**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH**

Case no: PA 10/2017

In the matter between:

**SOUTH AFRICAN POLICE SERVICE** **Appellant**

and

**ANELE MAGWAXAZA** **First Respondent**

**M.A. NOZIGQWABA** **Second Respondent**

**SAFETY AND SECURITYSECTORAL**

**BARGAINING COUNCIL** **Third Respondent**

**Heard:** **18 September 2019**

**Delivered:** **05 November 2019**

**Summary: Appeal- review of arbitration award.**

**Coram: Waglay JP, Coppin JA and Kathree-Setiloane AJA**

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**JUDGMENT**

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COPPIN JA

[1] This is an appeal against an order of the Labour Court (Coetzee AJ) dismissing an application brought by the appellant ("the SAPS") to review and set aside an award of the second respondent ("the arbitrator") in favour of the

first respondent ("the employee"). Leave to appeal to this Court was granted on petition.

[2] The employee, a sergeant, employed by the SAPS since about 1991, was dismissed after being found guilty at a disciplinary enquiry of shooting and killing a civilian with his service firearm. The arbitrator found that his dismissal was substantively unfair and ordered his retrospective reinstatement with full back pay. The Labour Court found that the arbitrator's award fell within the bounds of reasonableness and, accordingly, dismissed the SAPS' review application. The SAPS argued on appeal that the arbitrator and the Labour Court were wrong.

[3] At the outset, the SAPS applied for the reinstatement of its appeal and for condonation. The applications were opposed by the employee.

[4] In respect of the merits, the main issues on appeal are whether the employee could reasonably have been found guilty of misconduct, its exact nature, and whether the sanction of dismissal was appropriate in the circumstances.

[5] I deal firstly with the issue of condonation, then proceed to give a brief background of the facts and, lastly, with the merits of the appeal.

Condonation

[6] The SAPS, firstly, sought condonation for the late filing of its notice of appeal and the appeal record, the grant of which will result in the reinstatement of the appeal. The application was opposed by the employee. The SAPS, secondly, sought to introduce into the record copies of extracts of the arbitrator's bench-book notes, which are in manuscript, with their transcriptions, and also sought condonation for their late filing. The employee's legal representative indicated that he was also objecting to the grant of that application.

[7] The gist of the employee's opposition to the condonation applications turned on the time it took SAPS to lodge the necessary documents. In essence, it was submitted on his behalf that there was a clear lack of diligence on the part of the State Attorney in that regard and the employee was prejudiced by

the long delays because he was unable to work and provide for his family. His legal representative further submitted that the employee's rights as a breadwinner had to be protected by refusing the applications for condonation.

[8] It is trite that condonation is not for the taking and that the applicant for such relief has to make out a proper case for it to be granted. Good, or sufficient, cause must be shown. This not only involves giving a full explanation for the delay, but also showing that the main process (in this instance the appeal) has reasonable prospects of success. Generally, a slight delay and a good explanation for the delay could compensate for weak prospects of success, and good prospects could make up for a long delay. But the interests of justice are paramount.[1]

[9] The SAPS was supposed to deliver its notice of appeal within 15 days after leave to appeal had been granted on petition on 30 November 2017. Hence it had to deliver its notice by no later than 21 December 2017. But it only did so some months later. Similarly, the record was to have been delivered within 60 days, i.e., by 20 February 2018. But the SAPS only delivered it on 24 October 2018. These delays are indeed long.

[10] In support of the main application for condonation, which was filed on 21 May 2018, the delays are explained extensively. Part of the delay was caused by the unavailability of the attorney and counsel. By about 31 January 2018, a draft record had been compiled by the State Attorney using documents in the office file, and was submitted to ADS in Cape Town, a service provider that had been engaged to prepare the record. ADS, however, indicated that certain further documents were required, including the SAPS' heads of argument. After seeking clarification from ADS, a copy of the heads of argument which did not have to be part of the record, but for ADS' insistence, was furnished to them on 6 February 2018.

[11] Further delays were caused by a host of other factors or circumstances, including demands by ADS for more documents, difficulties accessing the preliminary record compiled by ADS, the latter's request for yet more

[1] See: *Melane v SANTAM Insurance Co. Ltd.* 1962 (4) SA 531 (A) at 532C-F.

(unnecessary) documents, such as the application for leave to appeal, finalisation of the record, including the cross – referencing, and difficulties with tracing the court file. The court file was eventually found on 7 March 2018. There were yet further delays caused by ADS in finalising the record after the application for leave to appeal, which had been belatedly requested by them on 6 April 2018, had been sent to them. Subsequently, there were yet further requests by ADS for additional documents (also not relevant), such as a copy of the charge sheet in the disciplinary hearing.

[12] The delays were compounded by the State Attorney's erroneous impression that the filing of a notice of appeal was not necessary where leave to appeal was granted by this Court on petition. It is only after counsel's advice had been sought that such a notice was prepared. Yet further delays were caused by the unavailability of the appellant's attorney due to an unfortunate family bereavement.

[13] According to Ms Leigh Jonas, the attorney, when an attempt was made by the State Attorney to file the record on 9 May 2018, the Registrar of the Labour Court refused to accept the record and insisted that it be accompanied by a substantive condonation application. The process of engaging counsel and drafting the condonation application led to further delay. The application was eventually filed on 21 May 2018. An attempt was made to file the record at the same time, but the State Attorney was advised by the office of the Registrar of the Labour Court that the record would not be accepted until the reinstatement application had been finalised. This was obviously wrong advice, but according to Ms Jonas, the State Attorney accepted it since it came from the Registrar's office.

[14] It is only on 12 October 2018, after Ms Jonas had enquired about the reinstatement application that she was advised that it would be heard together with the appeal. This was after the Registrar's office in Port Elizabeth had consulted the Registrar in Johannesburg concerning the filing of the record. The record was eventually filed on 24 October 2018.

[15] It is apparent from the explanation furnished that there were delays at various junctures due to a variety of causes and that all of the delay was not due to the fault of the State Attorney. A sizeable portion of the delay was due to the difficulties it experienced in the compilation and preparation of the record. The requests of ADS, the compiler, were oftentimes for documents which the State Attorney should have known were irrelevant, and its belated request for an important document, such as the notice of appeal, and the attorney's ignorance of its importance, further complicated matters.

[16] I am satisfied that the respondent had adequate notice of the main application for condonation and that he has had sufficient opportunity to file affidavits in opposition thereto, but has not done so. Mr Thobani Evidence Jalmeni, an administration officer employed by the SAPS and stationed at its provincial Head Office, in Zwelithsha, states in an affidavit that is part of the record of the condonation applications, that on 19 December he, personally, attended at the employee's place of residence, and personally served the record of appeal, the appellant's heads of argument, practice note and the application for condonation (including a supplementary affidavit) on the employee, but the employee refused to sign for them. It is further implicit from the contents of the heads of argument filed on behalf of the employee, that the employee and his legal representative were in possession of those documents, making it possible for them to make submissions concerning their contents.

[17] The employee's heads of argument and practice note (apparently drawn by the employee's legal representative) were filed on 31 January 2019. On 22 February 2019, the employee filed a further set of heads, apparently drafted by him (although they bear the date 28 January 2019). In those heads, the employee, *inter alia*, acknowledges that he got to know of the application for condonation on 12 October 2018, and that Mr Jalmeni came to his place of residence to serve the documents on him, but he denies refusing to sign for them. He alleges that he told Mr Jalmeni to serve the documents at the offices of Legal Aid in King William's Town, where he had a legal representative. He does not allege that the documents were not served as per his request. It is apparent from his heads and the attachments to those heads that there was

service on the Legal Aid offices and that they were aware of the application as early as October 2018. In any event, the employee has furnished no evidence by his former representative at Legal Aid confirming his version. He also does not explain when Legal Aid ceased to represent him, and when and how he came to appoint his new legal representative, Mr Makubalo; and how the drafter of his heads of argument (two sets), if it was not him, came to have knowledge of the contents of condonation application.

[18] There is also no merit in the point raised by the employee, or on his behalf, that the application for condonation was defective, because it was deposed to by Ms Jonas, instead of the SAPS. It is apparent from Ms Jonas's affidavit that she was the attorney at the State Attorney who was in charge of the matter and that she had personal knowledge of the facts. It was most appropriate for her to depose to the main affidavit.

[19] The explanation for the delay, although full, on its own, may not have been enough to pass muster. Nevertheless, because this matter is in the public interest and the SAPS' prospects of success are excellent (as will be discussed in due course) this compensates for deficiencies in the explanation. The grant of the necessary condonation is clearly justified in the interests of justice as will become clear in due course when the merits are discussed.

[20] The application to introduce copies of extracts from the arbitrator's bench notes was filed with the Labour Court, according to the date stamp on the document, on 6 December 2018. An index for that application (together with a copy of the application) was served on the employee's attorneys on 11 September 2019.

[21] In the affidavit filed in support of that application, which is also deposed to by Ms Jonas, she explains that counsel for the appellant, during the course of preparing its heads of argument, became aware that portions of the arbitration transcript were missing from the appeal record, in particular, the final part of the employee's evidence in chief; the first part and the last part of his evidence given under cross-examination; and the evidence of Lt. Col. Hakula. The arbitrator's detailed bench notes, which were before the Labour Court,

capture those missing portions. They were, however, not included in the appeal record at the outset, because Ms Jonas assumed that the record was complete.

[22] The importance of the notes is obvious. If the record had been complete otherwise, then their inclusion would not have been strictly necessary. But since the record is otherwise lacking, their inclusion in the record is vital. Neither the employee, in his submissions, nor his legal representative, alleged that the notes were not a true record of the evidence that had been given at the arbitration. On the contrary, their accuracy was accepted and the opposition to their inclusion centred on the delay issue, which is dealt with above. In addition, the employee did not challenge the averments of Ms Jonas, including, those concerning the accuracy of the notes, and did not seek a postponement, or leave, to file an opposing affidavit.

[23] Considered in light of all the facts, the late filing of the notes is condoned in the interests of justice.

The background facts

[24] It is common cause that on 24 December 2011, the employee, who was off-duty at the time, but armed with his official firearm, attended a traditional ceremony in his local community in Zinyoka, King William's Town. There, he got involved in an argument with the deceased and others. The argument appears to have been about the spillage of traditional beer at another ceremony held at the deceased's sister's house the previous day, i.e. on 23 December 2011.

[25] The deceased's sister, Ms Noquaka, who was also at this other venue on 24 November, intervened when she was made aware of the argument and left the ceremony with the deceased. According to the deceased's girlfriend, Ms Masela, who was also at the ceremony, when the deceased was leaving the employee said to him "I'm going to get you". And according to Ms Noquaka, the deceased had told the employee to "voetsek". This evidence was not challenged in cross-examination.

[26] At about 20h30 that evening, the deceased was found lying prostrate on the road, close to where he lived, after he had been fatally shot in the stomach, at close range, by the employee. The deceased was pronounced dead on arrival at the hospital.

[27] It is common cause that after firing the fatal shot, the employee walked from the scene to his house, which was close by, and remained there until he was arrested by the police in the early hours of the next morning.

[28] At his disciplinary hearing the employee, who admitted fatally wounding the deceased, maintained that he was acting in self-defence after perceiving that the deceased, who, on his version, had confronted and reminded him of what had happened at the ceremony earlier, was about to stab him with an object which he, subsequently, thought was a knife. According to the employee he also feared being attacked by others at that stage, even though he only saw the deceased.

[29] Ms Masela testified that she witnessed the shooting incident from a vantage point about five metres away, where she had hidden herself. The deceased approached the employee in the road and enquired after the whereabouts of Ms Masela. The employee did not answer the deceased. The deceased was about 2 m away from the employee when the shot went off. She heard the deceased ask the employee “Soso’s father why are you shooting me” (Soso is the employee’s child). There was no scuffle before the shooting and the deceased was unarmed. Immediately after the shooting, the employee left the scene. Ms Masela approached and found the deceased lying prostrate and unresponsive. The deceased had nothing in his hands and there was no knife on the scene. Ms Noquaka also came to the scene and the deceased was taken to hospital where he was declared dead on arrival. This evidence was also not challenged under cross-examination.

[30] Const. Ruiters, who arrested the employee, testified that he smelt of alcohol at the time, but could not say if he was drunk. Ms Masela testified that she did not know whether the employee was under the influence of alcohol at the traditional ceremony, and Ms Noquaka testified that she saw him drinking

beer, but could not say how much. The employee denied that he drank alcohol on that day.

[31] The employee testified at the arbitration that, immediately after he shot the deceased, he moved 10 meters from the scene and phoned a policeman to report the incident. He was told by that person that he should go home and wait there, which he did. As he was a suspect, he believed that it was not his duty to call an ambulance. This version was proved to be false as he had given a different version at the disciplinary inquiry. There, he had testified that he went straight home after the shooting and had not reported the incident.

The Disciplinary hearing

[32] The SAPS charged the employee with four counts of misconduct arising from his killing of the deceased. After the employer had presented evidence and the employee had testified and presented evidence, he was found guilty of three of the charges, the main one being charge 2, which is discussed later. The sanction of dismissal was imposed. The employee's appeal to the Provincial Commissioner of Police was unsuccessful.

The Arbitration Award

[33] The employee referred an unfair dismissal dispute to third respondent ("the SSSBC"). At the arbitration, the employee gave evidence, and called Lt. Col. Hakula to establish that the employee's reinstatement to the SAPS would not be intolerable.

[34] The arbitrator rejected the employee's defence. He stated in his award: "… The applicant pleads that he acted in self-defence when he shot the deceased and therefore his act was justified and cannot be said to be murder. He testified that the deceased drew a knife and said they should continue with what they had started. This testimony contradicted what he said during the disciplinary hearing. I am not convinced on whether the applicant saw exactly a knife carried by the deceased before he shot him.… When the applicant met the deceased he unreasonably thought that he had come to attack him, since he had uttered swear words to him at the ceremony…".

[35] Instead, the arbitrator found that the employee had been negligent in causing the death of the deceased and was therefore guilty of culpable homicide. The arbitrator states in the award: "… The applicant acted out of paranoia rather than from a genuine attack from the deceased. He thought that there was an attack imminent on his life whereas there was none. He acted contrary to what a reasonable man would have done. The applicant shot the deceased in his stomach, and this was indicative of the fact that he harboured no intention to kill the deceased. There was no clearly established motive of (*sic*) killing the deceased. What the applicant could at least be found guilty of was culpable homicide (negligent killing of a human being) because he should have been certain that there was an imminent and real danger to his life. He thought there was whereas in actual fact there was no imminent danger. The applicant is therefore not guilty of murder."

[36] It is apparent from the passage quoted that the arbitrator found that the employee was not guilty of murder and he says that this is so, firstly, because he had shot the deceased in the stomach, and, secondly, because it was not clearly established that he had a motive for killing the deceased. The finding of negligence was purely on the basis that the employee had made a mistake about there being an imminent and real danger to his life.

[37] Having made those findings, the arbitrator seemingly reasoned that the employee's dismissal was unfair because he was not guilty of murder, and proceeded to find that reinstatement with full back pay was the appropriate ("fair") remedy. In coming to this conclusion, the arbitrator essentially found that there was no substantial evidence that the relationship of trust between the applicant and the SAPS had broken down. The arbitrator further reasoned that the offence was committed while the employee was off duty, and that his commander Lt Col Hakula, who testified on his behalf at the arbitration, had confirmed that the employee was a disciplined member who had carried out his duties satisfactorily. And, further, that the employee had a clean disciplinary record and long service which should count in favour of him being reinstated.

<u>The Labour Court</u>

[38] Essentially, the Labour Court found that the arbitrator had reasonably arrived at the conclusion that the employee was not guilty of murder, but of culpable homicide; that the evidence of Ms Masela "does not turn culpable homicide into murder"; and that there was no other credible evidence, apart from that of the employee, concerning the intention to kill the deceased, or the lack thereof. The Labour Court further concluded that the SAPS did not prove that the employee had the intention to kill the deceased; that it was for them to show that the employee had the requisite intent, or that his denial that he had such intent, was a lie.

Discussion

[39] There is merit in the argument made on behalf of the SAPS that both the arbitrator and the Labour Court had adopted an unduly formalistic approach and had made the cardinal mistake of wrongly focusing the enquiry on whether it had been proved that the employee had murdered the deceased, as if it was a criminal trial.

[40] The true enquiry had to be about determining, in a manner which was not unduly formalistic, whether the employee's dismissal was fair, taking into account the allegations made against the employee and the standard of conduct required of him.[2] The approach of the arbitrator, on its own, constituted a gross irregularity that justified a review of the award.

[41] The arbitrator let the employee off, scot-free, with "compensation" in the form of full back pay, despite having found that he had unjustifiably killed a civilian. This conclusion is clearly incongruous, unreasonable, and was due to the approach adopted by the arbitrator.

[42] It seems implicit in the arbitrator's reasoning that the fact that the charges did not (at least expressly) mention the crime of culpable homicide, but murder, meant that the charge(s) against the employee had not been proved and, therefore, no sanction was justified. This was not only unreasonable, but unjustified in light of the following. On the assumption that there was a charge

[2] *Mashigo v SAPS* [2018] 10 BLLR 943 (LAC) paras 14-17.

of murder, in disciplinary proceedings there is no requirement for competent verdicts to be mentioned in the charge sheet, and in the absence of prejudice an employee may be found guilty of the offence that is a competent verdict.[3]

[43] In *Mashigo v SAPS,*[4] this Court referred with approval to what is stated in *Woolworths v Commission for Conciliation Mediation and Arbitration and Others*[5], namely, (quoting *Le Roux and Van Niekerk*[6]): "The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of the applicable rules or standards."[7]

[44] Properly construed, the essence of charge 2 was not murder. It was alleged that the employee was guilty of contravening Regulation 20 (z) of the SAPS Regulations – 2006, read with section 120 (3), (a), (b) and (c) of the Firearms Control Act 3 of 2000 in that he had "committed a common law or statutory offence, to wit, murder" of the deceased. Thus, the essence was about him having committed a common law or statutory offence using his official firearm. Since it was found that this offence had been committed by the employee with his official firearm he could not have been let-off, scot-free. There had to be a sanction.

[45] In any event, assuming murder had to be proved, both the arbitrator and the Labour Court were wrong in finding that the requisite intention could only be proved by direct evidence. The arbitrator was further wrong and unreasonable in concluding that in order to prove such intention clear proof of motive was necessary, or that it was lacking.



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[3] *EOH Abantu (Pty) Ltd v CCMA and Others* (JA 4/18) [2019] ZALAC 57 (15 August 2019) paras 16 - 17.
[4] See above para 16.
[5] (2011) 32 ILJ 2455 (LAC) para 32.
[6] Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (Juta 1994) 102.
[7] See: *Mashigo v SAPS* (above) para 16.

[46] The fact that the employee shot the deceased in the stomach (abdomen) and not in the legs does not count in his favour. Instead it is indicative of recklessness on his part. It is an area where vital organs are situated. As a policeman, the employee was trained in the handling of firearms, which could easily produce lethal results, or serious harm. Given the distance between the employee and the deceased at the time the employee shot (about 2 meters), the area of the body he aimed or shot at, and all the other factors, it cannot be said that he did not foresee the possibility that the shooting may result in the death of the deceased. And that by nevertheless shooting, he had reconciled himself to that possibility, or that he was reckless as to whether that result might ensue. Considering all of the evidence properly before the arbitrator, that is the least that a reasonable arbitrator would have found.

The sanction

[47] On the assumption that the finding of the arbitrator, that the employee was guilty of negligently killing the deceased, falls within the band of findings a reasonable arbitrator would have made (which I do not find), he nevertheless committed an irregularity in not concluding, in those circumstances, that the employee had committed misconduct and, thereafter, considering what an appropriate sanction for that misconduct would be, or would have been.

[48] Even if the employee had only been found guilty of culpable homicide, the arbitrator's decision to reinstate him, notwithstanding such conviction, was unreasonable. Even though the SAPS did not lead any evidence to prove that reinstatement would be intolerable, this is clearly implicit given the egregious nature of the misconduct and the circumstances in which it was committed,[8] including the fact that police are to protect and secure the inhabitants of this country and uphold the law and not to, unjustifiably, cause harm to them through unlawful acts.[9]

[49] Lt. Col. Hakula's evidence did not establish that the employee's reinstatement would not be intolerable. It is not only clear from his answers under cross-

[8] Compare*: Impala Platinum Ltd v Jansen and Others* (2017) 38 ILJ 896 (LAC) paras 13-15.
[9] See: *inter alia*, s205 (3) of the Constitution of the Republic of South Africa, 1996.

examination that he did not have much to do with the employee from a work perspective, but a direct question he was asked in re-examination about the employee's reinstatement was correctly disallowed. Taking all the evidence into account, the sanction of dismissal was appropriate and fair.

[50] In the result, the following order is made:

1. The late filing of the record, including the arbitrator's bench notes and the notice of appeal, are condoned and the appeal is reinstated;

2. The appeal is upheld.

3. The order of the Labour Court is set aside, and is replaced with the following order: "a) The award is reviewed and set aside; and b) the award of the arbitrator is substituted with the following order: 'the dismissal of the employee was procedurally and substantively fair'";

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

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P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kathree-Setiloane AJA concur in the judgment of Coppin JA

APPEARANCES:

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| FOR THE APPELLANT: | Anton Myburgh SC and Mark Thys<br>Instructed by the State Attorney (Port Elizabeth) |
| FOR THE FIRST RESPONDENT: | Mr ZG Makubalo of Makubalo Attorneys |