit to mention what had happened on their return to the police station. The Fourth Respondent testified that she was not aware that the complainant had been left in the bushes; that she was in a state of shock upon their return to police station; and therefore requested, and was granted, permission to go home.³ She did not, however, inform her superior of what had occurred.

THE DISCIPLINARY ENQUIRY

8. Flowing from the above events, the employees were charged with contraventions of the South African Police Service Discipline Regulations, 2016, as follows:

8.1. Constable Tomboer:

8.1.1. Charge 1: Regulation 5(4)(n) – Kidnapping;

³ Record p 183

8.1.2. Charge 2: Regulation 5(4)(d) – Assault GBH;

8.1.3. Charge 3: Regulation 5(4)(y) – Contravention of the Firearms Control Act
in discharging a firearm in a public place without good reason to do so;

8.1.4. Charge 4: Regulation 5(4)(x) – Conduct detrimentally affecting the image
of the Service or bringing the service into disrepute or involving an
element of dishonesty thereby tarnishing the image of the SAPS.

8.2. Constable Van Heerden:

8.2.1. Charge 1: Regulation 5(4)(n) – Kidnapping;

8.2.2. Charge 2: Regulation 5(4)(d) – Assault GBH;

8.2.3. Charge 3: Regulation 5(4)(x) – Conduct detrimentally affecting the image
of the Service or bringing the service into disrepute or involving an
element of dishonesty thereby tarnishing the image of the SAPS.

8.3. Constable Filander:

8.3.1. Charge 1: Regulation 5(4)(n) – Kidnapping;

8.3.2. Charge 2: Regulation 5(4)(x) – Conduct detrimentally affecting the image of the Service or bringing the service into disrepute or involving an element of dishonesty thereby tarnishing the image of the SAPS.

9. The First Respondent conducted the disciplinary enquiry in terms of an expeditious process in terms of the Regulations and found Constable Tomboer guilty of all four charges; Constable Van Heerden guilty of all three charges; and Constable Filander innocent of the first charge (kidnapping), but guilty of the second (tarnishing the image of the SAPS).

10. In respect of Constables Tomboer and Van Heerden, the First Respondent imposed a sanction of two months' suspension without pay in respect of each charge; whereas in respect of Constable Filander he imposed a sanction of one month's suspension without pay.

11. Subsequent to the decision of the First Respondent, issued on or about 22 January 2024, the Second Respondent resigned with effect from 1 July 2024. Third and Fourth Respondents remain in the employ of the SAPS.

12. In respect of Second and Third Respondents the Applicants do not challenge the First Respondent's findings but seek the review and setting aside of the sanctions imposed and the substitution of the sanction of dismissal.

13. In respect of Fourth Respondent, Applicants seek to review and set aside the finding of innocence on the first charge as well as the sanction of one month's suspension without pay in respect of the second charge, and the substitution therefor of a finding of guilt on both charges coupled with the sanction of dismissal.

CONDONATION

14. As mentioned above, the decision of First Respondent was handed down on or about 22 January 2024. The present proceedings were instituted on or about 18 September 2024 – some 10 months later.

15. While it is indeed so that s 158(h) of the Labour Relations Act, No. 66 of 1995 ("the Act"), does not prescribe the time period for bringing a review application, it is an accepted principle that this must be done within a reasonable time and six weeks has been used as a measure of such reasonableness.⁴

16. Applicants' explanation for the delay in instituting proceedings (set out in paragraphs 18 to 52 of the founding affidavit) evinced numerous instances where, due to bureaucratic inertia, periods of between 2 and 5 weeks elapsed before the next step of the process was taken. Such delays are undesirable and would ordinarily require better explanation. However, in the final analysis Applicants' arguments regarding the absence of prejudice to the Third and Fourth

⁴ *Statistics South Africa v Molebatsi and Another* (2019) 40 ILJ 2603 (LC) para 2

Respondents, and the potential of harm to the public if they are allowed to continue in the Applicants' employ, weighed heavily with the Court.

17. In the premises, I find that good cause was shown and grant condonation, to the extent that it is necessary, for the late institution of the review application.

APPLICANT'S CASE

18. Applicants take issue with the sanctions imposed by First Respondent on the grounds that, despite finding the employees guilty of very serious acts of misconduct, he imposed sanctions of suspension without pay (as opposed to dismissal) on the basis that the relationship of trust between the parties had not irretrievably broken down, and that rehabilitation was possible.

19. The argument seems to be that First Respondent's decision not to dismiss the employees, in the circumstances of the case, constituted an irregularity in and of itself given the egregious nature of their conduct.

20. Applicants' main submission was that, taking into account the evidence led at the hearing, the First Respondent's interpretation and understanding of the guidelines in respect of the South African Police Service Discipline Regulations was

misguided in that there was no rational connection between the evidence led at the hearing and the conclusions he arrived at.

21. Applicants argued further that the employees' acts of misconduct involved an element of dishonesty amounting to gross dishonesty, and that the light sanction imposed, if not reviewed, will impact negatively on the culture within the SAPS in relation to discipline and dishonesty.

22. Furthermore, the nature of the misconduct committed by the employees, it was argued, rendered the continuation of the employment relationship intolerable and unfeasible. In these circumstances, the decision of the First Respondent to consider himself obliged to apply the principles of progressive discipline constituted an irregularity.

ANALYSIS

23. In the matter of *Association of Mineworkers & Construction Union on Behalf of Motswadi v Commission for Conciliation, Mediation & Arbitration & Others* (2023) 44 ILJ 2699 (LC), Van Niekerk J stated as follows:

[5] The test to be applied in review applications is clear. This court may intervene if and only if the applicant establishes that the decision to which

the arbitrator came was so unreasonable that no reasonable decision maker could come to it. ...

- [6] The threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. ... When an error or irregularity is established, the court must proceed to the second stage of a determination of the reasonableness of the result. Put another way, the award must be sustained if, by reference to the record and regardless of any error or irregularity on the part of the arbitrator, the award is one which a reasonable decision maker could reach.

- [7] In the case of what has been termed a penalty review (ie an attack on a decision by an arbitrator either to uphold or not to uphold the sanction of dismissal after having found the employee guilty of misconduct), the proper approach for the arbitrator is to take into account the totality of circumstances, considering the reason that the employer imposed the sanction of dismissal and the basis of the employee's challenge to the dismissal. Other relevant factors include any harm caused by the employee's conduct, whether additional training and instruction would result in the employee not repeating the misconduct and the effect of dismissal on the employee and his or her long service record. Ultimately, it

is not for an arbitrator to consider afresh what he or she would do in the same circumstances; the arbitrator is required to decide, without any deference to the decision of the employer, whether what the employer did was fair (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 29 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)).

[emphasis added]

24. I consider the present matter to fall within the category of a 'penalty review' as set out above. The first stage is therefore to determine the existence or otherwise of any error or irregularity on the part of the arbitrator.

25. The Applicants do not seek to review the findings of the First Respondent in regard to the employees' guilt, save in regard to the finding that Fourth Respondent was innocent of the first charge of kidnapping. Having carefully considered the record of proceedings, I am unable to find that the First Respondent committed any irregularity in this regard in light of all the evidence available to him at the time, and there is therefore no basis to interfere with First Respondent's findings in this regard.

26. However, the First Respondent relied heavily on the evidence of Lieutenant Colonel Thyse, Acting Station Commander of Atlantis SAPS, who testified in aggravation of sentence, as grounds for finding that the employment relationship

had not irretrievably broken down. I am, for the following reasons, unable to agree with the chairperson's reasoning in this regard.

27. Lt Col Thyse testified that he would not be able to trust the Second Respondent again, although he conceded that he was otherwise a reliable worker of great value to the organisation, with previously outstanding work performance.

28. The evidence of Lt Col Thyse was clear that the relationship of trust with Second Respondent had broken down. The fact that his previous work record was satisfactory or better does not disturb this conclusion, nor can Second Respondent's belated expression of remorse alter that fact. In failing to take account of this evidence, the First Respondent committed an irregularity.

29. As to Third Respondent, Lt Col Thyse testified that, a few weeks after the incident, Third Respondent had, in the course of a confidential chat, admitted his guilt and expressed remorse. For this honesty, he concluded that the employer could still trust him.

30. In my opinion, the First Respondent misdirected himself in placing too much weight on this evidence, given the totality of evidence available to him as well as the applicable law.

31. In *Notisi v SA Police Service & Others* (2024) 45 ILJ 986 (LAC), Gqamana AJA stated as follows:

[31] The breakdown of trust or intolerability in an employment environment, especially in a government employer like the SAPS, must not be viewed from collegiality perceptions, but rather on the broader image of the SAPS and, in this case, the public expectations on how members of the SAPS should conduct themselves. All members of the SAPS must command respect and confidence from the members of the public.

[32] ...

[33] The police have a duty to investigate criminal conduct and to bring perpetrators thereof to justice. It is crystal clear that the constitutional and statutory mandate of members of the police is an important mandate which should reasonably result in the trust of the police by members of the public. And where such trust is established, it would be easy for the police to achieve its tasks.

[emphasis added]

32. In terms of s 205(3) of the Constitution the SAPS has an obligation to prevent and investigate crime and to protect members of the public. It executes such mandate through its police officers who are required to be ethically beyond reproach.

33. The conduct of Third Respondent *in casu* falls far below any such standard and cannot be seen as anything other than grossly inimical to the ability of the SAPS to fulfil its Constitutional mandate. The question is therefore whether the nature and extent of the misconduct was such as to render the continued employment relationship intolerable and / or incompatible with the operational requirements of the employer.

34. In *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & Others* (2010) 31 ILJ 901 (LAC) the Labour Appeal Court held as follows:

[25] This court in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 1051 (LAC) stated the following at 1058E-G:

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

35. After dealing with the specific circumstances of the case, the Court continued as follows:

[38] I have found that, especially given the position of trust and responsibility that he held at the appellant, the third respondent, on his own admission, committed misconduct which involved gross dishonesty, which essentially amounted to fraud. Hence, in my view, retaining the third respondent in the appellant's employ, in these circumstances, would have been severely detrimental to the appellant's operational requirements and therefore inappropriate. Any continued working relationship between the appellant and the third respondent was, as a result of the third respondent's conduct, rendered intolerable.

[emphasis added]

36. I accordingly find that the First Respondent, in finding that the trust relationship had not irretrievably broken down between the employer and Third Respondent, failed to take account of relevant legal aspects and misconstrued the evidence before him. In doing so, he committed an irregularity.

37. As to Fourth Respondent, Lt Col Thyse could not testify as to the reasons for her conduct, although he noted that she was in a very emotional state, traumatised, and vulnerable. He testified that it would be difficult to trust her, but that, with the right mentorship and help, she could be reformed.

38. Fourth Respondent's conduct bears all the hallmarks of a relatively junior police officer – and the sole female officer on duty at the time– who found herself in the wrong place at the wrong time, in the dark hours of the night, in the company of two brother officers acting with a common purpose.

39. At most, she was guilty of failing to report an act of misconduct committed in her presence by a fellow employee – an act defined as misconduct in terms of Regulation 5(3)(jj) of the Regulations, but not one that would necessarily warrant the institution of the expeditious procedure provided for in Regulation 9.

40. The evidence available is ambiguous when it comes to assessing the status of the trust relationship between the employer and Fourth Respondent. In my opinion, it cannot be established on a balance of probabilities that the trust relationship has irretrievably broken down in her case.

41. However, in regard to Second and Third Respondents, I find that the first leg of the test propounded in *AMCU supra* is satisfied: there has been an error or irregularity on the part of the arbitrator. It therefore remains to be seen whether it can be said that the sanction imposed upon them by the First Respondent is a decision that a reasonable decision maker could have reached.

42. To the extent that the conduct of the employees involved elements of a lack of integrity and / or dishonesty, in *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC), the Labour Appeal Court held:

[44] It is not an invariable rule that offences involving dishonesty necessarily incur the supreme penalty of dismissal. The facts of every case must be assessed and the mitigating features taken into account. ... However, where the dishonesty complained of is gross, dismissal would be an appropriate sanction.

43. The Court continued as follows:

[53] If there is a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed then it would seem to me that a gross irregularity has been committed. The use of the word 'gross' indicates that the irregularity has to be so egregious that a court can conclude that the function of assessing a fair sanction has been misconceived. It is always difficult to define the extent to which the commissioner has to deviate from the normal sanction for such to constitute a 'gross irregularity'. In criminal law, appeal courts interfere with the sentence of a lower court where such induces a sense of shock or there is an alarming or disturbing disparity between the sentence imposed by the trial court and the sentence which the appeal court is minded to impose. A commissioner imposing a sanction in an arbitration in terms of the Act has

a similar but not identical role. Variations within the continuum of a fair sanction are to be expected and are acceptable. Where, however, the imposition of a sanction - or, indeed, the failure to impose a sanction - is so egregious that it shocks and alarms the court, then the commissioner has misconceived his duties. One of his duties is to determine a fair sanction and there are parameters within which he can work. If he strays outside those parameters to a significant degree he has failed to afford the aggrieved party a fair hearing. The fact that precise definition is not possible of the degree of error before a gross irregularity is committed, does not mean that the court should not interfere where it is convinced such a gross irregularity has taken place.

[emphasis added]

44. In the present matter, the sanction of suspension without pay imposed on Second and Third Respondents is indeed one which shocks and alarms the court, when the egregiousness of their conduct is taken into account. I accordingly find that the First Respondent committed a gross irregularity in this regard.

45. In the case of *South African Police Service v POPCRU* 2020 JDR 2353 (LAC), the matter involved a police officer who had been found guilty of the shooting and killing of a civilian at his (the officer's) home. Although the officer raised the defence of justification, this could not be established on the evidence. In setting aside the findings of the Court *a quo*, Kathree-Siloane AJA held as follows:

[24] The shooting and killing of a civilian without just cause constitutes misconduct of a very serious nature. It is not consistent with the obligations of a police officer who is required, in terms of the SAPS Code of Conduct to, amongst other things, exercise the powers conferred upon him or her in a responsible and controlled manner and uphold and protect the fundamental rights of every person. Such misconduct detrimentally affects the image of the police and brings it into disrepute, thus undermining public confidence in the police service. The SAPS was, therefore, justified in dismissing Const. Mmatli from the service.

[25] That being the case, the Labour Court should have found that the arbitrator's decision was one which no reasonable arbitrator could have arrived at. The Labour Court, accordingly, erred in concluding that the arbitration award fell within the bounds of reasonableness and there was "no legal basis to have it reviewed and set aside".

46. In the present matter, I similarly find that the sanction of suspension without pay imposed by the First Respondent in respect of Second and Third Respondents was a decision which no reasonable decision-maker could have reached.

47. In the circumstances, the First Respondent's decision in this regard is reviewed and set aside.

48. As to Fourth Respondent, it cannot in her case be said that the sanction imposed is one which was so inappropriate that it would shock and alarm the court. In the circumstances, I decline to interfere with the First Respondent's decision to impose a sanction of one month's suspension without pay on Fourth Respondent.

49. In light of the fact that Second Respondent has in the interim resigned from the Applicants' employ, the question arose whether there was any basis on which this Court could exercise jurisdiction, the employment relationship having been brought to an end. Mr Allen, on behalf of Applicants, was unable to refer me to any authority in this regard.

50. I in any event consider myself bound by the principle enunciated in *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZASCA 35 (31 March 2023) at para 12:

The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law.

51. The application is therefore moot insofar as the Second Respondent is concerned.

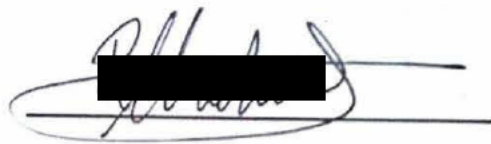
I mention for the sake of completeness that, if Second Respondent were still in Applicants' employ, I would have had no hesitation in imposing the sanction of dismissal.

52. As to Third Respondent, I find that the appropriate sanction is one of dismissal.

53. Accordingly, the following order is made:

Order:

1. No order is made with regard to Second Respondent;
2. The First Respondent's sanction imposed on Third Respondent is reviewed and set aside, and replaced with the sanction of dismissal;
3. No order is made with regard to Fourth Respondent;
4. There is no order as to costs.

A handwritten signature in blue ink, which appears to be 'Abrahams', is written over a black rectangular redaction box. The signature is positioned above a horizontal line.

ABRAHAMS AJ
Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: The State Attorney

Kurt Allen

For the Respondent:

LABOUR COURT