

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR25021/21

In the matter between:

ROSE SIMANGELE MALATSI

Applicant

and

NATIONAL PROSECUTION AUTHORITY

First Respondent

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL (GPSSBC)

Second Respondent

ADVOCATE ITUMALENG KGATLA

Third Respondent

Heard: 20 July 2025

Delivered: 10 November 2025

Summary: The Court dismissed the applicant's review application to set aside an arbitration award upholding a final written warning issued by the National Prosecuting Authority for alleged misconduct, ruling that the matter was not moot, the Commissioner's findings on procedural fairness were reasonable, substantive fairness was not at issue, and no costs order was warranted.

JUDGMENT

COOK, AJ

Introduction

[1] The Applicant seeks to review and set aside the arbitration award dated 27 September 2021 (award) issued by the Third Respondent (Commissioner) under the auspices of the Second Respondent, the General Public Service

Sector Bargaining Council (GPSSBC), in terms of Section 158(1)(g) read with Section 145 of the Labour Relations Act¹.

- [2] The Applicant seeks to substitute the order that the final written warning issued against the Applicant on 11 February 2020 by the First Respondent, the National Prosecution Authority (NPA), is procedurally and substantively unfair and therefore constitutes an act of unfair labour practice short of dismissal. The Applicant also seeks costs as the matter is opposed.
- [3] The NPA seeks that the review application be dismissed with costs.

Background

- [4] The Applicant is currently employed as the Regional Court Control Prosecutor at Boksburg Magistrates' Court.
- [5] On 8 April 2019, the NPA addressed a notice to the Applicant informing her that the NPA intends to take disciplinary action for:
- 5.1 failure to comply with the NPA Policy and Procedure in terms of the Prosecution Policy Directives, Part 4(d), relating to Section 204 witnesses as stated in paragraph 1;
 - 5.2 failure to comply with clause 2.3.1 and 3.3 of the NPA media policy;
 - 5.3 failure to comply with clause 7.7 of the NPA social media policy and bringing the name of the NPA into disrepute;
 - 5.4 abuse of sick leave and temporary incapacity leave.²
- [6] The Applicant provided her written submissions in response to the allegations levelled against her on 17 April 2019.

¹ Act 66 of 1995, as amended.

² pages 30 and 31 of the indexed pleadings "RA2"

[7] On 11 February 2020, the NPA issued a sanction of a final written warning against the Applicant, valid for six months.

[8] In terms of the final written warning, it was recorded:

‘The final written warning will be placed in your personal file and will remain valid for a period of six months from the date of the final written warning. After six months, the final written warning will be removed from your personal file and will be destroyed.’³

[9] On 17 February 2020, the Applicant filed an internal appeal with the NPA challenging the sanction and the manner in which it was imposed against her. The Applicant contended that *‘the NPA could not issue a sanction in an instance where I was never charged with any misconduct and/or found guilty of any misconduct’*.

[10] On 8 July 2020, the appeal upheld the sanction.

[11] Consequently, the Applicant referred a dispute of unfair labour practice for her dismissal to the GPSSBC (the dispute).

[12] On 27 September 2021, the Commissioner issued the award, finding that the NPA had followed a fair procedure in deciding to impose a final written warning.

Analysis

[13] The Court must determine whether the Commissioner’s award is reasonable.

[14] To determine this, the Court must determine if the award is one a reasonable decision-maker could have reached, given the evidence and material presented to him during the arbitration.

³ page 33 of the indexed pleadings

- [15] To determine this, the Court must assess whether the award is one that a reasonable decision-maker could have reached, considering the evidence and material presented during the arbitration.

Mootness

- [16] The NPA raised a point *in limine* that the matter is moot.
- [17] The NPA argues that the final written warning, which was valid for six months, lapsed in January 2021. Further, the NPA has removed and expunged the final written warning from the Applicant's records. Accordingly, it is argued that the relief by the Applicant in her review application will not be practical as the final written warning against the Applicant has been removed from the Applicant's disciplinary records and will not affect the Applicant in future hearings.
- [18] The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*⁴ remarked:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

- [19] The Labour Appeal Court in *National Employers' Association of SA v Metal & Engineering Industries Bargaining Council & Others*⁵ embraced this principle, stating:

'In my view, the mootness of this appeal is clear. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic.'

- [20] A final written warning constitutes a serious sanction short of demotion or dismissal, implying a finding of guilt for serious misconduct.

⁴ 2000 (2) SA 1 (CC) at para 21, fn 18.

⁵ (2015) 36 ILJ 2032 (LAC) at para 7.

- [21] Although the warning has expired and been expunged, this does not establish that its issuance was procedurally or substantively fair.
- [22] This situation is analogous to the expungement of a criminal conviction, which does not equate to an acquittal. The Applicant thus risks ongoing prejudice, including stigma, as an employee who has previously been sanctioned with a final written warning.
- [23] A live controversy persists regarding the reasonableness of the Commissioner's award. If the award is found unreasonable, the Court may grant substantive relief by declaring the issuance of the final written warning an unfair labour practice. Such relief is not academic.
- [24] The Court therefore finds that the matter is not moot and dismisses the point in *limine*.

Substantive unfairness

- [25] The Applicant submits that the Commissioner, if acting reasonably, ought to have evaluated all evidence, determined her guilt on the accusations, and assessed the fairness of the sanction. His failure to do so renders the award unreasonable and subject to review.
- [26] However, these submissions are unsupported by the arbitration record.
- [27] During the arbitration, the Commissioner clarified the scope of his enquiry:

Commissioner:

So the issue that I must determine here without going into details, I do not decide what would have been decided in the disciplinary hearing if it was held. The issue before me is whether it was fair or unfair for the employer to issue a notice requesting a response, and the response was given when they issued a sanction without a disciplinary process. So going into the merits of what would have happened during the disciplinary

hearing, and response that would have happened together with the supporting document is not going to assist the process. As I understand the dispute before me, it is based on the procedure, whether a correct procedure was followed or not, and if it was not followed, is it justifiable in the circumstances. If it is justifiable then it is fine, if it is not justifiable then it amounts to an unfair labour practice. But getting into the merits of the allegations as the Applicant would be more like this arbitration process now is assuming the role of the disciplinary hearing that ought to have taken place if it was orientated in the circumstances.

...

So any evidence that was taken into account or had relating to the merits of what ought not to have been ventilated in the disciplinary hearing is not going to be considered. Therefore, there is no need to entertain it. Yes, Sir? Before you ... [interjects].

Magoshi:

No, commissioner, I think you have clarified that part and I want to say what the dispute is all about, which you clarified it is as to what are we dealing with here.

Commissioner:

Okay no, that is fine. That is in essence that is the merits of what ought to have transpired during the disciplinary hearing if it was orientated or not is what the dispute to be is before us. Then the rest of the things will just be nosy if you want to entertain them because they do not concern us.

...

Netangaheni: Yes, I do not have any further questions.

...

Magoshi: But as far as I remember, this matter is not concerned with the merits of the possible allegations of the [inaudible].

...

We are not even dealing with whether she is guilty or not guilty of any charges.' (Own emphasis)

[28] Accordingly, the Commissioner recorded in his award:

'Briefly, I am required to determine whether or not the conduct of the Respondent to issue the Applicant with a final written warning without a formal disciplinary hearing was in line with a fair procedure, and if not, whether or not such conduct amounts to Unfair Labour Practice.' (Own emphasis)

[29] The NPA correctly submits:

'It is important to note that the Third Respondent was not faced and required to deal with the merits of the case in respect of misconduct that was committed by the Applicant but to deal with whether the notice that was served on her, the written submissions she made in response thereto and the subsequent final written warning issued against her was procedurally fair.' (Own emphasis)

And

'It was clear to all parties that the Third Respondent was not required to deal with the substantive fairness in the matter but the procedural aspect.' (Own emphasis)

[30] In these circumstances, the Commissioner was not required to determine the Applicant's guilt, but only whether the NPA's procedure in issuing the final

written warning was fair. The Commissioner did not err in declining to assess guilt, as he was not called upon to do so.

- [31] The Commissioner did not commit any reviewable misconduct, gross irregularity, or exceed his powers. Thus, the award is not reviewable on substantive fairness grounds.

Procedural fairness

- [32] Resolution 1 of 2003 of the PSCBC, Amendments to Resolution 2 of 1999: Disciplinary Code and Procedures For The Public Service:

‘ ...

2.1 Discipline is a corrective measure and not a punitive one.

2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.

2.3 Discipline is a management function.

...

5. PROCEDURES DISCIPLINARY ACTIONS

...

5.4 Final written warnings. In cases where the seriousness of the misconduct warrants a final written warning, the manager may give the employer a final written warning ...

...

- d. A final written warning remains valid for six months. At the expiry of the six months, the final written warning must be removed from the employee's personal file and

destroyed.

5.5 For less serious forms of misconduct no formal enquiry shall be held.

...

6. SERIOUS MISCONDUCT

If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 5, the employer may initiate a disciplinary enquiry. The employer must appoint an employee as a representative, who as far as possible should be the manager of the employee, to initiate the enquiry.'

[33] The code establishes that discipline is a management function, corrective in nature, and must be applied progressively. Where misconduct warrants a final written warning, the manager may issue one without a formal enquiry. A disciplinary enquiry is required only for misconduct justifying sanctions more serious than a warning.

[34] Here, the NPA exercised its discretion and determined that the misconduct warranted a final written warning, obviating the need for a formal enquiry.

[35] The Commissioner reasonably found:

'It is apparent in my view from this provision that, the employer has a wide discretion on the manner and form which a disciplinary process may take. I, however, find that such discretion was exercised reasonably by the Respondent.'

[36] The Commissioner relied on *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & Others*⁶, which sets out what is required for procedural fairness:

⁶ (2006) 27 ILJ 1644 (LC) at 1651F – G.

'It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.'

[37] In this case, the NPA investigated the alleged misconduct, afforded the Applicant a reasonable opportunity to respond in writing, considered her representations alongside the allegations, made a decision, notified her, and allowed an appeal. The Applicant thus had a fair opportunity to defend herself.

[38] The Commissioner reasonably found:

'[62] It is common cause that the final written warning imposed by the Respondent against the Applicant has already expired and has been expunged and removed from the Applicant's disciplinary record; consequently, the warning will not be considered in future disciplinary actions against the Applicant by the Respondent.

[63] I find that the procedure followed by the respondent in arriving at a decision to impose the sanction of a final written warning was in line with well-established rules of the South African Labour Law and the interpretation of such procedure is supported by case law decided prior to and during the era of Constitutional democracy, and after the enactment of the Labour Relations Act 66 of 1995.'

[39] The Commissioners' award is not unreasonable in respect of the procedural fairness finding.

Costs

[40] In labour matters, costs do not necessarily follow the result. An order of costs is determined by considering whether it would be fair to award such costs in accordance with law and fairness.

[41] Although the review application lacked merit, it cannot be said that the Applicant was unreasonable in approaching this Court. In these circumstances, fairness dictates that the Applicant should not be further burdened with a costs order.

Conclusion

[42] The review test is a stringent and conservative test of reasonableness. The Court can only interfere with the award if the result is untenable.⁷ The Commissioner did not misconceive the nature of the enquiry, nor did he arrive at an unreasonable result.⁸

[43] The Commissioner's award is not one a reasonable decision-maker could not have reached under the circumstances.⁹

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

Order

1. The review application is dismissed.
2. There is no order as to costs.

A.L. Cook

Acting Judge of the Labour Court of South Africa

⁷ *Makuleni v Standard Bank of South Africa (Pty) Ltd & others* (2023) 44 ILJ 1005 (LAC) at para 4.

⁸ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA).

⁹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

Appearances:

For the Applicant: W P Scholtz, Scholtz Attorneys

For the Respondent: Advocate R Ramatselela

Instructed by: H Maponya, State Attorney

LABOUR COURT