IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 39/19

In the matter between:

SOUTH AFRICAN POLICING UNION

o.b.o. MERRIAM KGOPANE MATE **Applicant**

and

SOUTH AFRICAN POLICE SERVICE **First Respondent**

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **Second Respondent**

G.T. PHALANE *N.O.* **Third Respondent**

Enrolled: **25 May 2020**
Decided on the papers

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be on 08 September 2020 at 12:15**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant, the South African Police Union (SAPU) seeks an order reviewing and setting aside the jurisdictional ruling dated 13 November 2018 issued under case number PSSS 398-17/18 by the third respondent (the

Arbitrator). The ruling was issued under the auspices of the second respondent, the Safety and Security Sectoral Bargaining Council (SSSBC).

[2] In his ruling, the Arbitrator had found that the SSSBC lacked the jurisdiction to arbitrate the unfair labour practice dispute referred to it by SAPU on behalf of its member Warrant Officer Mate (Mate). The Arbitrator proceeded to dismiss the referral and directed SAPU and Mate to review the SAPS' decision in this Court.

Background:

[3] Arising from the declaration of the National State of Disaster, and at the invitation of the Court, the parties agreed that the matter be disposed of without the hearing of oral arguments. Furthermore, the parties, despite an invitation by the Court, elected not to file written supplementary heads of argument.

[4] The following facts are not in dispute;

4.1 Mate commenced her employment with the SAPS on 29 October 2007 and in 2011 she was promoted to the position of Senior Personnel Officer. During the cause of 2015 Mate was further promoted to the rank of Warrant Officer.

4.2 On 26 August 2016 members of the SAPS were invited to apply for certain vacant positions which included that of Senior Personnel Practitioner at the rank of Captain. Mate had applied for the position and was shortlisted.

4.3 On 31 October 2016, a 'provisional' offer of appointment to that position was made to Mate. Certain conditions were set out in the '*certificate of acceptance of position*', which Mate had signed on 1 November 2016 in accepting the offer. Those conditions *inter alia* included a warranty against any pending criminal and disciplinary cases and further that the information submitted in support of the application for promotion was factually accurate.

4.4 Mate assumed the new post on 1 December 2016. Some five months since accepting the offer and commencing with her duties in the rank of Captain, Mate's remuneration had not been adjusted in accordance with the salary level of the post. She was then informed by the Head of Support in the division (Brigadier Mhlongo) on 5 April 2017 that an adjustments to her remuneration had not been done since she did not qualify for appointment into that post. These contentions were made on the basis that she did not have at least two years' experience in the rank of Warrant Officer as per the requirements of the advertised position. It is not in dispute that Mate had occupied the rank of Warrant Officer for a period of approximately one (1) year at the time that she responded to the advertisement.

4.5 In a letter dated 6 July 2017, Lieutenant General Matakata, the then Acting Head of the Directorate of SAPS withdrew the offer and further directed Mate to return to her previous post. Arising from these facts, Mate lodged an internal grievance, contending that she was demoted.

4.6 The internal grievance processes did not yield any results, and Mate had thereafter referred an unfair labour practice dispute to the SSSBC for conciliation. Attempts at conciliation failed, and the matter after being referred for arbitration, came before the Arbitrator for determination.

[5] SAPU's contention is that during the arbitration proceedings, the Arbitrator had *mero motu* raised the issue of jurisdiction. It is alleged that the Arbitrator upon being furnished with a bundle of documents, had advised the parties that he would consider the matter and issue a ruling without hearing the parties or any evidence being led. This was followed by the ruling which SAPU seeks to have reviewed and set aside, in which the Arbitrator declined jurisdiction on the basis that the withdrawal of the offer and the post constituted an administrative action.

[6] The SAPS' contentions are that the withdrawal of the offer came about after an investigation was conducted into whether Mate met the requirements of

the post. Upon being advised that she did not have the minimum requirements of two years in the rank of Warrant Officer, she was then afforded an opportunity to state why the offer should not be withdrawn. Her representations however did not change the decision to withdraw the offer.

[7] The SAPS further contended that at the arbitration proceedings, the parties had agreed after the narrowing of issues that the dispute pertained to an unfair labour practice relating to demotion. It further contends that upon the Arbitrator having been furnished with a bundle of documents, he had asked Mate questions and the latter had explained the facts of her dispute. At no stage was it established that Mate wanted to lead any oral evidence at all, and the Arbitrator had issued his ruling on 13 November 2018, finding that the Council lacked jurisdiction.

Preliminary issues:

[8] SAPU had objected to the late filing of the answering affidavit by the SAPS. SAPU's notice of motion was filed on 11 January 2019 and within the timeframes stipulated in terms of section 145(1) of the Labour Relations Act (LRA).[1] On 23 January 2019, the SAPS filed a notice indicating its intention to oppose the review application.

[9] On 7 February 2019, SAPU filed its notice in terms of rule 7A(8) of the Rules of this Court indicating its election not to supplement its founding papers. On 24 May 2019 and some 12 weeks subsequent to the filing of the rule 7A(8) notice, the SAPS filed its answering affidavit. On 3 June 2019 SAPU filed its objection to the late filing of the answering papers.

[10] In terms of the provisions of Rule 7A(9) of the Rules of the Court *any party wishing to oppose* a review application must file an answering affidavit to that effect within 10 days from the receipt of the notice in terms of Rule 7A(8) notice. However, in terms of Clause 11.4.2 of the Practice Manual 2013, a party filing an answering affidavit outside the timeframes set out in the Rules is excused from filing a condonation application, unless a notice of objection is

[1] Act 66 of 1995, as amended

filed within 10 days of the filing of that affidavit. The objection having been filed by SAPU, the SAPS filed an application for condonation for the late filing of the answering affidavit on 19 June 2019, which SAPU had opposed

[11] The principles applicable to applications for condonation are trite. Condonation should be granted if it is in the interests of justice, and refused if it is not[2]. The interests of justice must be determined by reference to all relevant factors outlined in *Melane*[3], including but not limited to the nature and extent of the delay, the explanation for the delay, the prospects of success, the nature of the relief sought, and the effect of the delay on the administration of justice.

[12] In this case, the delay in filing the answering affidavit is about 12 weeks, which is indeed excessive. The SAPS for unknown reasons did not even make an attempt to state the extent of the delay. On 22 February 2019, SAPS was warned by SAPU that if no answering affidavit was filed by 27 February 2019, an objection would be filed.

[13] In an affidavit deposed to by an attorney in the Office of the State Attorney (Mr Nhlanhla Mkhwanazi), the delay is essentially attributed to the internal administrative processes of the Office of the State Attorney, and in particular, the process of appointing or briefing counsel. It was only on 18 March 2019 that a request for an extension was made to SAPU, and there does not appear to have been a response to that request. Mkhwanazi averred that counsel was only briefed on 10 April 2019, and consultations with him only

[2] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA) 83 (CC) at para 3

[3] *Melane v Santam Insurance Co. Ltd* 1962 94) SA 531(A) At 532b-E, where it was held;

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

took place on 6 May 2019, resulting in the answering affidavit only being served on SAPU on 22 May 2019.

[14] Clearly the explanation proffered for the excessive delay is inadequate as it does not cover the entire period of the delay. Furthermore, it is not known what the purpose of having an Office of the State Attorney is when no one from that office could draft an answering affidavit given the uncomplicated nature of the facts of this matter. I did not understand Mkhwanazi to be saying that the Office of the State Attorney at the time lacked capacity. In fact no explanation was proffered as to the reason any attorney or Mkhwanazi himself could not attend to the drafting of the answering affidavit.

[15] The SAPS conceded that as early as 22 February 2019, it was warned that an objection would be launched should the answering affidavit not be filed on 27 February 2019. Nothing was done at the time despite the clear knowledge of the bureaucracy in the Office of the State Attorney associated with securing outside counsel. The request for an extension on 18 March 2019 was clearly belated, and there does not appear to have been any steps taken in enquiring whether SAPU had agreed to an extension or not.

[16] In the end, although some explanation was proffered for the delay, it is not in my view satisfactory. Other than this inadequate explanation, no effort was made in the condonation application to address other factors necessary for establishing good cause. In any event, given the conclusions to be reached in this judgment, SAPS' prospects of success on the merits are non-existent. Given the failure to proffer a reasonable and acceptable explanation for the excessive delay, and further in circumstances where nothing was said about the prospects of success despite these being weak, clearly the interests of justice cannot favour the granting of condonation.

<u>The arbitration award:</u>

[17] A perusal of the 17 paged transcribed record of the proceedings indicates that the following took place;

17.1 At the commencement of the proceedings, Mr Mabena for Mate and SAPU had indicated that he intended to lead two witnesses. He further gave a brief outline of what Mate's case was all about and further told the Arbitrator that Mate should be sworn in as a witness.

17.2 The record does not however reflect that Mate was sworn in as a witness. The Arbitrator had nonetheless proceeded to ask her questions related to her dispute. Thereafter, Colonel Molopyane for SAPS had in response, contended that the issue in dispute was the demotion of Mate and had continued to state what SAPS' defence was, contending she was not subjected to any unfair labour practice.

17.3 After Colonel Molopyane's opening remarks, the Arbitrator then expressed an opinion that central to the dispute was the decision to withdraw the appointment into the post on 7 July 2017, which constituted an administrative act. Colonel Molopyane agreed with the Arbitrator's views. Flowing from various exchanges between the representatives and the Arbitrator, the latter then stated that he would make a formal ruling as to whether he had jurisdiction to hear the matter.

[18] In his award, the Arbitrator observed that in view of the withdrawal being taken unilaterally by the SAPS and further since Mate was not subjected to a disciplinary enquiry, the issues fell within the perimeters of an administrative action and thus the dispute did not fall under the purview of the unfair labour practice regime.

[19] The Arbitrator further stated that the appropriate cause of action in the light of the withdrawal of the position would have been to institute review proceedings for the purposes of setting aside Mate's non-appointment. The Arbitrator further observed that the SSSBC was not empowered in terms of the provisions of the LRA, to assess the fairness of an administrative decision.

[20] The Arbitrator concluded that the conduct of the SAPS to withdraw the position amounted to an administrative action and as such the SSSBC lacked the competency to arbitrate the dispute and further the most appropriate

forum for Mate to find recourse would be to initiate review proceedings in this Court.

Grounds of review:

[21] The jurisdiction ruling is challenged mainly on two grounds, namely;

21.1 that the Arbitrator had pre-judged the issues prior to having heard any evidence and/or submissions on behalf of the parties. The contention is that the Arbitrator should had at the very least construed from the hearing of *viva voca* evidence that the dispute before him related to a promotion which promotion culminated in a unilateral demotion.

21.2 that the Arbitrator's finding that the SSSBC lacked requisite jurisdiction to arbitrate the matter was incorrect. This was based on the contention that SAPU had referred the non-implementation of a promotion dispute on behalf of Mate to the SSSBC and in those circumstances, the dispute fell within the parameters of the definition of unfair labour practice provided for in terms of section 186(2)(a) of the LRA.

Evaluation:

[22] The test on review related to jurisdictional rulings is that as stated in *Jonsson Uniform Solutions PTY LTD v. Lynette Brown and others*[4] as follows;

> "[33] The generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* as follows: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"
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> [34] In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the

[4] (DA10/2012) [2014] ZALCJHB 32

dispute. See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*.

[35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied." (Citations omitted)

[23] The readiness of arbitrators to easily relinquish jurisdiction at the first sign of an alternative cause of action being raised, and without having heard all the evidence and the facts of a particular dispute received rebuke in *Ngobe v J.P Morgan Chase Bank and Others*[5], where Van Niekerk J stated the following;

"[12] The applicant's case appears, to some extent at least, to rest on the assumption that it was somehow incumbent on the commissioner to intervene in the process and herself to decide that the real dispute between the parties was one that concerned a dismissal on account of pregnancy. There is a trend in the CCMA for commissioners to intervene on this basis and to halt arbitration proceedings and refer a dispute to this court when the commissioner forms the view that he or she has no jurisdiction on the basis that the real dispute between the parties concerns a reason for dismissal that is listed as automatically unfair. This is an unfortunate trend. A party referring a dispute to the CCMA must stand or fall on the merits of that dispute. If it is clear from an initial interrogation of the dispute that the applicant has erred in referring a dispute concerning an automatically unfair dismissal to the CCMA, there can be no harm done in advising an applicant of that fact and that the matter ought appropriately to be referred to this court for adjudication. However, whereas in the present instance, the parties make conscious decisions to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene by abandoning the proceedings, thereby dictating

[5] (JR 1893/2012, JR 1882/2012) [2015] ZALCJHB 317; (2015) 36 ILJ 3137 (LC) (17 August 2015)

to parties what he or she thinks their real dispute is and how it should be litigated."

[24] A perusal of the transcribed record of the proceedings and the Arbitrator's award reveals that without even having the benefit of the a clear understanding of the real dispute between the parties, the Arbitrator had *mero muto*, raised the question of jurisdiction, and that the SAPS had unfortunately blindly agreed with the Arbitrator's misplaced conception of what the real dispute was.

[25] It is accepted that Arbitrators are not necessarily bound by the description and labels the parties attach to the nature of their disputes, and that the Arbitrators must ascertain the real dispute between the parties[6]. However, ascertaining the real dispute may in some instances require the Arbitrator to hear oral evidence, and to have a clear picture of what the dispute is all about. A superficial glance of the dispute based on opening statements at the arbitration proceedings is not enough as it happened in this case.

[26] As it is stated in *Ngobe*, especially in disputes related to alleged unfair labour practices, the applicant parties must stand and fall with the cause of action pursued and discharge the onus in that regard. Matters related to non-appointments, demotions and promotions ordinarily fall squarely within the realm of an unfair labour practice as defined in section 186(a) of the LRA[7].

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[6] *CUSA v Tao Ying Metal Industries* **[**2008] ZACC 15; 2009 (2) 204 (CC); 2009 (1) BCLR 1 (CC) at para 66, where it was held;

> "A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in"

[7] (2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving-

> (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

Furthermore, under the provisions of section 191(5)(a)(iv), once a dispute has been certified as unresolved or the thirty days period had lapsed, the Arbitrator must arbitrate the unfair labour practice dispute upon the request of the referring party. The only exception where an unfair labour practice dispute may be referred to this Court is to be found under the provisions of section 191(13) of the LRA[8].

[27] In the end, once an employee has alleged an unfair labour practice, the onus to establish that the conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on that employee[9]. The employee must therefore be able to lay the evidentiary foundation for his or her claim of an unfair labour practice.

[28] From the above, it follows that it is not for an arbitrator to dictate to the referring party what his or her dispute is all about, especially without having a grasp of the nature of the real dispute between the parties. It is apparent in this case that the Arbitrator having merely heard opening remarks, steadfastly held an uninformed and firm view that the decision of the SAPS constituted an administrative action. In my view, the decision to adjourn the proceedings for the Arbitrator to consider his ruling was merely meant to confirm his incorrect stance, as the record clearly shows that he had made up his mind on the matter.

[8] Which provides;

> '(13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.'

[9] See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19; *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 73, where it was held that;

> "…An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so..."

[29] Inasmuch as a dismissal cannot ordinarily constitute an administrative action on the part of the State as an employer[10], in the same token, a decision by the State as an employer not to appoint or to promote, or even to demote, cannot constitute an administrative decision readily susceptible to a review by this Court. The mere fact that a unilateral decision was taken by SAPS to withdraw the offer of the post of Captain, and Mate was placed back in her original position, does not in itself amount to an administrative action as the Arbitrator incorrectly found.

[30] In conclusion, it follows that based on the essence of what SAPU and Mate's case was, and as also understood by SAPS at the commencement of the proceedings (and prior to being flummoxed by the Arbitrator), the dispute ought to have stayed at the SSSBC for arbitration. As already indicated, it was

[10] See *Marius v Overstrand Municipality* (CA24/2013) [2014] ZALAC 107 (25 September 2014), where Murphy AJA held;

> "[10] In *Chirwa*, Ncgobo J, while accepting that the dismissal of an employee by a public entity involved the exercise of a public power, held that such was not decisive of the question whether the exercise of the power in question constitutes administrative action. He held that the subject matter of the power involved in that case was the termination of a contract of employment and that such did not involve an act of administration. He concluded:
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> > 'Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under section 33 (of the Constitution) can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognizes that employment and labour relations and administrative action are two different areas of law ….. The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement …. The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices.'
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> [11] The Constitutional Court endorsed this statement in *Gcaba* and commented further on the relationship between the constitutional right to fair labour practices and the right to administrative justice as follows:
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> > 'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer or consequences for other citizens, it does not constitute administrative action.'
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> [12] These *dicta* of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices (unfair conduct relating to promotion, demotion, training, the provision of benefits and disciplinary action short of dismissal) should ordinarily pursue the remedies available in section 191 and 193 of the LRA, as mandated and circumscribed by section 23 of the Constitution. The court made no explicit finding in either case in relation to section 158(1)(h) of the LRA."

for Mate and SAPU to discharge the onus and establish the unfair labour practice complained of. To this end, both grounds of review are sustainable, as the Arbitrator's award was clearly incorrect in the light of established legal principles.

[31] Further having had regard to the material placed before the Court, no purpose would be served by remitting the matter back to the SSSBC for reconsideration of the jurisdictional point, and particularly in the light of what is stated in this judgment. To this end, the Court is in a position to substitute the Arbitrator's ruling.

[32] I have further had regard to the requirements of law and fairness in regards to an order of costs. Inasmuch as no replying affidavits were filed in the review application and further since SAPU and Mate were compelled to oppose the failed application for condonation, it is my view that SAPS should be burdened with the costs of this application, particularly since it ought to have been apparent to it that the jurisdictional ruling was indefensible.

[33] Accordingly, the following order is made;

Order:

1. The application for condonation for the late filing of the answering affidavit to the review application is dismissed.

2. The Jurisdictional Ruling issued by the Third Respondent under case number PSSS-17/18 dated 13 November 2018 is reviewed, set aside and substituted with an order that;

   2.1 The Second Respondent (SSSBC) has jurisdiction to determine the unfair labour practice dispute referred by the Applicants.

   2.2 The Second Respondent is ordered to enrol the matter for arbitration on an expedited basis.

3. The First Respondent is ordered to pay the costs of this application.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:	Thapelo Kharametsane Attorneys. Heads of argument drafted by Adv. G. Mashego
For the First Respondent:	State Attorney Pretoria. Heads of argument drafted by Adv. M.X. Shebe