

**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Case No: JR1546/2021

Not Reportable

In the matter between:

SAMWU obo MASHILO PETER MANAKA

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT  
BARGAINING COUNCIL

Second Respondent

TIMOTHY BOYCE N.O

Third Respondent

Heard: 24 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 14h00 on 6 May 2024.

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JUDGMENT

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ALLEN-YAMAN J

## Introduction

[1] The applicant seeks orders in the following terms,

- ‘1. *Reviewing and setting aside the arbitration award issued by the third respondent under the auspices of the second respondent under case number GPD012007, dated 4 June 2021.*
2. *Substituting the arbitration award with an order to the effect that the dismissal of the dismissed employee is both procedurally and substantively unfair.*
3. *Directing the first respondent to reinstate the dismissed employee retrospectively to the position of Metro Police Officer which he occupied on similar terms and conditions prior to the termination of his employment contract on 12 November 2019.*
4. *Alternatively directing that the matter be referred back to the second respondent for an arbitration de novo before a commissioner other than the third respondent.*
5. *Ordering any of the respondents who may oppose this application to pay the cost hereof, jointly and severally, the one paying the other to be absolved.’*

[2] The first respondent opposed the application by the delivery of both an answering affidavit and heads of argument, however, did not attend the hearing of the application when it was first enrolled on 18 October 2023, without explanation for its absence from those proceedings. In the circumstances, the application was adjourned to 23 November 2023, with the question of the wasted costs of the adjournment then reserved. The first respondent was again absent on 23 November 2023 and the matter proceeded in its absence. Notwithstanding that the first respondent did not participate in the hearing of the matter, its opposition to the application as set forth in that which was delivered on its behalf was taken into consideration.

[3] In view of the fact that the review application had been initiated outside the time periods allowed therefor, the applicant applied for condonation for the delay.

This application was not opposed by the first respondent and, in view of the factors relevant to the granting of condonation, this court finds that the interests of justice warrant that the relief so sought be granted.

### Background

- [4] The applicant employee, referred to herein as Mr Manaka, was dismissed on 15 November 2019 pursuant to having been found to have committed certain infractions relating to his conduct as a member of the first respondent's police department, framed as follows,

#### 'Charge 1

*That you committed an act of misconduct which would constitute just cause for discipline, thereby contravening Clause 1.2.3 of the Disciplinary Procedure Collective Agreement.*

*In that On Thursday 22 September 2016 at approximately 12:00 you were allegedly involved in a verbal altercation with a member of the public namely Mr Mbuyazi while you were on duty. This escalated to you assaulting him and another member of public later whom witnessed the altercation and went so far that you drew your official fire-arm and discharged four shots of which one injured the complainant whom was unarmed and running away from you. This incident was not reported to the department or SAPS which is also in contravention with the fire-arm controls act, as a fire-arm was involved. You therefore failed to perform your tasks and job responsibilities diligently, carefully and to the best of your ability.*

#### Charge 2

*That you committed an act of misconduct which would constitute just cause for discipline, thereby contravening Clause 1.2.9 of the Disciplinary Procedure Collective Agreement.*

*In that: On Thursday 22 September 2016 at approximately 12:00 you were allegedly involved in a verbal altercation with a member of the public namely Mr Mbuyazi while you were on duty. This escalated to you assaulting him and another member of public whom witnessed the altercation and went so far that*

*you drew your official fire-arm and discharged four shots of which one injured the complainant whom was unarmed and running away from you. You therefore failed to refrain from any rude, abusive, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee or member of the public. Your actions were also unlawful which constitutes to a criminal offence.'*

- [5] Mr Manaka was charged as aforesaid pursuant to an individual, Mr Bongani Mbuyazi, having accused him of having both physically assaulted and shot him on 22 September 2016, and another individual, Mr Kubuzakuni Mchunu, having alleged that he too had been assaulted by Mr Manaka that day.
- [6] It was common cause that on 22 September 2016 an operation had taken place, under the leadership of one Colonel Ramaphakela of the South African Police Services, between members of the South African Police Services, members of the first respondent's police department (which included Mr Manaka) and a team of security officials, colloquially referred to as the Red Ants. The operation took place in an area called Vusimusi, an informal settlement, and the purpose thereof was the removal of illegal electrical connections in the area. Members of the South African Police Services and the first respondent's police department were intended to protect the Red Ants as well as the property removed by them from any possible hostile response to their activities by the local community.
- [7] It was also common cause that Mr Mbuyazi attended, firstly at the Birchleigh North Clinic and thereafter at the Tembisa Hospital, in the afternoon of 22 September 2016, presenting with a gunshot wound to his upper right arm. The evidence established that the bullet which had caused the wound had penetrated the rear and exited through the front of his arm.
- [8] The issue that was in dispute was how Mr Mbuyazi had come to be so wounded.
- [9] On Mr Mbuyazi's version, he had struck up a conversation with Mr Manaka (whom he knew by sight by virtue of Mr Manaka's involvement in local soccer

team) during the morning. A comment made by him relating to one of the players in Mr Manaka's soccer team, referred to as Banju, led to Mr Manaka having lost his temper. This was evinced by Mr Manaka having struck him twice and thereafter having drawn his weapon, whereupon he fled. Mr Manaka pursued him and fired four shots, the last of which hit him. He managed to find refuge in one of the homes in the area whereupon Mr Manaka ceased further pursuit of him. On the version presented by the first respondent at the arbitration, Mr Manaka was, however, not yet finished with his violent rampage. Through its further witness, Mr Mchunu, it was alleged that upon his return to the place where the incident had started, he set upon one Mr Mchunu, who he then accused of wishing to steal the wiring that was then being removed. He then assaulted him; firstly with his fists and thereafter with either a stick or a pick axe, which he borrowed from one of the members of the Red Ants for such specific purpose.

[10] Mr Manaka denied that any such incident had taken place that day, and also denied ever having met either of his accusers prior to the disciplinary hearing in 2019. His version was supported by one Mr Tshwene Moloto, a fellow constable, who testified that they had been stationed together on 22 September 2016, and that he witnessed none of the events described by Mr Mbuyazi and Mr Mchunu.

[11] Upon the conclusion of the arbitration the third respondent found that Mr Manaka had committed the misconduct alleged, and that his dismissal had been substantively fair.

### Analysis

[12] The applicant asserted, in general terms, that the conclusions arrived at by the third respondent, that Mr Manaka was guilty of the misconduct alleged and that his dismissal was substantively fair, were not findings that a reasonable arbitrator could have arrived at in consideration of the evidence before him.

[13] Insofar as its specific complaints relating to the third respondent's treatment of the evidence was concerned, it was the applicant's case that he:

- ignored material evidence;
- ignored a number of material contradictions between the oral evidence of the first respondent's witnesses and the statements made by them in 2016;
- took irrelevant issues into consideration in rejecting the evidence of the applicant's witness, Mr Moloto;
- erred in concluding that one Mr Mawete had corroborated the identification of Mr Manaka as the person who had shot Mbuyazi when such evidence was unreliable hearsay.

[14] The applicant took further issue with the manner in which the third respondent had conducted the arbitration, having involved himself excessively in the leading of the first respondent's witnesses, and having interfered with the applicant's cross-examination thereof. By having conducted himself as aforesaid it was alleged that it was evident that the third respondent had been biased and had allowed his own personal feelings to have influenced his findings, demonstrated by the comment in his award that Mr Manaka was lucky not to have been charged with attempted murder.

[15] The third respondent was confronted with two competing versions: that of the first respondent's witnesses Mr Mbuyazi and Mr Mchunu, who testified that Mr Manaka had acted as alleged, and that of Mr Makana and Mr Moloto, who denied that the events alleged had ever occurred.

[16] In view of the fact that the first respondent bore the onus of establishing the fairness of Mr Manaka's dismissal it was required, in the first instance, to present sufficient evidence to establish that he was guilty of the misconduct alleged. To this end, it relied on the oral evidence of four witnesses, Mr Mbuyazi, Mr Mchunu, Mr Ngoako Mawete, and Mr Nhlanganiso Ndlovu, together with certain documentary evidence.

[17] In contrasting the evidence of those who were capable of giving direct evidence concerning the alleged incident, Mr Mbuyazi and Mr Mchunu, on the one hand, and Mr Makana and Mr Moloto, on the other, the third respondent found that the evidence of the former was '*cogent and compelling*' whilst that of the latter was '*nothing but a pack of lies.*' The basis upon which he preferred the former was, in part, based on his assessment that neither had waived from their respective versions. Analysis of their evidence reveals that such conclusion was not that of a reasonable decision maker.

[18] Mr Mbuyazi contradicted himself in a number of material respects in relation to the statement previously given by him in December 2016, the material portions of which read,

*'It was on 2016-09-22 Thursday at about 12:00 when I was at home and that time the Red Ants were busy taking the illegal connection at Vusimusi. They came in my house and disconnecting the wires that I was used it to connect electricity. After this I get out to see what was happening outside because I heard a lot of noise outside.*

*When I was out with other community of Vusimusi together with the Red Ants, one traffic officer came next to us because I know him, I greet him and he greet us back. Then I started talking with him by the football. We laughed each other and I said to him I will tell Banju to play unprofessional at the playground in order to lose the goals. Banju is the one who plays the team of the traffic officers. The name of the traffic officer is Manaka and I don't know his address.*

*After I said so Manaka was very angry with me and started insulting me at that time he hit me with the palm of his hand twice. After that he throw out his firearm came to me and I started running to different directions and he was followed me. I heard one shots of bullets and at that time I was busy running and the second shot making noise and he was busy chasing me. I heard the third bullet and the fourth one. After that I heard that I am no longer have the energy to run and I fell down at that moment is where I can saw that Manaka already shot me.*

*Community of Vusimusi helped me when they saw me bleeding and they took me to Birchleigh Clinic at about 16:00 at the clinic they transferred me to Tembisa hospital.*

*I was shot on my right hand on the shoulder by one bullet. I know the suspect Mr Manaka of unknown address and he is a traffic officer but I don't know where he worked.*

*I don't give anybody permission of shooting me and I request further investigation to the police.'*

[19] His evidence at the arbitration was at odds with this statement in a number of material respects, including:

- In 2016 his statement reflected that Mr Manaka had exited the cemetery where he had been standing and, after they had spoken for a while and he (Mr Mbuyzai) had joked about the player named Banju, Mr Manaka had become angry and aggressive. In contrast, his evidence at the arbitration placed Mr Manaka inside the cemetery when the conversation which led to his alleged outrage took place and it was only after he had become enraged that he had exited the cemetery and acted as alleged.
- In his statement of 2016 the shot to his arm caused him to lose the ability to move and he fell down immediately thereafter. By the time he testified, however, this aspect of the event had changed whereby he had by then been able to continue on until he found shelter in the house of a stranger and had remained hidden until the danger presented by Mr Manaka had passed.
- In 2016, without mention of either his wife or a private vehicle, he alleged in his statement only that the community had helped him find his way to the North Birchleigh Clinic after having been shot, whereas by the time he testified at the arbitration, he was able to recall that he had managed to telephoned his wife who in turn arranged for him to be driven to the clinic.



- According to his statement, he recovered two spent cartridges from the scene of the incident on 26 September 2016, whereas in his evidence he testified that he had recovered one cartridge at a much later stage, after the IPID inspector had taken his statement, which itself happened only after 'a long time had passed' after he had reported the matter to the SAPS.

[20] The same was equally true of the evidence of Mr Mchunu in relation to the version he had presented in his statement of 2016, the material portions of which read,

*'On Thursday 2016-09-22, at about 12:00 I was standing in the street next to my place of residence with Uncle Bongani Mbuyazi watching Red Ants who were disconnecting illegal connections of electricity at V Section in Tembisa. While waiting and watching I noticed one of the traffic officers known to me as Manaka who has a football team in Tembisa coming to us through a small opening in the graveyard which is in front of the houses where we were standing.*

*We then greeted and he responded and Uncle Bongani started talking to him about football and he joked with him saying that he will tell one of his players by the name of Banju to cost him a soccer match. This Banju plays for the team that this traffic officer owns and that is when he became angry and started insulting him and he assaulted him twice and when he realised that Uncle Bongani was blocking with his hands he took out his service firearm. At that he was in full uniform and he threatened to kill him and that is when Uncle Bongani started running to different direction and ran after him. Then heard four gun shots fired and notices him firing shots towards Uncle Bongani.*

*After a few minutes he came back to me, he clapped me with an open hand once on my left side of my face. He accused me that I wanted to steal the electric wire that was being disconnected. I then decided to go and while I was*

*leaving he came back and took a stick from one of the Red Ants and [illegible] to assault me with it but I was blocking with my hands injuring them.*

*I know the suspect as Mr Manaka a traffic officer at Ekurhuleni Metro and therefore [illegible] police investigations in this matter as Uncle Bongani informed me the following day that one of the bullets hit him on the right hand while running away.'*

[21] The material contradictions between this statement and Mr Mchunu's oral evidence included,

- In his statement he stated only that he heard four shots fired after both Mr Mbuyazi had run away from Mr Manaka, which was restated in his evidence in chief. Under cross-examination, he then recalled actually having witnessed the first shot having been fired by Mr Manaka.
- His statement reflected that he had been informed by Mr Mbuyazi the following day that he had been shot in the incident, however, in his evidence he testified that he discovered the following day that Mr Mbuyazi had been admitted to hospital, and did not speak with him until after he had been discharged.
- In explaining why he himself had not opened a case against Mr Manaka in respect of the assault he alleged he had suffered at his hands, he explained in his evidence that he was awaiting advice from his elder family members, and that he believed that his older brothers could accompany him to Mr Manaka to discuss matters. This was in stark contrast to the explanation given by him under cross examination wherein he indicated that he neither knew how to open a case, nor the name of his assailant. That latter explanation was in conflict with his own statement of 2016 in which he indicated that Mr Manaka was then known to him.

[22] The first respondent's additional witnesses not only added nothing to the first respondent's case, they detracted therefrom.

[23] The third respondent placed reliance on the evidence of Mr Mawele as corroboration of Mr Mbuyazi's and Mr Mchunu's identification of Mr Manaka as having been the assailant of Mr Mbuyazi, demonstrated by the finding in his award,

*'In addition to the plausible evidence of both Mbuyazi and Mchunu, the identification of the applicant as the person who shot Mbuyazi and assaulted Mchunu is corroborated by the unequivocal evidence of Mawele.'*

[24] Mr Mawele's evidence had been that shortly after the conclusion of the operation at Vusimusi on 22 September 2016, and whilst he and Mr Manaka had been travelling in a vehicle together, he had received a telephone call from Colonel Ramaphakela who was looking for Mr Manaka. Colonel Ramaphakela explained to him that he then had two people at the Tembisa South Police Station, one of whom was injured in the arm, both of whom wanted to open a case against Mr Manaka.

[25] Leaving aside the hearsay nature of that which was allegedly conveyed to Mr Mawele, which issue was given no consideration by the third respondent, the conversation itself could not possibly have been true. The first respondent's documentary evidence established that after Mr Mbuyazi had been attended to at the Birchleigh North Clinic in the afternoon of 22 September 2016 he was taken by ambulance to the Tembisa Hospital where he was admitted as a patient at 14:05 and where he remained for several days thereafter. This being the case, he could not possibly have attended at the Tembisa South Police Station after 16:00 on 22 September 2016, less so could he then have named Mr Manaka as his attacker to Colonel Ramaphakela at that time.

[26] The first respondent's witness, Mr Ndlovu, a Senior Investigator with IPID, was responsible for investigating the incident and could provide no direct evidence concerning the events of the day. His cross-examination by Mr Ntuli, Mr

Manaka's representative, revealed a number of discrepancies and deficiencies in his investigation. In the course of his investigation he never inspected the alleged scene of the incident, he never obtained cellphone records to obtain independent verification of the whereabouts of the complainants during the course of that afternoon, and, beyond establishing that Mr Manaka had been assigned to work at the Vusimusi operation on 22 September 2016, never established where he had been assigned to work, what he had been assigned to do, or with whom. The totality of his investigation appears to have constituted taking statements from a few, select individuals, and having Mr Manaka's official firearm together with the spent cartridges which Mr Mbuyazi had obtained and given to him forensically examined. No part of his evidence supported a finding that Mr Manaka had committed the infractions in question.

[27] This then, constituted the totality of the evidence upon which the first respondent's case rested: the oral evidence of two witnesses whose evidence was far from satisfactory in material respects.

[28] In contrast, there was nothing *ex facie* the evidence of either Mr Manaka or Mr Moloto which could have served to justify the third respondent's conclusion that their every utterance had been '*a pack of lies*'. Mr Manaka explained what work he had done that day, which had not included assaulting Mr Mchunu and assaulting and shooting Mr Mbuyazi, whilst Mr Moloto simply testified that he had been paired to work with Mr Mbuyazi that day and that they had spent an unremarkable day in the graveyard at Vusimusi ensuring the safety of the Red Ants.

[29] The third respondent's reasoning in having rejected Mr Moloto's evidence lacked rationality. This he seemingly did for the reason that Mr Manaka had not, prior to the disciplinary hearing having been convened during 2019, mentioned anything to him concerning the fact that he had been accused of shooting Mr Mbuyazi in 2016. Given that it took the first respondent some three years to charge Mr Manaka, and he would accordingly have had no reason to discuss the issue with Mr Moloto at any time prior thereto, it is difficult to

appreciate the basis upon which the third respondent found this reason enough to disbelieve Mr Moloto.

[30] As against these versions, the third respondent was required to consider other, extraneous evidence which could have served to prove or disprove either version. This he failed to do.

[31] Firstly, upon the finalisation of the operation it was reported to Colonel Ramaphakela that it had been concluded with neither incident nor injury. This much was recorded in the South African Police Services' Occurrence Book. Subsequent to this certain members of the Vusimusi Community had attended at the Tembisa South Police Station to complain that members of the Red Ants had stolen a cellphone or cellphones which complaint was attended to.

[32] When it was put to Mr Ndlovu that, given the size of the locality within which the operation was being conducted it would have been impossible for members of the South African Police Services, the first respondent's police department and the Red Ants not to have heard the shots in question, Mr Ndlovu elected not to comment. The reasonableness of that proposition not having been challenged, this begs the question as to why the incident was not reported at the end of the day by any one of the approximately sixty individuals who took part in the operation. Given that the shots would have been heard if the incident had indeed occurred, there would have been only two possible reasons why no report was made: either every individual who had participated in the operation colluded to cover up Mr Manaka's misconduct, or the incident simply never took place. The notion of a collusion to cover up Mr Manaka's misconduct, extending to individuals who were not his colleagues, and approximately one third of whom were members of the South African Police Services, is so far-fetched as to be wholly improbable.

[33] In addition, on the version of Mr Mchunu, Mr Manaka had in fact taken the weapon which he utilised to beat him directly from one of the members of the Red Ants. This person, who would presumably have been a direct witness to his assault, never mentioned such an incident having occurred.

[34] Finally, and notwithstanding that a violent assault had allegedly been perpetuated on two of their own, in circumstances in which the apparent loss of property warranted complaint, the members of the Vusimusi Community did not see fit to mention any such incident to the South African Police Services.

[35] The complete absence of any report concerning the alleged incident by anyone who had been in attendance in the course of the operation, which included members of the South African Police Services, the first respondent's police department, and the Red Ants, or any member of the Vusimusi community (other than Mr Mbuyazi and Mr Mchunu themselves) casts grave doubt on the notion that such an incident ever took place.

[36] This doubt is compounded by the evidence relating to the forensic testing that was performed at the request of Mr Ndlovu on Mr Manaka's official firearm, the live cartridges in that firearm, and the two spent cartridges which were alleged to have been found by Mr Mbuyazi in the vicinity of the shooting. The relevant part of the forensic examiner's Ballistic Report read as follows,

- ‘3. On 11 January 2017 during the performance of my official duties I received a sealed evidence bag with number PW3000036421 from Case Administration of the Ballistics Section, containing the following:  
A SEALED EVIDENCE BAG WITH NUMBER PAD001733828 CONTAINING:
- 3.1 One 9mm Parabellum Calibre Vektor Model SP1 Semi-Automatic Pistol, serial number S[...] with a magazine.
- 3.2 Fifteen 9 mm Parabellum Calibre cartridges unmarked.  
A SEALED EVIDENCE BAG WITH NUMBER PA5001749800 CONTAINING:
- 3.3 Two 9 mm Parabellum Calibre fired cartridge cases and marked them 520751/16 A1 and A2 respectively.
4. The intention and scope of this forensic examination comprise the following:

- 4.1 *The examination and identification of ammunition and fired cartridge cases.*
- 4.2 *Microscopic individualization of fired cartridge cases.*
- 4.3 *Firearm mechanism examination.*
- 5. *I visually inspected the cartridges mentioned in 3.2 and found they consist of a primer, cartridge case and bullet and were designed and manufactured to be fired by a centre-fire firearm.*
- 6. *I examined and tested the pistol in 3.1 and found:*
  - 6.1 *The pistol mentioned in 3.1 functions normally without any obvious defects.*
  - 6.2 *Ammunition used for test purposes was marked as 271TC1 and 271TC2 (on the cartridge cases) and 271TB1 and 271TB2 (on the bullets) and was fired in the pistol mentioned in 3.1.*
- ...
- 8. *I examined the fired cartridge cases mentioned in 3.3 and 6.2 and compared the individual and class characteristics transferred to them by firearm during the firing process using comparison microscope and found:*
  - 8.1 *The cartridge cases mentioned in 3.3 were fired in one firearm, however, it cannot be determined if they were fired or were not fired in the firearm mentioned in 3.1'*

[37] Whilst the forensic examination was inconclusive regarding whether Mr Manaka's official weapon had fired the spent cartridges which had been sent for testing, the process itself established the improbability of it having done so. It was common cause that the weapon was confiscated with a full magazine of 15 live cartridges. It was further Mr Manaka's evidence that the last occasion when he recalled having discharged his firearm was at a shooting range in 2014. More importantly, he testified that the procedure to replenish live rounds is onerous and that the bullets which are provided to the first respondent's members are marked as belonging to the first respondent. This evidence was not challenged in cross-examination. The first respondent accordingly failed to explain how it could have been that Mr Manaka's official weapon was confiscated with a full complement of live cartridges in circumstances in which

he was alleged to have discharged his weapon four times in the direction of Mr Mbuyazi on 22 September 2016, without any explanation as to how those live cartridges may have been replenished in the intervening period.

[38] The third respondent, in preferring the versions of the first respondent's witnesses, not only overlooked the inconsistencies in their own versions, but did so having failed to consider the extraneous evidence which militated against any possible finding that Mr Manaka had been guilty of the misconduct alleged.

[39] In concluding that he must have been guilty of the misconduct alleged, it appears from the third respondent's award that he placed almost exclusive reliance on the inability on the part of Mr Manaka to have provided a sufficiently satisfactorily speculative explanation as to why Mr Mbuyazi and Mr Mchunu would have accused him of having acted as alleged, if he had not done so. The difficulty with having called upon Mr Manaka to speculate a possible motive where none was obvious to him, was that he was limited by his own imagination. Whether Mr Mbuyazi and Mr Mchunu bore some deep seated resentment towards him for reasons unknown to him, or saw an opportunity to benefit financially in the amount of R2 000 000.00 by instituting action against the first respondent for on the basis of vicarious liability, or for some other unfathomable reason, the fact that Mr Manaka was unable to identify their motivation with certainty did not lead to the automatic conclusion that their versions were to be preferred.

[40] Had the third respondent applied himself to his obligation to fairly assess the evidence before him, he would have been constrained to have concluded that the evidence presented by the first respondent was insufficient a basis to have established the fairness of Mr Manaka's dismissal: the evidence of Mr Mbuyazi and Mr Mchunu was neither cogent nor consistent, the evidence of Mr Mawele could not possibly have been true, and Mr Ndlovu provided no direct evidence of the events at all. Against this, Mr Manaka's version that absolutely nothing had taken place was supported by the probabilities that a report would have been made by any number of people on 22 September 2016, had such an event taken place, as well as the objective evidence that demonstrated that the



magazine of his official weapon was full of the first respondent's issued, live rounds when it was confiscated, with no suggestion by the first respondent that Mr Manaka had taken steps to have it refilled.

[41] In the circumstances, this court finds that the third respondent's award was not that of a reasonable decision maker. Had the third respondent considered the totality of the evidence before him, he would have been constrained to have acquitted Mr Manaka of the misconduct alleged. The award accordingly falls to be reviewed and set aside and substituted with an order that Mr Manaka's dismissal by the first respondent was substantively unfair.

[42] Although the applicant included in its prayer for relief that Mr Manaka's dismissal be declared also to have been procedurally unfair, the issue of the procedural fairness of his dismissal was abandoned at the outset of the arbitration and was accordingly not an issue which the third respondent had been required to determine.

### Costs

[43] On the first occasion on which the matter was enrolled, the absence of the first respondent was wholly unexplained and an order was issued in which the first respondent's attorney of record was required to depose to an affidavit in which he was to have explained the first respondent's failure to have appeared on 18 October 2023, and to show cause why he should not be personally liable for the wasted costs of the adjournment.

[44] Although no affidavit was prepared as directed, the applicant was unable to demonstrate at the hearing of the matter on 23 November 2023 that the order of 18 October 2023 had been served on the first respondent's attorney, although it did demonstrate that the first respondent had been notified of the date to which the application had been adjourned.

[45] In the circumstances of the first respondent having failed to have appeared on 18 October 2023 without explanation for its absence, and this court not being in

a position to order that those costs be paid *de bonis propriis*, the first respondent will be ordered to pay the applicant's wasted costs occasioned thereby.

[46] Insofar as the costs of the application itself are concerned, Mr Manaka has been assisted by a trade union, SAMWU. As Mr Manaka himself has not been put to the expense of incurring costs in the protection of his right not to have been unfairly dismissed, those costs having been assumed by his trade union, SAMWU, which itself has an ongoing bargaining relationship with the first respondent, no costs order will be made in the main application.

### **Order**

1. The arbitration award issued by the third respondent under the auspices of the second respondent under case number GPD012007, dated 4 June 2021 is reviewed and set aside and substituted with an order that the dismissal of the applicant employee Mr Mashilo Peter Manaka by the first respondent on 15 November 2019 was substantively unfair.
2. The first respondent is directed to reinstate Mr Mashilo Peter Manaka to the position of Metro Police Officer with retrospective effect to 15 November 2019 on the same or substantially the same terms and conditions which governed his employment by the first respondent at the time of the termination of his employment on 15 November 2019, with no loss of benefits.
3. The first respondent is ordered to pay the applicant's wasted costs of 18 October 2023.

K Allen-Yaman  
Judge of the Labour Court of South Africa

### **Appearances**

Applicant:

Ms G Phakedi of Phakedi Attorneys Inc

First Respondent:

No appearance

# LABOUR COURT