IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR965/13

In the matter between:

SOUTH AFRICAN POLICE SERVICE **Applicant**

and

MJ NKOPANE **First Respondent**

ENDLANE COLLIN MALUBANE **Second Respondent**

GUGU BRENDA MAZIBUKO **Third Respondent**

NTENYANE CHRISTIAN TLHAKUDI **Fourth Respondent**

Heard: **24 November 2016**

Delivered: **04 April 2017**

JUDGMENT

TLHOTLHALEMAJE J

Introduction

[1] The applicant, the South African Police Service (SAPS) seeks an order reviewing and setting aside the undated arbitration ruling issued by the first respondent (Arbitrator) under case numbers DRP13/2012 and DRP15/2012. The arbitration proceedings were conducted in terms of the provisions of the Arbitration Act[1] (the Act).

[2] This dispute emanates from a termination of a training programme agreement – Memorandum of Agreement (the MOA) between the SAPS and the second to fourth respondents (the Trainees) as prospective members of the Service. The Trainees were discharged from the training program after they were found guilty of acts of misconduct deemed to be in contravention of the provisions of the MOA.

Background

[3] The Trainees were appointed as police trainees during January 2012 in terms of a fixed-term MOA for a period of 24 months. In or around July 2012, they were charged with various acts of misconduct in contravention of the MOA and the SAPS' Academy Orders. Annexure "C" to the MOA makes provision for a disciplinary procedure to be followed in instances of misconduct.

[4] Endlane Collin Malubane (Malubane) was allegedly found to have been under the influence of alcohol and in possession of alcoholic drinks on 01 July 2012. Gugu Brenda Mazibuko (Mazibuko) and Ntenyane Christian Tlhakudi (Tlhakudi) were charged with offences related to an incident involving another trainee, Mmelesi, who had complained of being assaulted by Mazibuko. Mmelesi had also alleged that Tlhakudi attempted to sexually assault and forcibly kiss her. An internal disciplinary enquiry took place on 05 September 2012 and 21 September 2012, and they were accordingly found guilty of the said charges, resulting in the MOA's being terminated.

[1] Act 42 of 1965.

[5] After the disciplinary hearings, the chairperson had informed the Trainees of their rights in terms of clause 15 of Annexure "C" of the MOA, which provided that a party aggrieved by the outcome of an internal hearing, could make submissions to the Divisional Commissioner: Human Resource Development within three (3) business days, whose decision is deemed final and binding, subject to any arbitration ruling on the matter in accordance with clause 17 of Annexure "C". Malubane had made representations, and his outcome is recorded as follows:

> "I have viewed the details of the case and have taken cognizance of your representation. I consider the misconduct to be of a very serious nature. I concur with the sanction imposed by the Presiding Officer to terminate the agreement".

[6] The above was signed by Major General S Nyalungu (Nyalungu), Head: Basic Police Development. On 12 September 2012, Malubane was served with a notice of termination of the MOA with effect from 07 September 2012. The outcome of similar representations made by Mazibuko and Tlhakudi was dated 09 October 2012, and signed by Nyalungu. They were informed on 11 October 2012 of the termination of the MOAs.

[7] In terms of clause 4 of Annexure "D" to the MOA, any dissatisfaction and/or dispute regarding the interpretation, application or termination of the agreement must be referred to the Dispute Resolution Panel, which is appointed by the National Commissioner. Representatives of the SAPS and the Trainees agree on a member of the Panel, who will arbitrate the dispute in accordance with the provisions of the Act.

[8] On 15 February 2013, the Trainees and SAPS agreed to refer the dispute to arbitration. The arbitration hearing took place on 15 February 2013 after the Trainees' disputes were consolidated. At the commencement of the arbitration proceedings the Trainees' representative had raised a "preliminary point", calling into question the authority of the reviewing personnel (Nyalungu) to

confirm the termination of the MOAs. The Arbitrator upheld the preliminary point, concluded that the termination of the MOAs was invalid, and ordered SAPS to reinstate the Trainees in the training programme.

Condonation

[9] The ruling of the Arbitrator is undated, and it was contended on behalf of SAPS that it was only received on 25 March 2013. The review application was filed and served on 15 May 2013. In terms of section 32(2) of the Act, an application for review must be filed within six weeks from the date the award was published.[2] Accordingly, the delay in filing the review application is about six days.

[10] The principles applicable in applications for condonation are well-known. The court exercises its discretion in such matters having considered circumstances of each case, including whether it is in the interests of justice to grant condonation, the extent of the delay, the explanation for the delay, the effect of the delay on the administration of justice and other litigants, the importance of the issues and the prospects of success.[3]

[11] It cannot be doubted that a delay of about six days is hardly excessive. I have also taken regard of the explanation in this regard as proffered by the SAPS' Josiah Rasi Mokoena in his founding affidavit, including that the papers for the review application were finalised on time, and that one Mhambi, who was tasked by the Office of the State Attorney to service and file the papers timeously, had not done so prior to his resignation. In the light of the non-excessive nature of the delay, the explanation in that regard, the SAPS'

[2] Section 32(2) which provides that:

> "The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct."

[3] See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B-E, *United Plant Hire (Pty) Ltd v Hills 1976* (1) SA 717 (A) at 720 E –G; *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F.

prospects of success in the review application, and a further consideration of the interests of justice, it is concluded that condonation ought to be granted.

The arbitration agreement

[12] The essential elements of the arbitration agreement are:

a) The Arbitrator will be appointed on a rotation basis by the SAPS from the Dispute Resolution Panel;

b) The Arbitrator will have the power to decide upon the procedure to be followed at the hearing;

c) The Arbitrator shall make an award which he/she deems reasonable and appropriate in the circumstances;

d) The Arbitrator's award would be final and binding;

e) The Arbitrator was required to decide (in respect of Malubane):

"Whether the conduct of SAPS was unfair towards the Trainee."

f) In respect of Mazibuko and Tlhakudi, the Arbitrator was asked to decide:

(i) Whether there is fair cause to make a finding of misconduct against the Trainee and whether the sanction imposed was fair;

(ii) Whether there was a fair cause to terminate the Agreement between SAPS and the Trainee; or

(iii) Whether the conduct of SAPS was unfair towards the Trainee.

The arbitration proceedings

[13] As already indicated, a preliminary point was raised on behalf of the Trainees at the commencement of the proceedings, which it was contended, went to the validity of the dismissal.[4] In this regard, the argument was that in purporting to terminate the MOAs, the SAPS had not adhered to the provisions of clause 15 of Annexure "C" to the MOA, insofar as Nyalungu had signed off the notices or letters confirming the terminations. It was argued that only the Divisional Commissioner: Human Resources Development had the

[4] Line 14 of page 7 of the record of proceedings.

authority to respond to the representations made by the Trainees after the termination of the MOAs, and when Nyalungu purported to give notice of outcome of the representations, he had acted *ultra vires*, and the decision was therefore null and void.

[14] The SAPS' initial response to the preliminary point was that any reference to "The Divisional Provincial Human Resource Development" was in regard to the *office*, and *not the individual*, and that Nyalungu had in signing off the terminations, acted on behalf of those in power and was authorised to do so. At that point, the Arbitrator sought proof of delegated authority, and stood down the matter to allow the SAPS' representative at the proceedings to get proof that indeed Nyalungu had delegated authority. Prior to doing so, the SAPS' representative then conceded that the point raised pertained to a procedural issue, and that to the extent that Nyalungu had no delegated authority, then the substance of the charges should be dealt with. The Arbitrator was still not satisfied and had implored the SAPS' representative to go and verify whether Nyalungu had the necessary delegated authority to sign off the confirmation of the termination of the MOAs.

[15] Nyalungu was then called upon to testify on whether he signed the outcome of representation and/ or whether he had authority to consider the representation taking into account the provisions of Annexure "C". His evidence may be summarised as follows:

15.1. He is the Head: Human Resource Development, and had been in the South African Police Service for over 30 years at the time of the arbitration. His duties included the management of the Basic Training Development Department;

15.2. He confirmed that he had signed the notices of termination. He testified that the functions such as termination and suspension of Trainees were assigned to him by the Divisional Commissioner, and that he reported to the Divisional Commissioner, Lieutenant General Mbekela;

15.3. The Divisional Commissioner had assigned him the referred functions verbally, but he had readily conceded that the verbal instruction did not

amount to an amendment of the MOA, as reference to 'Divisional Commissioner' referred to the Office and not the incumbent. He however contended that reference to 'Divisional Commissioner' also includes the Management Team of the Office, and as a result, and as it was normal practice, he was assigned with the administration of the MOAs;

15.4. He maintained under cross-examination that he had the authority to sign the outcome of representations, and contended that his conduct did not infringe on the contractual rights of the Trainees.

The Ruling

[16] The Arbitrator's starting point was to consider whether the MOAs were validly terminated, and her reasoning in coming to her conclusions was as follows:

16.1. There was insufficient evidence to enable her to make a finding on whether the authority vesting on the Divisional Commissioner to consider the representation was a delegated authority or not;

16.2. In terms of the MOA, the authority to consider the representation was vested in the Divisional Commissioner: Human resources Development, Lieutenant General Mbekela.

16.3. If it was the intention of the parties that the powers to consider the representation were to be vested in the Office of the Divisional Commissioner, and by extension, the person within that Office, that would have been explicitly included in the agreement, and any delegated authority would have been in writing;

16.4. Nyalungu therefore did not have the authority to consider the representations made by the Trainees or the authority to terminate the MOAs. In the result, MOAs were not validly terminated, and therefore the purported terminations were null and void;

16.5. In respect of the relief, the Arbitrator found that the only competent order was for the Trainees to be allowed back and continue with the training programme from where they had "left off".

The review test

[17] Flowing from the seminal decisions in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another*[5] and *Telcordia Technologies Inc v Telkom SA Ltd*,[6] it is now accepted that awards emanating from proceedings conducted under private arbitrations are reviewable only on the grounds set out in section 33 of the Act.[7] The Labour Appeal Court in *NUM obo 35 Employees v Arbitrator John Grogan NO & Another*[8] succinctly restated the review test as follows:

> "I am inclined to agree with Counsel for the first respondent that, on the facts of this case, it would not matter whether one used the standard of review applicable to CCMA awards as stipulated in sec 145 of the LRA or one used the standard of review contained in sec 33 of the Arbitration Act as the result would be the same. However, in so far as it may be necessary to decide the issue, I am of the view that the respondent's Counsel is correct that, since this is a review of a private arbitration award, it can only be reviewed on the grounds set out in sec 33 of the Arbitration Act and not in terms of the grounds set out in sec 145 of the LRA as extended by the judgments of this Court in *Carephone* and *Shoprite Checkers* and by the judgment of the Constitutional Court in *Sidumo*. In my view, while parties to a dispute are able to give an arbitrator powers which he otherwise does not have in resolving their dispute, they cannot do the same with regard to a court such as the Labour Court which has statutory power to review arbitration award issued by such arbitrator. Parties to a dispute such as the parties in this case cannot confer on the Labour Court powers to review a private arbitrator's award on grounds which it otherwise has no power to rely upon to review such an award. It would be different if there was a provision of the

[5] [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC). *(Lufuno Mphaphuli and Associates)*

[6] [2006] ZASCA 112; 2007 (3) SA 266 (SCA; 2007 (5) BCLR 503 (SCA). *(Telcordia Technologies Inc)*

[7] Section 33 of the Arbitration Act which provides:

> "(1) Where
>
> a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers;
>
> c) An award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[8] [2010] 8 BLLR 799 (LAC); (2010) 31 ILJ 1618 (LAC) at para 33. See also *Volkswagen SA (Pty) Ltd v Koorts NO & Others* (2011) 6 BLLR 561 (LAC).

> LRA which conferred upon the Labour Court the power to review such an award on any grounds upon which the parties to a dispute may agree. That is not the case here. Accordingly, I hold that the grounds of review applicable in this case are only those grounds set out in sec 33 of the Arbitration Act on which the appellant has relied in its papers. In this regard the appellant relied upon gross irregularity."

[18] Thus, the wider test for review of section 145 of the Labour Relations Act[9] (LRA) is not applicable to private arbitrations, and in *Clear Channel Independent (Pty) Ltd v Savage NO and Another*,[10] it was confirmed that the test as set out in *Telcordia* applied in reviews of private arbitration labour disputes.

[19] In *Telcordia Technologies Inc,* the SCA further held that courts should not be too eager to interfere with private arbitration awards, and held that:

> "By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case."[11]

And,

> "Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, '"common law" or otherwise. If they wish to extend the grounds, they may do so by agreement but then they I have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court."[12]

The grounds of review

[9] 66 of 1995.

[10] [2008] ZALC 166; [2009] 5 BLLR 439 (CC); (2009) 30 ILJ 1593 (LC) at para 36.

[11] *Telcordia Technologies Inc* above n 6 at 50.

[12] Id at para 51. See also *Volkswagen SA (Pty) Ltd v Koorts NO & Others* (2011) 6 BLLR 561 (LAC); (2011) 32 ILJ 1892 (LAC) at para 9.

[20] SAPS' main contentions are that the Arbitrator:

20.1. committed a gross irregularity in the conduct of the arbitration proceedings and/ or exceeded her powers;

20.2. the ruling did not fall within the Arbitrator' terms of reference;

20.3. made an error in law by finding that the decision of Nyalungu to uphold the terminations was the actual decision to terminate the agreement;

20.4. misconceived the nature of the inquiry she was required to determine. In this regard, the applicant's argument was that the Arbitrator had to determine whether the Trainees were guilty of misconduct and if so, what ought to have been the appropriate sanction.

[21] The Trainees in their answering affidavit submitted that:

21.1. this Court lacked jurisdiction to hear the review application on basis that the ruling was issued in terms of the Act, and further that they were not "employees" as defined;

21.2. the parties by agreeing to arbitrate the dispute under the Act agreed that the fairness of the hearing would be determined by the provisions of the Act; and had waived their rights of appeal;

21.3. the parties further agreed to limit the interference by the Courts to the ground of procedural irregularities set out in section 33(1) of the Act, and thus waived the right to rely on any further ground of review, common law or otherwise;

21.4. the SAPS' application was meant to ask the Court to exercise a mandate it did not have, as the only grounds of review applicable were those set out in section 33 of the Act.

[22] The SAPS' response in this regard was that a court may set aside an award in terms of the Act if the grounds as outlined in section 33(1) were met; that in terms of section 157(3) of the LRA, any reference to the court in terms of the Arbitration Act must be interpreted as referring to the Labour Court when an

arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of the Act; and that this Court has jurisdiction to hear a dismissal dispute that has been arbitrated in terms of the Arbitration Act, and that the relationship between the parties must be determined in terms of the agreement between the parties.

[23] SAPS' further contended that the Trainees were appointed in terms of Regulation 38(1); were paid a stipend, and had received other benefits. It was argued that there was nothing in the MOAs that stipulated that the Trainees were not employees, and further reliance in support of this contention was placed on the provisions of section 200A of the LRA to demonstrate that the trainees ought to be regarded as employees.

Evaluation

[24] On 4 August 2016, the Trainees' application in terms of rule 11(1)(a) and (2) of the Rules of this Court came before Van Niekerk J. In that application, they had contended that the review application ought to be dismissed on the basis that the SAPS had not established the jurisdiction of this Court as they were not "employees" as defined in section 213 of the LRA. They had further contended that the ruling which was the subject matter of the review application was final and binding, and was thus not subject to review by this Court.

[25] The rule 11 application was however withdrawn on its hearing date. Van Niekerk J had further ordered that costs of that application were to be determined together with the review application. To the extent that this was the case, I will accept that the question of whether the Trainees were "employees" or not is no longer an issue. In any event, I am of the view that the status of the Trainees as at the date of termination of the MOAs is of no consequence in this case, as the parties per the provisions of the MOAs and Annexure "C" had agreed to subject their dispute to private arbitration in terms of the Act, and accordingly, its section 33 is applicable.

[26] Regarding the issue of whether this Court has the requisite jurisdiction to determine the review application, it is trite that the competency of this Court to adjudicate matters derives from the provisions of section 157 of the LRA.[13] Section 157(3) of the LRA[14] enjoins this Court to adjudicate matters emanating from private arbitrations in respect of disputes which may be referred for arbitration under the LRA. Thus, for this Court to have the requisite jurisdiction to consider this review application, the question is whether the underlying dispute between the parties is one that could have been arbitrable under the provisions of the LRA.

[27] The dispute referred for private arbitration in this case pertained to the termination of the MOAs. In this regard, the Arbitrator was required to determine the issues as per the terms of reference as agreed between the parties. In terms of clause 7.3 of the MOA, any termination of the agreement on grounds of misconduct was to be dealt with in terms of the provisions of Annexure "C" to the MOA. Clause 12 of the MOA further provides that any disputes between the parties in connection with the interpretation, application or termination of the MOA shall, unless resolved by the parties, be determined by arbitration as provided for in Annexure "C".

[28] Annexure "C" mainly deals with misconduct during the training programme. Once the matter reaches a stage where the Divisional Commissioner makes a final determination on the matter involving misconduct and the Trainee is dissatisfied, the matter must be referred to the Dispute Resolution Panel for arbitration, which is appointed by the National Commissioner after consultation with recognised trade unions.

---

[13] Section 157(1) which reads:

> "subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

[14] Section 157(3) of the LRA provides that:

> "Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act."

[29] But for the above in-built dispute resolution procedures as contained in the MOAs, the trainees would ordinarily have been entitled to refer the termination thereof to the relevant bargaining council for determination. There is therefore no merit in the argument that this Court lacks jurisdiction to determine the review application in the light of the provisions of section 157(3) of the LRA and the authorities referred above.

[30] A further argument raised on behalf of the Trainees was that the ruling is not reviewable on the basis that the Arbitrator's terms of reference specifically provided that her award (or ruling as in this case) was 'final and binding'. This contention equally has no merit. Awards and rulings issued under section 138(7) of the LRA are meant to be final and binding in accordance with the provisions of section 143(1) of the LRA. This however does not imply that they are not susceptible to a review under the provisions of sections 145 or 158 (h) of the LRA. Equally so with private arbitrations, section 28 of the Act provides that an award shall, subject to the provisions of the Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms. The provisions of section 33 however specify circumstances where any award issued under the Act may be reviewed. As far as I understood the Trainees' case, it was not contended that this review application was an appeal in disguise.

[31] The next issue to be determined is whether the grounds relied upon by SAPS in seeking relief are sustainable within the provisions of section 33 of the Act. Thus, it must be determined whether the Arbitrator committed a gross irregularity in the conduct of proceedings, or alternatively, exceeded her powers as alleged by SAPS.

[32] As to what constitutes the "exceeding of powers" was addressed by the Supreme Court of Appeal in *Telcordia Technologies Inc*[15] in the following terms:

[15] *Telcordia Technologies Inc* above n 6 at para 52.

"The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all:

> "But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail.""

[33] Similarly, in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*,[16] Goldstone JA in a further elucidation of the grounds of review under section 33 held that:

> "Before considering these grounds, it is as well to emphasise that the basis upon which a Court will set aside an arbitrator's award is a very narrow one...."
>
> "It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a Court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s 33(1)(b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: *Dickenson and Brown v Fisher's Executors 1915 AD 166 at 174-81*. It was held in *Donner v Ehrlich 1928 WLD 159* at 161 that even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant interference."[17]

---

[16] 1994 (1) SA 162 (A).

[17] Id at page 169 B-D.

[34] The SAPS' argument is predicated on the contention that the Arbitrator's ruling did not fall within her terms of reference. Thus, in finding that the termination of the MOAs as confirmed by Nyalungu was invalid, the inquiry is not whether the Arbitrator erroneously exercised powers vested in her but whether she purported to exercise powers she did not have.

[35] The arbitration agreement as already stated is formulated in broad terms. The Arbitrator's terms of reference included a determination of whether there was *a fair cause* to make a finding of misconduct against the trainees, whether there *was a fair cause* to terminate the MOAs, and whether the conduct of SAPS was *unfair* towards the Trainees. Clause 4 of the arbitration agreement granted the Arbitrator the power to decide upon the procedure to be followed at the hearing, whilst clause 5 enjoined her to make an award which she deemed *reasonable and appropriate in the circumstances*.

[36] Thus, to the extent that fairness was the theme of the terms of reference, the question that arises is whether the Arbitrator committed an irregularity or exceeded her powers by determining the validity of the termination of the MOAs. Thus, can it be said that the Arbitrator's mandate was only confined to the fairness of the termination of the MOAs in line with the terms of reference and her powers, or was she entitled to address and consider any other points pertaining to the matter?

[37] In *Telcordia Technologies Inc,* the SCA held that arbitrators can be "wrong in their exercise of duties" and restated the position as follows:

> "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of

> the inquiry. To adapt the quoted words of Hoexter JA: 'It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court'"[18]

And,

> "Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."[19] (Footnote omitted)

[38] In this case, the issue of the invalidity of the termination of the MOAs was raised right at the commencement of private arbitration proceedings. In *Lufuno Mphaphuli and Associates*, it was held that:

> "The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from

[18] *Telcordia Technologies Inc* above n 6 at para 85.

[19] Id at para 86.

> the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated."[20]

[39] In my view, given the wide powers conferred upon the Arbitrator in accordance with clauses 4 and 5 of the arbitration agreement, and the narrow approach that this Court is required to adopt in reviews of this nature,[21] there was nothing that precluded the Arbitrator from considering whether the terminations were valid or not as a point raised on behalf of the Trainees. As far as those arbitration proceedings are concerned, the Arbitrator went at length in affording the SAPS an opportunity to demonstrate that Nyalungu did indeed have the requisite delegated authority to confirm the termination of the MOAs. There is in my view, no basis to suggest that the Arbitrator's approach in this regard was in any manner irregular, or that she had exceeded her powers in considering the point as raised, or that she had incorrectly interpreted her terms of reference.

[40] The validity in question pertained to whether the SAPS had effected the terminations in accordance with the terms and conditions of the MOAs, and the Arbitrator's interpretation of Annexure "C" of the MOA cannot in my view be faulted. Thus, once it was established that Nyalungu did not have the requisite delegated authority to terminate the MOAs, it followed that the terminations could not have been valid. The contention by SAPS that

---

[20] *Lufuno Mphaphuli and Associates* above n 5 at para 236.

[21] See *Academic and Professional Staff Association v Pretorius SC N.O. and Others* [2008] 1 BLLR 1 (LC) para 59 where it was held that:

> "The courts have, in dealing with review of private arbitration, adopted a narrow approach. This approach confines itself to mainly issues related to procedural aspects of the arbitration. This approach is mainly informed by the fact that private arbitration flow from the consent of parties, who, through an agreement, determine the powers of the arbitrator."

Nyalungu merely acted in error can only be affirmation of the invalidity of his decision.

[41] The SAPS' contention that the Arbitrator had to first determine whether the Trainees were guilty of misconduct and if so, what was the appropriate sanction is however not without merit. This is so in that, in the light of the terms of reference under clause 2 of the arbitration agreement, the Arbitrator was required to consider the merits leading to the termination of the MOAs and the fairness thereof.

[42] Central to the determination of the merits however, and as can be gleaned from the record of the proceedings and the ruling itself, is the initial decision to terminate the MOAs, which was not even dealt with during the arbitration proceedings. To the extent that this was the case, that decision stands. What was invalid however was the confirmation of that decision by Nyalungu in contravention of the provisions of Annexure 'C'. Thus, once that finding of invalidity was made, that was the end of the matter. There is however no merit in the contention that a finding of invalidity extended to the initial decision to terminate the MOAs.

[43] In the light of the above conclusions, there is no basis for a conclusion to be reached that the Arbitrator exceeded her powers or committed any gross irregularity in the conduct of proceedings. The only issue that remains however is whether the relief granted by the Arbitrator was reasonable and appropriate in the circumstances, more specifically in the light of her powers as encapsulated in clause 5 of the arbitration agreement.

[44] In *Steenkamp,*[22] Zondo J having considered a competent remedy within the context of an invalid dismissal and the effect thereof held as follows:

> "The common law which gives us the concept of the invalidity of a dismissal is rigid. It says that if a dismissal is unlawful and invalid, the employee is

[22] *Steenkamp and Others v Edcon Limited* [2016] ZACC 1; (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC).

> treated as never having been dismissed irrespective of whether the only problem with the dismissal was some minor procedural non-compliance. The consequences thereof are that the employer must pay the employee full back-pay even if, substantively, the employer had a good and fair reason to dismiss the employee.[23]

And,

> "An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer. In this Court's unanimous judgment in *Equity Aviation*, Nkabinde J articulated the meaning of the word "reinstate" in the context of an employee who has been dismissed. She said, quite correctly, it means to restore the employee to the position in which he or she was before he or she was dismissed. With that meaning in mind, the question that arises in the context of an employee whose dismissal has been found to be invalid and of no force and effect is: how do you restore an employee to the position from which he or she has never been moved? That a dismissal is invalid and of no force and effect means that it is not recognised as having happened. It is different from a dismissal that is found to be unfair because that dismissal is recognised in law as having occurred."[24] (Footnotes omitted.)

[45] It is accepted that the above was stated within the context of the interpretation of section 189A(2)(a) read with section 189A(8) of the LRA, in addressing whether non-compliance with those provisions could lead to a finding of invalidity or not. In this case however, the issue was the termination of the MOAs in terms of which the Trainees were appointed, and not a dismissal within the meaning of the provisions of the LRA. Furthermore, the arbitration proceedings were conducted in terms of the provisions of the Act.

[46] From the above, and considering the effect of a declaration of invalidity as elucidated in *Steenkamp*, what this implies then is that the purported termination of the MOAs as effected by Nyalungu is a nullity, and of no force

[23] Id at para 118.

[24] Id at para 189.

and effect. There is therefore no basis to interfere with the Arbitrator's findings, including the relief granted therein.

[47] In regard to the issue of costs, as already indicated elsewhere in this judgment, the Trainees had launched and a rule 11 application and withdrew it on 04 August 2016. Nothing was presented before the Court as to the reason costs should not be awarded in that instance, especially in the absence of a tender of costs prior to the withdrawal. In respect of the costs pertaining to this application, it is my view however that the requirements of law and fairness militates against any such cost order.

Order

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

1. The Applicant's late filing of the review application is condoned.
2. The application to review and set aside the undated ruling issued by the First Respondent is dismissed.
3. The Second to Fourth respondents are ordered jointly and severally, to pay the costs of the rule 11 application that was withdrawn on 04 August 2016.
4. There is no order as to costs in respect of the review application.

_____

E. Thotlhalemaje

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant:	Adv. P Pio
Instructed by:	The State Attorney, Pretoria
For the Second –	
Fourth respondents:	Adv. VP Ngutshana
Instructed by:	Maoba Attorneys