



- (1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: PA 8/24

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Appellant

and

BF MKONTO

First Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

Second Respondent

CLARENCE RANDALL, N.O.

Third Respondent

Heard: 30 September 2025

Delivered: 08 January 2026

Coram: Mahalelo ADJP, Nkutha-Nkontwana JA, Basson AJ

Summary: Labour law — Disciplinary proceedings — plea bargain agreement — guilty plea in exchange for a lenient sanction — Whether the chairperson has the power to reject the lenient sanction — proposed guideline on a procedure to follow when the chairperson rejects the proposed lenient sanction.

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

- [1] Plea-bargain agreements, in which guilty pleas are exchanged for lenient sentences, form an integral part of our criminal justice system.¹ They are an efficient and cost-effective mechanism for resolving numerous criminal cases. This concept is not foreign in labour matters, as employees commonly plead guilty to disciplinary charges in exchange for a lenient sanction short of dismissal.² Plea-bargain agreements are equally crucial in labour matters. They enable hassle-free coalface problem-solving and save time and resources.
- [2] Nonetheless, plea-bargain agreements are not immutable. They must be subjected to scrutiny by the chairperson of the disciplinary enquiry, as they usually would be by the trial court in criminal cases. What should happen if the chairperson of the disciplinary enquiry rejects the proposed lenient sanction in terms of the plea-bargain agreement? That is the question that confronts us in this appeal, which is by the leave of this Court.

Condonation

- [3] Before I turn to the merits, I need to address the appellant's (SAPS) application for condonation of the late filing of the record of appeal. The delay is 60 days and is attributed to the glitches in the collation and transcription of the record. While the first respondent (Mr Mkonto) opposes the condonation, he, however, does not complain of any prejudice arising from the delay. In my view, condonation should be granted, and the lapsed appeal be reinstated. The delay is not egregious, and the explanation is relatively acceptable. As well, the interest of justice dictates that the appeal be disposed of on the merits. This Court never had the opportunity to pronounce on plea-bargain agreements.

¹ They are regulated by section 105A of the Criminal Procedure Act 51 of 1977 (the CPA).

² See: *Member of the Executive Council: Department of Health, Eastern Cape Province v Public Health and Social Development Sectoral Bargaining Council and Others* [2016] 6 BLLR 621 (LC). In this case, the Labour Court endorsed a plea bargain agreement with selected accused employees who pleaded guilty and became the employer's witnesses in exchange for lenient sanctions.

Facts

- [4] Mr Mkonto commenced his employment with the SAPS on 19 September 2003 and held the position of constable. In 2007, he moved to the Child Protection and Sexual Offences Unit, which had jurisdiction over several areas, including Cookhouse, Cradock, Hofmeyer, Tarkastad, Bedford, and Middelburg. On 1 July 2015, he was promoted to the rank of sergeant.
- [5] Mr Mkonto was charged with allegations of serious misconduct, including unauthorised use and parking of the SAPS's motor vehicle. According to SAPS, these actions were aggravated by dishonesty, which entailed falsifying or manipulating his travel records. Mr Mkonto was unable to account for the usage of the SAPS motor vehicle, which he had driven 799 km for private or unauthorised purposes.
- [6] The first sitting of the disciplinary hearing, scheduled for 10 and 11 March 2015, was postponed, allowing Mr Mkonto an opportunity to seek legal representation. The disciplinary hearing resumed on 27 May 2015. Mr Mkonto pleaded not guilty to all charges levelled against him. SAPS led the evidence of its first witness, Brigadier Tega, the investigating officer. The matter was postponed to 31 July 2015 due to the unavailability of the SAPS' second witness.
- [7] On 31 July 2015, the parties' representatives engaged in a successful plea bargaining. Mr Mkonto changed his plea from not guilty to guilty on all five charges, in exchange for a lenient sanction, a suspended dismissal valid for six months and a R500 fine. The chairperson was informed of the plea-bargain agreement and requested to endorse it. However, while the chairperson accepted the plea of guilty, he rejected the proposed lenient sanction and imposed a sanction of dismissal.

The arbitration proceedings

- [8] Mr Mkonto challenged his dismissal by referring a dispute to the second respondent (SSSBC), contending that it was procedurally and substantively unfair. The third respondent (arbitrator) was appointed to arbitrate the dispute following a failed conciliation. The parties concluded a pre-arbitration minute,

which records as common cause that the parties entered into a plea-bargain agreement. Pertinently, the main issue for determination was whether the chairperson was empowered to overturn the plea-bargain agreement.

- [9] The SAPS contended that the chairperson of the disciplinary hearing, Colonel Lairi, was not bound by the plea-bargain agreement. That is so because the SAPS Discipline Regulations³ enjoins the chairperson to pronounce on the verdict, having satisfied herself that the sanction was commensurate with the offence. Colonel Lairi testified that she viewed the plea-bargain agreement as a proposal regarding the sanction and therefore allowed the parties to submit mitigating and aggravating circumstances. Mr Mkonto duly filed his mitigation circumstances. While she conceded that the SAPS did not submit any aggravating circumstances, she was adamant that the charges against Mr Mkonto were serious enough to warrant a sanction of dismissal. She took into consideration that Mr Mkonto was dishonest and showed no remorse, as he changed his plea to guilty only after the SAPS had commenced to lead its evidence.
- [10] The SAPS contended further that Mr Mkonto's dismissal was substantively fair. The essence of its case was that Mr Mkonto used and garaged (parked) the state motor vehicle with registration number FXP 739 EC at his private residence without authorisation; falsified the kilometres he had travelled with the motor vehicle; compromised the efficiency of the unit which has a high responsibility to families and children; and failed to maximise the use of the motor vehicle during the impugned period. The alleged incidents that led to the charges occurred during trips between Cradock and Hofmeyer from 10 December 2013 to 5 January 2014.
- [11] It was not disputed that the use of state-owned motor vehicles is regulated by the National Instruction 4 of 2011 (the National Instruction), which requires, *inter alia*, that a state motor vehicle be used for official purposes, the driver, a state employee, must complete a motor vehicle register upon receiving and returning the motor vehicle and accurately record the destination of the journey and the odometer reading after completing the trip. The National

³ South African Police Service Discipline Regulations, 2016.

Instruction also directs that a senior official must authorise the use and garaging of a motor vehicle, and the reason for using it after hours must be recorded in the motor vehicle register.

- [12] Mr Mkonto denied the charges. His explanation for pleading guilty during the disciplinary hearing was that he was assured of a lenient sanction. Otherwise, his supervisor at the time, Captain Sefa, had given him blanket verbal authorisation to drive and garage the motor vehicle at his private residence. That was consequent upon Captain Sefa appointing him to act as the head of the unit and to perform standby duties during the impugned period as recorded in the motor vehicle register.
- [13] Captain Sefa corroborated Mr Mkonto's evidence. However, he was constrained to concede that the National Instructions provide that authorisation to use and garage a state-owned motor vehicle in a private residence must be in writing. He further conceded that he could not have authorised the unlawful garaging of the motor vehicle or the falsification of information in relation to the trips undertaken.
- [14] The arbitrator found that the parties were constrained by the pre-arbitration minute. Therefore, the issue for determination was whether the plea-bargain agreement was binding on the chairperson. On the strength of the dictum in *Minister of Justice and Constitutional Development v General Public Service Sectoral Bargaining Council and Others*⁴ (Minister of Justice), the arbitrator found that the chairperson had no power to interfere with the plea-bargain agreement. That, he reasoned further, meant the SAPS, through the chairperson, interfered with a plea-bargain agreement and dismissed Mr Mkonto in a procedurally and substantively unfair manner. He ordered his reinstatement with full back pay.

The Labour Court proceedings

- [15] The SAPS impugned the award on various grounds, including the contention that the arbitrator misinterpreted the case law he relied on to support his

⁴ (2017) 38 ILJ 213 (LC).

finding that the plea-bargain agreement was binding on the chairperson; that he rendered a contradictory award; and that he unreasonably concluded that dismissal was an appropriate sanction.

- [16] The Labour Court upheld the arbitrators' finding that the chairperson was compelled to honour the plea-bargain agreement and to impose the lenient sanction. Otherwise, the chairperson ought to have allowed Mr Mkonto to revert to his plea of not guilty or to recuse himself from the disciplinary hearing. The Labour Court also found no contradictions in the award and no evidence to support the SAPS's contention that the employment relationship had broken down, justifying a sanction of dismissal. In its view, the award was unassailable as it met the threshold of reasonableness. It therefore dismissed the SAPS review application.

The proceedings in this Court

- [17] The SAPS submits that the Labour Court erred by endorsing the arbitrator's finding to the effect that the chairperson was compelled to honour the plea-bargain agreement. Moreover, it attacks the Labour Court's reliance on this Court's dictum in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others*⁵ (SARS), which settled the question of whether the employer may substitute the chairperson's lenient sanction with dismissal. SARS was found to have acted unlawfully in substituting the sanction.⁶
- [18] By the same token, the SAPS impugns the arbitrator's reliance on the dictum in *Minister of Justice*, as well as the Labour Court's endorsement of that finding. It contends that both the arbitrator and the Labour Court misconstrued the legal tenets implicated in those cases. The SAPS contends further that, given the seriousness of the charges against Mr Mkonto, the arbitrator ought to have found the sanction of dismissal appropriate.
- [19] Mr Mkonto defends both the arbitration award and the Labour Court's judgment. He contends that the chairperson unlawfully rejected the lenient

⁵ (2016) 37 ILJ 655 (LAC).

⁶ Id at para 42.

sanction as she was bound by the plea-bargain agreement. Therefore, the arbitrator rendered a reasonable award, which the Labour Court correctly upheld.

Discussion

Plea bargain agreement

[20] The main issue for determination in this appeal is whether the chairperson of the disciplinary hearing may reject a lenient sanction pursuant to the plea-bargain agreement. Generally, plea-bargain agreements are mundane and are readily sanctioned by trial judges in criminal cases. On the odd occasion, as typified in the present case, a trial judge may reject a plea-bargain agreement if they are of the view that the proposed sentence is unjust (unduly lenient or harsh). In essence, trial judges are not bound by the plea-bargain agreement. However, the parties will have an option to withdraw from the plea-bargain agreement; if they do, the accused will revert to a plea of not guilty, and the trial will commence *de novo* before a different presiding officer, unless the accused does not object.⁷

[21] In the present case, the chairperson was similarly not bound by the plea-bargain agreement. As correctly contended by the SAPS, the Disciplinary Regulations enjoin the chairperson to decide on the sanction after considering mitigating and aggravating circumstances. That is what happened here. Having rejected the lenient sanction agreed to by the parties, the chairperson imposed a sanction she deemed appropriate, given the seriousness of the charges.

[22] Therefore, reliance on the dicta in *SARS*⁸ and *Minister of Justice*⁹ by both the arbitrator and the Labour Court is misconceived. In those cases, the respective employers unlawfully interfered with the chairperson's decision to impose a lenient sanction. Conversely, *SARS* supports SAPS's contention that the chairperson was clothed with the *persona* of the employer and, as

⁷ See section 105A(9) of the CPA.

⁸ *SARS* above fn 5.

⁹ *Minister of Justice* above fn 4.

such, her decision is that of the employer.¹⁰ Therefore, the arbitrator's finding that the plea-bargain agreement was binding on the chairperson is unreasonable.

[23] Yet, the chairperson could not pick and choose which part of the plea-bargain agreement to endorse. By rejecting the lenient sanction, the chairperson effectively collapsed the plea-bargain agreement. Consequently, there was no basis upon which to impose a sanction she considered appropriate. In my view, the approach adopted by the chairperson showed no fidelity to the *audi alterum partem* rule, a fundamental principle of natural justice that requires a fair hearing before an adverse decision is made. It follows that there is no merit in the SAPS' contention that the arbitrator failed to furnish reasons for his finding that Mr Nkonto's dismissal was procedurally unfair.

[24] It would seem to me that the procedural bungle in the present case stems from the absence of a prescribed procedure to be followed when a lenient sanction is rejected in labour matters. I, therefore, propose the following brief guidelines for the procedure to be followed when the chairperson of a disciplinary enquiry has reservations about the lenient sanction proposed in a plea bargain agreement.

24.1 First, the chairperson must inform the parties that they are disinclined to endorse the proposed lenient sanction and give reasons.

24.2 Second, the parties must be allowed to review their positions and consider their options, which may include the following:

26.2.1 To reopen the plea-bargain discussions to address the chairperson's concerns and propose another sanction.

26.2.2 Alternatively, to terminate the plea bargain agreement.

24.3 Third, in the event the parties decide to terminate the plea-bargain agreement, the accused employee must be allowed to withdraw the plea of guilty.

¹⁰ SARS above fn 5 at para 41.

24.4 Finally, the disciplinary enquiry must commence *de novo* before a different chairperson, unless the accused employee has consented that the same chairperson may continue to preside over the disciplinary enquiry.

[25] This guideline is, nonetheless, not cast in stone; a degree of flexibility ought to be permitted as and when practical justice demands.

Substantive unfairness

[26] The next question is whether the procedural unfairness tainted the enquiry to the extent that it inhibited a substantively fair outcome. In *SARS*, this Court cautioned against turning the distinction between substantive and procedural unfairness into a legal principle that creates two separate concepts, as its usefulness is context sensitive. The following observations in *SARS* drive the point home:

‘An unlawful act will always be, within the Labour jurisprudence paradigm, both substantively and procedurally unfair. A lawful act *may* be both substantively and procedurally unfair, and sometimes only one or the other. Sometimes a defective and thus unfair procedure may taint an enquiry so as to prevent a fair decision on a substantive issue from being taken. Sometimes, an unfair procedure does not get in the way of discerning a substantively fair dismissal.’¹¹

[27] As a point of departure, in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹² (*Sidumo*), a *locus classicus* on the reasonableness review test, the Constitutional Court found that, in determining the fairness of a dismissal, the arbitrator is not required to defer to the employer’s decision as the arbitration is a *de novo* hearing. The test is one of fairness, which entails weighing factors such as the gravity of the misconduct, the employee’s circumstances, the impact on the employer, and whether the sanction is appropriate in the context of the employment relationship.¹³

¹¹ *SARS* above fn 5 at para 33.

¹² (2007) 28 *ILJ* 2405 (CC)

¹³ *Id* at para 79.

- [28] The SAPS contends that the arbitrator unreasonably failed to pronounce on the fairness of the sanction of dismissal, despite the overwhelming evidence that Mr Mkonto committed serious acts of misconduct, which the arbitrator himself acknowledged. The arbitrator was of the view that, by entering into the plea bargain agreement, the SAPS must have accepted that the trust relationship had not broken down and that the actual misconduct was not serious enough to warrant a sanction of dismissal. This view is untenable, given my conclusion that the plea-bargain agreement did not bind the chairperson.
- [29] Moreover, since the arbitration is a hearing *de novo*, I do not see how the procedural irregularity could have impeded the arbitrator from determining the substantive fairness of Mr Mkonto's dismissal, particularly because he was confronted with overwhelming evidence on the merits. The evidence showed that Mr Mkonto failed to adhere to the National Instructions, which provide that the authority to use the state-owned motor vehicle must be in writing. Captain Sefa could not explain the source of his powers to verbally appoint Mr Mkonto to act in his position and to use the motor vehicle.
- [30] Even if Mr Mkonto had been granted verbal authorisation to use the motor vehicle, he was still expected to seek a written authorisation to garage it at his private residence for not more than seven days and to provide precise details of the trips undertaken. It is also telling that, while Mr Mkonto insisted that he was performing standby duties, his name did not appear on the standby duty roster for the impugned period.
- [31] The only conclusion to be drawn from the evidence, viewed in its totality, is that Mr Mkonto used the state motor vehicle for his private trips, clocked about 799 km, and garaged it at his private residence, in breach of the National Instructions.

Inconsistency

- [32] Mr Mkonto's claim that the sanction of dismissal was inconsistently applied cannot assist him. It is a well-accepted notion that an inconsistency is a factor to be considered in the determination of the fairness of the dismissal, but it is

not decisive.¹⁴ The SAPS contends that what distinguished Mr Mkonto's conduct from that of his comparators was that he was also accused of dishonesty. This evidence was not seriously disputed. Moreover, it was Mr Mkonto's own version that the transgressions occurred when he was the acting head of the unit. That being the case, he had a duty to exemplify compliance with the prescripts, but he dismally failed to do so. It is also disquieting that Mr Mkonto showed no remorse for his conduct. Instead, he mounted a complete volte-face in his plea and engineered a justification for his conduct that is plainly untenable.

Dishonesty

[33] Worse still, Mr Mkonto's dishonest conduct, which reflects a lack of integrity or straightforwardness, marred the employment relationship.¹⁵ A high premium is placed on honesty and integrity within the SAPS and all other national law enforcement agencies, a point aptly underscored in the cases referred to by SAPS.¹⁶ The following observations in *National Commissioner of the SA Police Service & Another v Mphahlele NO & Another*,¹⁷ are instructive:

'The evidence demonstrates indisputably that Mezichel had succumbed to his personal difficulties and had acted fraudulently in a manner that made him wholly unreliable as a police officer, a lawyer and an employee in whom the station commander needed to repose considerable trust. Such an employee is required to observe the highest standard of integrity, good faith, honesty and reliability. Police officers and lawyers should always (not only in the discharge of their official duties) act honourably in a manner befitting their office, free from fraud, deceit and falsehood, and be virtuous in their behaviour. A police officer must maintain high standards of rectitude in private as well as in public life. A police officer, who in fulfilment of his or her duties is required to act against fraud, when he or she practices such in his or her own life, is a hypocrite. This inevitably will result in a total loss of confidence in the

¹⁴ *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) para 31.

¹⁵ See: *Nedcor Bank Ltd v Frank and Others* (2002) 23 ILJ 1243 (LAC) at para 15.

¹⁶ See: *SA Police Service v Magwaxaza* (2020) 41 ILJ 408 (LAC) at para 48; and *Booyesen v Safety and Security Sectoral Bargaining Council and Others* (2021) 42 ILJ 1192 (LAC) at para 19.

¹⁷ (2019) 40 ILJ 806 (LAC) at para 19.

officer concerned, which could rub off on the SAPS more generally, adding to a loss of public confidence in SAPS...' (Emphasis added)

[34] The arbitrator unreasonably held that the SAPS failed to lead evidence to justify the dismissal of Mr Mkonto. The breakdown of trust was evident from the nature of the offence, which revealed a stratagem of dishonesty perpetrated by Mr Mkonto, a police officer.¹⁸ The Labour Court accordingly erred by sanctioning the arbitrators' findings that Mr Mkonto's dismissal was substantively unfair, contrary to this Court's caution against deferring to the arbitrator's reasoning.¹⁹ Instead, it should have determined the reasonableness of the award based on the totality of evidence on the record of the arbitration proceedings.²⁰

Conclusion

[35] In all the circumstances, the appeal succeeds in part and only in relation to the substantive unfairness of the dismissal. What remains is the determination of a relief for a procedural unfairness claim. I deem it expedient that this Court deal with this matter to finality rather than remit it back to the SSSBC for a *de novo* hearing, given the unfortunately long and protracted history of the matter, and fairness to both parties. Also, the parties took no issue with the adequacy of the record.

Relief

[36] The relief for procedurally unfair dismissal is compensation, rather than reinstatement or re-employment. Compensation must be just and equitable in all the circumstances, but not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.²¹ Since compensation is not automatic, in awarding compensation, I have considered, as alluded to above, *inter alia*, the extent of the SAPS' deviation from its own procedure, the impact of Mr Mkonto's transgression on

¹⁸ See: *Autozone v Dispute Resolution Centre of Motor Industry & others* (2019) 40 ILJ 1501 (LAC) at paras 12 and 13.

¹⁹ See: *Khambule & Another v Impala Platinum Ltd & others* (2019) 40 ILJ 2505 (LAC) at para 11.

²⁰ *Id.*

²¹ See: Section 193(2) and 194(1) of the LRA.

the SAPS operations and the general public.²² Mr Mkonto should accordingly be paid compensation equivalent to three months' remuneration as at the time of dismissal.

Costs

[37] As to costs, both parties are considerably successful. The SAPS succeeded in reversing the reinstatement order. At the same time, Mr Mkonto defended the order of procedural unfairness and secured compensation. It therefore accords with the principles of fairness and equity that each party pays their own costs.

[38] In a result, the following order is made:

Order

1. Condonation for the late filing of the record of appeal is granted, and the lapsed appeal is reinstated.
2. The appeal is upheld in part.
3. The orders of the Labour Court are set aside, and are replaced with the following:

'The review application succeeds in part, and the arbitration award dated 26 September 2019 is reviewed and set aside, save for the order that the dismissal was procedurally unfair, and substituted with the following:

- (i) The dismissal of Mr Mkonto was substantively fair.
- (ii) The SAPS shall pay Mr Mkonto compensation equivalent to his salary for 3 months at the time of dismissal.'

4. No order is made in respect of the costs of the appeal.

²² See: *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* (2017) 38 ILJ 97 (CC) at para 52 and 53.

Nkutha-Nkontwana JA

Mahalelo ADJP et Basson AJA **concur.**

APPEARANCES:

FOR THE APPELLANT: Adv M Thys
 Instructed by State Attorney

FOR THE RESPONDENT: Mbulelo Qotoyi Attorneys