



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No: JR857/21

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS UNION  
obo THABO BEN MOABI & TWO OTHERS**

**Applicant**

and

**SOUTH AFRICAN LOCAL GOVERNMENT  
BARGAINING COUNCIL**

**First Respondent**

**CITY OF JOHANNESBURG**

**Second Respondent**

**PALESA MAWASHA N.O.**

**Third Respondent**

**Heard: 25 June 2024**

**Delivered: 30 September 2024**

**(This judgment was handed down electronically by emailing a copy to the parties. The 30 September 2024 is deemed to be the date of delivery of this judgment).**

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**JUDGMENT**

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**RAMJI, AJ**Introduction

[1] The South African Municipal Workers' Union (SAMWU) is the applicant in this review application. At the hearing of this matter, I granted SAMWU's application to condone the late filing of its review application and provided judgment *ex tempore*.

[2] SAMWU seeks to set aside the arbitration award of 20 February 2021, made by the Third Respondent (commissioner) under the auspices of the First Respondent, the South African Local Government Bargaining Council (Council). SAMWU brings the review application on behalf of three former Johannesburg Metropolitan Police Department officers (officers). Until their dismissal the officers were employees of the Second Respondent, the City of Johannesburg (City).

[3] The officers were charged as follows on 11 February 2019:

'Failure to comply with the standard of conduct as contained in ANNEXURE A of the Disciplinary Procedure Collective Agreement, clause 1.2.5 read with 2.7.5 and 2.7.9:

On 18<sup>th</sup> September 2019 at about 09h00 Prelude and Genesis Streets in the district of Johannesburg, you were complicit and/or party to, either directly or indirectly in an act of soliciting and/or extortion (i.e. corruption) whereby an amount of R4000.00 (four thousand Rand) was accepted and/or taken and/or received by your colleagues and yourself from Mr M Omar and his uncle in order not to arrest him and/or his uncle after you had found them in possession of cash in excess of R20 000.00 (twenty thousand Rand).' [Sic]

[4] The officers were dismissed on 16 October 2020. SAMWU challenged the substantive fairness of the dismissal. The Commissioner found their dismissals to be

substantively fair.<sup>1</sup> SAMWU argues that the Commissioner committed several reviewable errors which warrant the setting aside of the award. Before proceeding to the merits of the review application, I deal with the City's opposition to the review application and accompanying motions, and with the incomplete record filed by SAMWU.

#### Opposition to the review application

[5] The City filed a notice of intention to oppose the review application through its attorneys on 20 August 2021. It appears from the court file that the City then served but did not file any pleadings after this.

[6] A copy of an answering affidavit deposed to by the Acting Director for Employment Relations and Development, and a copy of a covering filing sheet (both dated 30 September 2021) appear in the court file but bear no court stamp and there is no other indication that they were filed in terms of rule 5 of the Labour Court Rules<sup>2</sup> applicable at the time. SAMWU's attorney, Ms Phakedi, explained at the hearing that the answering affidavit was served on her offices and, not knowing that it had not been filed, she entered SAMWU's replying affidavit. Her firm then put a copy of the City's answering affidavit in the court file to have the matter enrolled. This is why the unstamped answering affidavit was before me.

[7] On 11 October 2021, SAMWU objected to the City's late filing of its answering affidavit. The City then served SAMWU with an application for condonation on 14 October 2021. SAMWU filed papers opposing the City's application for condonation. There was, however, no condonation application from the City in the court file – filed or not. No representative appeared for the City at the hearing to explain the status of the pleadings, explain whether they were filed or to argue the City's opposition or condonation application. The City also appears not to have filed heads of argument. To exercise my discretion on whether to grant condonation, I must be fully apprised

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<sup>1</sup> In heads of argument, SAMWU's attorney, Ms Phakedi, stated that the dismissals were both procedurally and substantively unfair, but procedural fairness was never challenged at the hearing and the officers' representative at the CCMA was explicit about that.

<sup>2</sup>GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

of the facts relating to the delay. These are not before me, and I therefore cannot condone the lateness of the City's answering affidavit.<sup>3</sup>

### Incomplete record

[8] Only the transcript of the Council's proceedings was provided. The transcript indicates that the officer's representatives (at the time, another trade union) and the City submitted their own bundles of documentary evidence and that the City also submitted video evidence. The arbitration award states that the Commissioner conducted an inspection *in loco* at the site of the officers' alleged misconduct on 29 January 2021. The inspection was not transcribed for the record.

[9] In *Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo & others*<sup>4</sup> (*Baloyi*), the Constitutional Court held:

'There may be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record, or what remedy should follow when no proper record is available. In this case, it was improper of the Labour Court...'<sup>5</sup> [Own Emphasis]

[10] There is therefore no strict rule that prevents the determination of a review without a record. This is borne out by other case law.<sup>6</sup> In *Baloyi*, the Labour Court made a decision based only on a Commissioner's handwritten notes (which had been typed out), in circumstances where the bargaining council expressly made no objection to the arbitration award being set aside based on the absence of the record, and where the applicant in the review application disputed the facts recorded in the Commissioner's handwritten notes.

[11] The facts relating to the provision and contents of the record in this case are different. In this case, the arbitration award and transcript of Council proceedings are

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<sup>3</sup> *Seatlolo & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC); [2011] ZALCJHB 88 at paras 11 and 27.

<sup>4</sup> (2016) 37 ILJ 549 (CC); [2016] 4 BLLR 319 (CC).

<sup>5</sup> *Ibid* at para 36.

<sup>6</sup> See the majority judgment in *Papane v Van Aarde NO & others* (2007) 28 ILJ 2561 (LAC); [2007] 11 BLLR 1043 (LAC) at para 30. See also: *SA Social Security Agency v Hartley & others (Hartley)* (2023) 44 ILJ 1334 (LC); [2023] ZALCJHB 50 at paras 51 – 52.

available. There is no documentation in the court filed indicating that SAMWU made any attempt to reconstruct the missing portions of the record. Ultimately, providing the record is an applicant's duty and this Court has held:

'The applicant should assess its grounds for review and consider whether the available portion of the record is sufficient to proceed with the review and whether this court would be in a position to consider and determine the review on such limited portion of the record.'<sup>7</sup>

[12] Ms Phakedi urged me to determine the application based on the transcript, effectively conveying that SAMWU was prepared to stand or fall by the transcript. Ms Phakedi explained that the transcript was sufficient. I agree: Hearings were held until 8 February 2021. I have transcripts of proceedings covering all witness testimony. Although both parties submitted bundles of documentary evidence, the transcript does not reflect extensive reliance on the documentary evidence, with the notable exception of the invoice from the shop at China Shopping Centre to which the Omars alleged they were travelling, and previous statements that were read into the record. There was a video which was used by the employer at the arbitration, but SAMWU does not dispute what the video depicts. Instead, Ms Phakedi argued that the inference drawn from the depiction is unreasonable.

[13] I am therefore satisfied that I may determine the merits of the review application, instead of setting aside the award solely based on an incomplete record.

#### Background facts

[14] These facts are not in dispute: On the morning of 18 September 2019 at approximately 09h00, Mahomed and Mikhael Omar were travelling in Selby, Johannesburg South, in a Range Rover with tinted windows. In the remainder of this judgment, I shall refer to them by their first names only for convenience. Mohamed was sitting in the passenger seat and his nephew, Mikhael, was driving. They were stopped by the officers after crossing the Prelude Avenue and Genesis Boulevard intersection. The officers, all constables, were in a JMPD vehicle. Constable Mahori

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<sup>7</sup> *Hartley* supra at para 50.

was driving. To stop the Omars, the officers made a U-turn and followed the Omars signalling them to stop. The Omar's stopped. Two armed officers approached the Omar's vehicle, Constables Mahori and Moabi. Constable Mashego also exited the JMPD vehicle but remained behind the Range Rover, bearing his rifle. All officers were wearing plain clothes. The officers checked Mikhael's driver's licence and the car licence. They asked the Omars if they were carrying firearms. They then conducted a thorough search of the vehicle, and at least Mikhael was forced to exit the vehicle.

[15] There are other facts in dispute.

[16] The officers testified that the Omars did not stop at the stop sign at the intersection, and Constables Mahori and Mashego both testified that Constable Mahori took the decision to pull the Omar's vehicle over for that reason. The Omars both testified that Mikhael stopped at the stop street and, after stopping and then crossing, was pulled over by the officers in the JMPD vehicle.

[17] The Omars testified that Constable Moabi approached the driver's side and Constable Mohari the passenger side. The officers testified that both Constables approached on the driver's side only at first, with Constable Mahori leading, and then moving over to the passenger side after checking Mikhael's driver's licence and scanning the car licence disc positioned on the passenger side of the vehicle. The Omars testified that the officers did not identify themselves. Constable Mahori testified that he immediately produced his officer's card and told the Omar's that they had been pulled over for failing to stop at a stop street. The Omars testified that Constable Mohari asked for them to unlock the vehicle and proceeded to conduct a thorough search. Constable Mahori testified that he sought permission, that this was granted and that Mohamed exited the vehicle and observed his search. Constable Mahori then testified that during the search, Mohamed said to the two constables that they were harassing them and that he (Mahomed) knew people in high places, specifically naming the SAPS officer (Strydom) who would hand the case over to JMPD sergeant (Nemukula) for internal investigation. This was in addition to Mikhael's opposition to the searches.

[18] At this point, the parties' versions deviate completely. The officers' version is that after searching the Omars' vehicle and each of the men, they found nothing indicating criminal activity, they warned them about stopping at stop signs and let them proceed on their way. They did not issue Mikhael with a ticket for a traffic violation because they were on crime prevention duty (not traffic enforcement duty) and had therefore not brought their ticket books with them, and that it was in their discretion to verbally warn a driver. Constable Mahori further added that the officers usually specialise in arrests and hijackings and had no instructions for this shift.

[19] The officers testified that the Omars both asked why they were being treated like criminals and being approached with weapons. Mikhael was argumentative regarding the search (asking about a search warrant) and uncooperative when asked to exit the vehicle leading to Constable Moabi forcing Mikhael's door open and removing him from the car. Constable Mashego testified that he was generally too far to see anything, but all officers testified that he noticed a confrontation and approached the Omar's vehicle at one point. During the body search, Constable Mashego approached to check on the situation because of Mikhael's alleged confrontational behaviour, after which Mikhael began co-operating.

[20] The Omars version is that from the outset, Constable Mahori asked if they were carrying money, and told them that if they were, money laundering was a crime. Mahomed admits that he lied and said they were not carrying money, claiming that he lied out of fear. When the physical search took place, large amounts of cash were discovered on each of them (Mohamed testifying R20,000 in each of their pockets, and Mikhael testifying R10,000 in each of their pockets). They testified that they were carrying cash to pay a supplier at China Shopping Centre, who only took payment in cash. Constable Mahori told the Omars that carrying more than R10,000 on your person was money laundering, and told them to empty the cash from their pockets and place it on the vehicle floor. The officer then instructed the Omars to get back into the vehicles because they had to be taken to the police station to fill in forms relating to money laundering. At this point, Mahomed asked what he could do, to which Constable Mahori asked for R6,000. This was eventually negotiated down to R4,000, which the Omars paid over to Constable Mahori.

[21] There is a dispute as to whether the officers then trailed the Omars to their destination, or whether the officers merely followed behind in order to make a U-turn and return to their position. Video evidence (not included in the record) showed the JMPD vehicle driving behind the Omars for a portion of the time.

[22] Sergeant Nemukula's testimony about the incident between the Omars and the officers was hearsay but served to corroborate certain material aspects of the Omar's version. In other respects, Sergeant Nemukula deviated, most notably in respect of where the officers stood. Contrary to the Omars, Sergeant Nemukula testified that he was told that Constable Mahori was on the driver's side and Constable Moabi was on the passenger side. This is contradicted by the Omars and the officers, and is in any event, hearsay evidence. He testified for the City that the officers were out of their jurisdiction. This was hearsay evidence as it was information he allegedly received from Superintendent Phasha who did not testify and is inadmissible. Despite describing Sergeant Nemukula as a star witness, the Commissioner did not place extensive reliance on his testimony, which was appropriate, as much of it was hearsay.

[23] The officers' version is that they had been deployed to Crown Mines, Fordsburg and Mayfair. Sergeant Nemukula testified that all three officers refused to give written statements. The officers qualified this, explaining that they each said that they wanted time to consult their union first – Sergeant Nemukula had also mentioned this. The officers testified that they were then suddenly handed charge sheets before they had an opportunity to consult. The alleged incident took place on 18 September 2019, and according to Sergeant Nemukula, the officers had two weeks to provide written statements before charges were brought against them. In any event, at the CCMA and in this Court, the officers' representatives have been clear that this is a challenge to the substantive fairness of the dismissals.

[24] Superintendent Manyama who testified for the officers also testified that he did not know why Sergeant Nemukula investigated the matter as he was just an officer, under his (Superintendent Manyama's) authority, who wore uniform and fulfilled duties on the street.



[25] The officers' testimony was consistent, save for slight and insignificant differences as to why they pulled over the Omars: Constable Mahori testified that they were on crime prevention duty and considered the failure to stop at a stop street suspicious and warranted action because the JMPD vehicle was in clear view and because the vehicle had tinted windows through which they could not see. Constable Mahori testified that the failure to stop made them think the drivers were doing or had done something wrong. Constable Mashego made no claims to have witnessed anything and testified that they pulled the Omars over because Constable Mahori said that he saw them fail to stop at a stop sign.

### The award

[26] The Commissioner correctly identified the question for determination: On balance, did the officers extort money during the search which the officers conducted, under the circumstances set out in the charge sheet? If so, the dismissals would be substantively fair. The evidence was circumstantial and required inferences to be drawn to make certain factual findings.

[27] The first question before this Court is whether the inferences drawn by the Commissioner to determine the facts were so unreasonable that no other decision-maker could have made them. The second question is if the facts were reasonably inferred, whether relevant facts were considered, and irrelevant facts excluded, and if so, whether this led to a decision so unreasonable that no reasonable decision-maker could have reached it. Although the test is well-established, I have only repeated it because of the following averments in SAMWU's founding affidavit: First, that *"another Arbitrator could have arrived at a different conclusion based on all the evidence presented by all parties"*, and second, that *"a reasonable Arbitrator would have easily concluded that there was not enough evidence to find that the employees were guilty as charged"*.

[28] The Commissioner found that the evidence showed that on a balance of probabilities, the officers had extorted money from the Omar's during the search. The Commissioner reached this conclusion based on the following considerations: (A) The Omar's were *"concise and consistent"* in their versions of the incident, with

only minor inconsistencies relating to an amount of money in a wallet that was not shown to the officers. (B) Sergeant Nemukula was “a star witness” who “*presented a sensible testimony*”. (C) It is more probable that the Omar’s did stop at the stop street as they claimed because the JMPD vehicle was within view “*thus it would not be plausible that an average driver would disregard a stop sign in the clear presence of law enforcement*”. (D) The officers escorted the Omar’s to the gate of the China Shopping Centre (as shown on video), whereas it was possible for them to have made a U-turn at an earlier point after releasing the Omar’s (as noted during the inspection *in loco*). (E) The officers alleged that the Omar’s committed a traffic infringement but did not give Mikhael a ticket. (F) The officers gave bare denials “*in relation to their conduct during the search*”, which were improbable given that “*they knew that the area was dangerous*” and given “*the manner in which they conducted the search*”. (G) It was not plausible that the search lasted approximately 20 minutes without money being found and extorted. (H) Constable Moabi admitted to “*having manhandled Mikhael Omar which would have further intensified the Omars’ fear and desire to end the situation as quickly as possible*”. (I) The Omar’s were probably in a rush, and they were apprehensive and fearful of the officers.

[29] From these facts, the Commissioner concluded that it was probable that “*[t]he Omars indeed had money in their possession and the Applicants were familiar with the area and what went on there as well as at the China Shopping Centre that was the purpose of their patrol in the first place*”.

[30] Thereafter, the Commissioner assessed the officers’ testimony and the testimony of Superintendent Manyama for the officers’ case and found as follows, in further support of her factual finding: (A) Constable Mashego materially contradicted himself and his co-applicants. (B) Constable Mahori tendered “*bare denials and conspiracy theories*” about why the Omar’s laid a complaint and “*these theories were irrelevant*” to the charges. (C) Constables Mahori and Mashego’s versions were implausible. Instead, their version confirmed “*their mindset on the day and the opportunity that they had to commit the extortion*”. (D) Superintendent Manyama’s testimony was irrelevant. (E) The officers’ failure to participate in the internal investigation, at least by submitting written statements, “*indicated that they had*

*something to hide, which would not have been the case had no money been extorted”.*

[31] Finally, the Commissioner referred to the case of *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v Commission for Conciliation, Mediation and Arbitration and others*<sup>8</sup> (*True Blue Foods*) to justify her finding against all three officers as a collective, stating that “*there is no need to prove individual culpability in a case of team misconduct*”.

#### The review application

[32] SAMWU argues that the Commissioner’s decision is reviewable because the Commissioner’s inferences were far-fetched, and the Commissioner considered irrelevant material and failed to consider relevant material. As a result, the Commissioner reached the conclusion that the officers extorted money from the Omars, and this conclusion is so unreasonable that no reasonable decision-maker could reach it.

[33] I assess below the irregularities that were pleaded by SAMWU as contributing to the Commissioner’s conclusion that it was more probable than not that the officers extorted money from the Omars. In heads of argument, Ms Phakedi argued further that the Commissioner was biased with reference to a single statement that could also be reasonably construed as the Commissioner seeking clarity on the evidence-in-chief. Bias as a ground of review and supporting facts concerning the Commissioner’s conduct, were never pleaded and I do not consider these.<sup>9</sup> As an aside, however, I note that the Commissioner offered no leniency to the City’s witnesses, for example, refusing to allow Mohamed to testify by simply reading his written statement from disciplinary proceedings, and insisting that he testify afresh, and from the record, conducting an impartial hearing.

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<sup>8</sup> [2015] 2 BLLR 194 (LC); [2014] ZALCD 2.

<sup>9</sup> See: *Mooki v CCMA and Others* [2017] ZALCJHB 173 at para 9, where the Court held that in a review application, “*the basis on which the outcome of arbitration proceedings subject to review is alleged to be unreasonable must be specifically pleaded - a failure to do so reflects a failure to establish a cause of action*”.

*Irregularity 1: Finding that the Omar's testimony was consistent*

[34] SAMWU argues that the Commissioner incorrectly determined the Omars to be consistent and therefore reliable witnesses because she failed to consider the following inconsistencies: (A) Mahomed testified that when Constable Moabi searched Mikhael, the constable did not find any money on him. (B) Mahomed changed his CCMA testimony, first stating that Mikhael gave Constable Moabi the money after counting it on the floor of the driver's seat, which he then changed to state that the money was counted on his own passenger side. (C) Mikhael testified that they paid their suppliers R36,000, whereas Mahomed testified that they paid their suppliers R40,000. (D) Mahomed testified that he had an extra R3,200 in his wallet, which they did not disclose to the officers. Mikhael testified that it was him, not his uncle who had R3,200 in his wallet. Sergeant Nemukula testified that he was told by Mohamed's brother that the pair were carrying R20,000 each in their pockets, and Mohamed an additional R3,200 in his wallet.

[35] Mohamed Omar's testimony regarding the handover was not unproblematic: Mohammed had made several written statements during the investigation. At the CCMA, Mohammed testified during examination-in-chief that they were instructed to place money on the driver's side floor of the vehicle. During cross-examination, he changed this to say the money was placed on the passenger side floor. This is according to his prior written statement. He did not testify during evidence-in-chief about the handover of money.

[36] The issue is whether these are material discrepancies, or immaterial, as the Commissioner determined. In material respects, the Omar's testimonies were consistent, including that they had stopped at the stop street, which of the Omars handed over the money, the money being carried, the purpose for which such a large sum was being carried, the officers who approached and searched the Omar's vehicle, the fact that they were armed, that they both co-operated with the officers, the officer who remained behind the Omar's vehicle with his rifle, the officers conducting the search, the amount of money handed over and the amount left behind in a wallet. Mohamed explained that there were details that he could not remember exactly because he was afraid, and had been held up in similar

circumstances in the past – a claim corroborated in part by the officers' own testimony.

[37] The point is that the Commissioner had regard to the inconsistencies and assessed their impact on the credibility of the City's witnesses, it was not unreasonable to find that the remaining inconsistencies between the Omar's respective testimony, as identified by SAMWU, were immaterial.

*Irregularity 2: Failure to consider the position of Sergeant Nemukula*

[38] SAMWU argues that the Commissioner failed to consider that Sergeant Nemukula "was the investigating officer who was seriously involved in the investigation and was very close to the complainants as Mr Mahomed Omar allegedly threatened the employees that he was going to report their conduct to him".

[39] It was not unreasonable for the Commissioner to disregard the allegation that Sergeant Nemukula was involved with the Omars because this was not established on a balance of probabilities. It was alleged by only one of the officers, and later Superintendent Manyama testified only that he did not know why Sergeant Nemukula was conducting the investigation. If Sergeant Nemukula was not entitled to do so, it is more probable that the superintendent (or other JMPD management) would have intervened during the sergeant's investigation, and not as a witness for the officers after the fact. It was therefore not unreasonable to find Sergeant Nemukula to be a credible witness.

*Irregularity 3: Failure to consider a contradiction between Mohamed's and Sergeant Nemukula's testimonies*

[40] The Commissioner reasonably found based on the officers' witness testimony that there was likely some kind of confrontation or argument involving the officers and the Omars, or at least Mikhael Omar. SAMWU argues that the Commissioner did not consider that Sergeant Nemukula testified that there was an argument at the scene, which contradicted the evidence of Mahomed and aligned with the evidence of the officers.

[41] This complaint has no basis: Sergeant Nemukula was not present and this aspect of his testimony is hearsay. In fact, the fact that the sergeant's testimony corroborates an aspect of the officers' testimonies is an indicator that his evidence was not one-sided. It is also not unreasonable to still find the Omar's version to be more probable, all factors considered. The most probable version is not determined solely based on preferring a group of consistent witnesses with a group of witnesses with some inconsistencies in their version of events.

*Irregularity 4: Erroneous finding that the officers failed to give a statement during the investigation and drawing a negative inference from not giving a written statement*

[42] The Commissioner recorded that the officers "*did not participate in the investigation*". However, this is incorrect because the officers were interviewed by Sergeant Nemukula who testified to this – along with the officers. It is clear, however, from the subsequent wording in the award that the Commissioner was referring to the fact that the officers failed to provide written statements. This fact is common cause.

[43] SAMWU further submitted that the Commissioner "*was wrong in concluding that an employee who is accused of a misconduct cannot exercise his constitutional right to remain silent during internal investigations*". The constitutional right to remain silent (to avoid incriminating oneself) applies when criminally charged. There is no indication from the papers that the City had also laid criminal charges against the officers.

[44] I agree with SAMWU that it was incorrect to draw an adverse inference from the officers' decision, for whatever reason, not to supply a written statement for purposes of the disciplinary hearing, particularly when they participated fully in the hearing and in the subsequent CCMA proceedings. This is one factor to be considered in determining the reasonableness of the Commissioner's decision.

*Irregularity 5: Erroneous finding that the video evidence was undisputed*

[45] SAMWU argues that the Commissioner's inference from the video evidence that the officers trailed the Omars to the China Shopping Centre. The video evidence was not before me as explained, and SAMWU's position was that I did not need the video evidence to consider this aspect of its complaint. Whether this is correct, I cannot consider whether the inference was reasonable without seeing the video evidence, and I do not consider this factor material to the inquiry into whether the officers' dismissal was substantively fair.

#### *Team misconduct*

[46] Finally, the Commissioner referred to the case of *True Blue Foods* to justify her finding against all three officers as a collective, stating that "*there is no need to prove individual culpability in a case of team misconduct*". I have had regard to the officers' own testimony that Constable Mashego remained behind Omar's vehicle with his rifle drawn and that he approached the vehicle to check if there was any issue at a certain point. Although this was not taken up by SAMWU, I consider the Commissioner's finding justifiable based on the evidence that each of the three officers, through their approach to the investigation, and their testimony, culpably failed to ensure that the team met its obligation under the prescribed standard of conduct by preventing the probable extortion of money from the Omars by at least one of the officers.

#### Conclusion

[47] Ultimately, SAMWU is left with two points: That the Commissioner erred in (A) finding that the Omar's evidence was consistent, and (B) drawing a negative inference from the officers' failure to give written statements prior to their internal disciplinary hearings.

[48] Regarding the first point, the Omar's respective testimonies were not mutually destructive. They were consistent in material respects, and it is not unusual for there to be minor inconsistencies in details between or among witnesses.

[49] The negative inference drawn from the officers' failure to provide written statements during the internal investigation is only one of several factors that the Commissioner considered to reach her conclusion. This error alone does not warrant interference with the award. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*, Ngcobo J stated:

'[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate.'<sup>10</sup>

[50] The Commissioner may have considered some immaterial facts, but overall, her decision is based on material considerations. The Commissioner also considered the credibility and reliability of the witnesses and considered the inherent probabilities of the competing versions before her.<sup>11</sup>

[51] Because SAMWU's application turns on alleged factual errors and how facts were considered, the standard set out in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*<sup>12</sup> applies:

'Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[52] It is my view that SAMWU has failed to establish material inferences drawn and the factors which the Commissioner considered in reaching her conclusion are not so unreasonable that no reasonable decision-maker could reach these. SAMWU may consider the Commissioner's findings to be wrong, but that is not a basis for this Court to review and set aside the award.

[53] Finally, legal submissions alluded to dismissal being an inappropriate sanction for the misconduct, through reference to the Code of Good Practice on Dismissal. SAMWU also pleaded that the officers had clean records.

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<sup>10</sup> [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at para 268.

<sup>11</sup> See: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); [2002] ZASCA 98 at para 5.

<sup>12</sup> (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.



[54] Regarding the sanction of dismissal itself, and in particular, SAMWU's contention that the Commissioner failed to have regard to the officers' clean disciplinary records, the evidence which is recorded in the award shows the Commissioner considered the misconduct to be of a serious nature. The Commissioner ended her award by stating that:

'In the current climate of South Africa one can conclude that both the Omars as well as the Applicants dear for their safety, however the Applicants played on this fear and benefitted to the tune of R4,000 which cannot be said to be correct in any forum of law.'

[55] The Commissioner has not articulated her point clearly or concisely, but this aspect of the award reflects that she considered the seriousness of the offence, and the award shows that the Commissioner had regard to the context in which the officers' misconduct took place. It is established in law that dismissal for a first offence is appropriate if the offence is sufficiently serious, including the offence of extortion in the public service.<sup>13</sup> I consider the sanction of dismissal was the appropriate remedy in respect of the charges on which the officers could reasonably have been found guilty.

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

Order

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

B. Ramji

Acting Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Ms Galaletsang Phakedi  
Instructed by: Phakedi Attorneys Inc.

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<sup>13</sup> *Mphigalale v Safety & Security Sectoral Bargaining Council & others* (2012) 33 ILJ 1464 (LC); [2011] ZALCJHB 110 at para 25.

For the Respondent: No appearance

LABOUR COURT