IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: JR128/23
Not Reportable

In the matter between:

UNITED NATIONAL TRANSPORT UNION	First Applicant
SEABATA MAPOYI	Second Applicant
and	
TRANSNET (SOC) LTIMITED (DURBAN ENGINEERING DIVISION)	First Respondent
TRANSNET BARGAINING COUNCIL	Second Respondent
BHEKI KHUMALO N.O.	Third Respondent

Heard: 15 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 24 March 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] On 14 December 2022 the third respondent handed down an award in which he concluded that the dismissal of the second applicant, Mr Seabata, by the first respondent, Transnet, had been both substantively and procedurally fair, and that he was accordingly not entitled to any relief. Dissatisfied with the outcome of the arbitration, the applicants initiated the present review application in which orders were sought as follows,

> *'1. Reviewing and setting aside the arbitration award delivered by the Third Respondent under case number TNBC 189-22 on 14 December 2022 ("the Arbitration Award") in terms of section 145 alternatively 158(1)(g) of the Labour Relations Act 66 of 1995 ("the LRA");*
> *2. Substituting the Arbitration Award with an order that the dismissal of the Second Applicant was substantively and procedurally unfair;*
> *3. Retrospectively reinstating the Second Applicant from the date of his dismissal on 12 August 2022;*
> *4. Alternatively to prayers 2 and 3 above, remitting the dispute to the Second Respondent for a de novo arbitration before an arbitrator other than the Third Respondent;*
> *5. Ordering such Respondents who oppose this application to pay the costs of this application, jointly and severally, the one paying, the others to be absolved.'*

[2] Transnet opposed the application.

[3] It may be noted that the applicants were unable to deliver a transcription of the arbitration proceedings due to the fact that the recordings of the proceedings had been irrevocably lost. They were nonetheless satisfied that the review was capable

of being determined with reference to such documentary portion of the record as had been made available to them.

Background

[4] Mr Seabata was employed by Transnet in 2002 and was dismissed on 12 August 2022. On 22 March 2022 he was issued with a notice to attend a disciplinary hearing in which it was alleged that he had misconducted himself by having falsified his time sheet on various occasions in the month of April 2021. The charge sheet read,

> *'1. You contravened Transnet Disciplinary Code and your conduct constitutes a serious form of misconduct in that you falsified or misrepresented time and contravened the aforementioned code and related policies in that:*
> *2. On 14 April 2021 on a time keeping sheet you signed 06H00-18H00 when submitting your time card you deliberately altered the time to 06H00-18H45.*
> *3. On 15 April 2021 on a time keeping sheet you signed 06H00-18H45 when submitting your time card on 07 May 2021 you deliberately altered the time from 06H00-15H00 and re-submit an amended time card on 14 May 2021 to 06H00-18H45.*
> *4. On 16 April 2021 on a time keeping sheet you signed 06H00-15H00 when submitting your time card on 07 May 2021 you recorded 06H00-15H00, and re-submitted an amended time card on 14 May 2021 to 06H00-16H00.*
> *5. On 20 April 2021 on a time keeping sheet you signed 18H00-06H00 when submitting your time card on 07 May 2021 you recorded 18H00-06H00 and re-submit an amended time card on 14 May 2021 you altered time from 18H00-07H00.*
> *6. On 21 April 2021 on a time keeping sheet you signed 18H00-06H00 when submitting your time card on 07 May 2021 you recorded 18H00-06H00, and re-submit an amended time card on 14 May 2021 you altered time to 18H00-06H30.'*

[5] Upon the conclusion of the disciplinary hearing he was found to have been guilty of the commission of an act of misconduct, but not that for which he had been charged. The chairperson issued the sanction of a final written warning of 12 month validity, this having been the sanction he determined as having been appropriate. The chairperson explained the reasons for his finding to have been,

> *'I have find him guilty on failing to obey the reasonable instruction from his lime manager not claiming overtime as he never got paid according to his time card he was paid based on the shift he worked.'*

He arrived at this conclusion despite having found that Mr Seabata had, in fact, recorded the extra hours claimed, which actions had constituted the very foundation of the allegations of misconduct for which he had been called to answer.

[6] Transnet was dissatisfied with the outcome and notified Mr Seabata that it intended to revisit the chairperson's findings by way of an internal review. The notification given to him of Transnet's intention included the extension of an invitation to him to participate therein,

> *'1. We refer to the sanction handed down by the Presiding officer of the disciplinary hearing on 06 June 2022.*
> *2. The employer does not agree with the sanction of the Presiding Officer because it is below the standard set for similar misconducts thereby creating inconsistences. Therefore the employer will be reviewing of the sanction.*
> *3. The internal review has been instituted because the sanction does not accord with the substance of the disciplinary code and procedure itself. A copy of the charge sheet, all documents used at the hearing and a transcript of the hearing will be provided to an independent Presiding officer for review.*
> *4. Kindly note that at the internal review, we will seek a sanction of dismissal. You will be afforded an opportunity to contest the appropriateness of the higher sanction sought and make representations in this regard.*
> *5. You are advised that the review panellist has the powers to consider the guilt based on the available evidence at company disposal and empowered to consider evidence on all charges, decide on guilt or not guilty*

thereon and to consider an appropriate sanction, which may include dismissal.

6. Therefore, you are advised to show cause why the decision of the presiding officer shouldn't be reviewed or set aside and replaced with that of the review panel in your response. In support of your submissions, you are invited to submit any other issue you wish to place before the panel for consideration including showing good cause why you should not be found guilty and in the event that you are found guilty why a sanction of dismissal should not be considered as an appropriate sanction.

7. You are requested to respond within five (05) working days and should you decide not to respond the process will proceed without your submissions.

8. You are further advised that the initiator from your hearing will be allowed the right to make written representations to the panel as well.'

[7] Mr Seabata conveyed his response to Transnet via his appointed attorney on 7 July 2022 in which he declined to participate in the proposed internal review of the verdict and sanction, having described the intended process as *'unlawful and grossly unfair.'* His reasons for refusing to do so were articulated as follows,

'3. According to the principle of double jeopardy, no employee can be subjected to what amounts to a retrial of the same charges which he/she was indicted upon. It is a general principle of fairness that a person should not be tried twice for the same offence. We record that the contemplated action referred to in your letter under reply would constitute double jeopardy and therefore such conduct is grossly unfair and unlawful. This is evident from the fact that:

3.1 you have already implemented the finding of the presiding officer rendered on 6 June 2022, by issuing Mr Seabata with a final warning;

3.2 the disciplinary hearing was chaired by an internal representative and therefore your conduct is in essence challenging your own finding, which is not permissible and would be grossly unfair;

3.3 the conduct proposed by Transnet is clearly against the principles of natural justice, equity and fairness;

3.4 as a result of your contemplated action, Mr Seabata is being subjected to another disciplinary hearing which may result in him being punished twice (and more severely) for the same incident of misconduct. It must be recorded that no new evidence has come to light and it is simply a situation where Transnet does not like the verdict and sanction which has been imposed; and

3.5 if management is unhappy or dissatisfied with the sanction that was imposed by the presiding officer, which it appointed, this cannot be corrected by punishing the employee again for the same offence. It is recorded that the first disciplinary hearing which was conducted on 28 and 29 March 2022 was conducted in terms of Transnet's code and, as recorded above, you appointed the presiding officer. The presiding officer, during a disciplinary hearing acts as an agent of the company who appointed him/her. The presiding officer was given the powers to hear the matter and to use his discretion to impose the verdict and sanction which he deemed appropriate. Mr Seabata did not appeal the sanction but accepted and complied with it.'

[8] Despite Mr Seabata's protestations Transnet persisted with its intended process of an internal review, the outcome of which was that he was found to have committed several acts of dishonesty by having deliberately altered his time sheet on each of the occasions alleged in the charge sheet, for the purpose of claiming overtime payments to which he was not entitled. In the circumstances of the presiding officer of the internal review having so concluded, he found that the sanction which had been handed down by the presiding officer of the disciplinary hearing had been irrational and unreasonable and concluded that Mr Seabata's conduct had destroyed the trust relationship between the parties.

[9] It was the conclusion of this process which resulted in the termination of Mr Seabata's employment and which led him to refer a dispute pertaining to the fairness of his dismissal to the second respondent. The outcome of the ensuing arbitration, being the dismissal of Mr Seabata's dispute, forms the subject matter of the present proceedings.

Analysis

[10] The applicants' grounds of review may be summarised as follows:

1. In having conducted its internal review, Transnet set aside the findings of the presiding officer of the disciplinary hearing in relation to both verdict and sanction. In view of the fact that neither Transnet's Disciplinary Code nor labour law jurisprudence allows for both a verdict and a sanction to be set aside by way of an internal review, the third respondent committed a gross irregularity in the conduct of proceedings by finding to the contrary.

2. Notwithstanding that the parties had agreed in the pre-arbitration minute that the issue to be determined by the third respondent was confined to whether Transnet had the power to vary the sanction imposed by the presiding officer of the disciplinary enquiry, the third respondent went beyond the issue in dispute as agreed in the pre-arbitration minute, and therefore exceeded his powers by having determined that Transnet had been entitled to have changed the initial verdict.

3. The third respondent committed a gross irregularity in the conduct of the arbitration proceedings by determining the dispute without hearing *viva voce* evidence, insofar as he determined that Mr Seabata had intended to be dishonest and that there had been a breakdown in the trust relationship without having heard any evidence on the issue.

4. It having been alleged by the applicants that an employee, Muller, who had been found guilty of a similar infraction to that of Mr Seabata had been given a final written warning, the third respondent's finding that there had been no inconsistency of sanction *vis-a-vis* the employee Muller by virtue of the fact that Muller's verdict and sanction had not been subjected to an internal review was not a conclusion that a reasonable decision maker could have reached on the evidence before him.

[11] The first of the applicants' grounds of review related to the third respondent's findings concerning Transnet's internal review process and his conclusion that such process had been permissible. The third respondent found,

'In SARS v CCMA and Others (2017) 38 ILJ 97 (CC), the Court dealt with the procedural issue where the Employer had reviewed and changed the disciplinary chairperson decision it was unhappy about. The Court confirmed the review as procedurally fair.

In Moodley v Department of National Treasury and Others [2017] 4 BLLR 337 (LAC) the court held, relying on the Constitutional Court judgment that an employee may revisit the decision of a sanction as long as it affords the Employee due process as long as it affords the Employee due process before taking the decision to review the sanction.

Therefore, I find that the Respondent has a right to review and change the disciplinary chairperson's decision and sanction. I hold that it is particularly so in case of gross misconducts such as those involving dishonesty and where the disciplinary chairperson probably committed gross irregularity in arriving at his decision.'[1]

[12] The parties' respective positions regarding this issue had been set out in the minute of their pre-arbitration conference,

'20. The Respondent contended that case law authorized it to, on its own initiative vary and alter the sanction to that of dismissal. Further, it was argued by the Respondent that the dismissal of the Applicant was both procedurally and substantively fair.

21. The Applicant contended that the Respondent was not entitled to change the sanction imposed by the disciplinary chairperson. Alternatively, if the Respondent had a right to invoke a process which would effectively alter or vary the sanction, the Applicant had a right too, to be invited to such a process and to make representation to whoever conducted the said process. Lastly, the Applicant argued that in this case he was deprived of a right to

[1] Award, paragraphs 33 - 35

make representation prior to a decision which resulted to his dismissal. Therefore, his dismissal was procedurally and substantively unfair.'

[13] From the aforementioned it is clear that the applicants' case that Mr Seabata's dismissal had been procedurally and substantively unfair was premised on (1) their assertion that Transnet had not been entitled to have changed the sanction which had been imposed by the disciplinary chairperson, and (2) in the event that this was found to have been permissible, Mr Seabata ought to have been afforded a right to have made representations, which was alleged to have been denied to him.

[14] Of relevance to the determination of the applicants' first ground of review is the manner in which the third respondent had been requested by the parties to resolve the issue concerning the internal review. The record demonstrated that Transnet had commenced the arbitration by having led the evidence of one witness, Mr Thuthuka Zulu, who introduced a time sheet and a time card both of which were alleged to have been completed by Mr Seabata. Upon the conclusion of his evidence in chief, Mr Seabata's representative, an official of the first applicant, indicated that, *'hearing evidence on the reason for the dismissal was an unnecessary waste of energy and time.'* His expressed belief was premised on the applicants' challenge to the fairness of Mr Seabata's dismissal seemingly having been confined to Transnet's competence to have proceeded by way of its 'internal review.' In the absence of the applicants' Form 7.11 having been provided to this court as part of the record, and the record of the oral portion of the proceedings having been lost, the third respondent's handwritten notes taken at the outset of the proceedings captured the applicants' opening statement in which the issues in dispute were identified,

- *Argue that disciplinary code does not cater for internal reviews.*
- *Code no powers to Employer right to interfere with disciplinary decision.*
- *Collective agreement also does not give power to Employer to change decision.*
- *March 2022 hearing – 06/06/2022 (AS23-24)*
- *Letter of termination letter received on 17/08/2022.*
- *Applicant was never involved to formal review hearing.*

- *Only 1 witness.*

[15] The record reflects that the third respondent issued a Ruling as a result of the applicants' assertions made at the conclusion of Mr Zulu's evidence, although the Ruling was likewise not included as a part of the record. Whatever such Ruling may have pertained to, the effect thereof was that the parties discontinued the arbitration proceedings in the form in which they had commenced, and concluded a pre-arbitration conference, the minute of which set out the parties agreement relating to the further conduct of the proceedings. Pursuant to the parties recording their agreement concerning a number of facts which were said to have been common cause, under the heading *'Facts Which Are In Dispute'* they recorded the issues the third respondent was required to determine,

> *'15. Whether in this case, the Respondent had powers or was entitled to alter the sanction decision issued by the disciplinary chairperson.*
> *16. Whether the Applicant was invited to make representation during the internal review process which altered the sanction imposed by the disciplinary chairperson.*
> *17. Whether in fairness, the Applicant had a right to be invited to make representation during the internal review process which decided on changing the chairperson's decision sanction to that of the Applicant's dismissal.*
> *18. Whether the disciplinary chairperson altered or added the charges by his remarks stated in bundle "A" pages 21, 22 and 23.*
> *19. Whether, the Respondent has a right, based on the Commissioner's finding in the affirmative on the aforegoing point, to alter or vary the sanction imposed by the disciplinary chairperson and dismiss the Applicant.'*

[16] In placing these issues before the third respondent by way of the pre-arbitration minute the parties contemporaneously agreed that neither would call any witnesses, and the issues would be determined on the basis of the parties'

documents which were agreed to have been evidence of *'what they purported to be'*, together with closing arguments which were to be submitted to the third respondent.[2]

[17] In their heads of argument the applicants asserted that the cases which had been relied upon by the third respondent were not authority for the proposition that an employer was entitled to alter the outcome of a disciplinary enquiry by way of internal review proceedings.

[18] In SARS the Constitutional Court was not ultimately called upon to decide the issue identified by the third respondent, which was abandoned by the appellant,

> *'Initially, SARS challenged the Arbitrator's decision on the basis that her construction of the collective agreement as not allowing its Commissioner to substitute the Chairperson's sanction was flawed. Also that the dismissal was substantively and procedurally fair because its Commissioner was, in terms of SARS' disciplinary code, well within its rights to increase the sanction. That ground was abandoned the day before the matter was heard by this Court. In considering the merits, it is thus necessary to bear in mind that, to the extent that the Arbitrator may have impliedly concluded that Mr Kruger's dismissal was substantively unfair, SARS does not attack that finding. It attacks only the reinstatement part of the award. We are therefore only asked to consider the appropriateness or reasonableness of the reinstatement. And the question is whether the reinstatement is reviewable and, if so, on what basis.'*

[19] In Moodley, pursuant to the employee having accepted the alternative sanction of demotion imposed by the chairperson of the disciplinary enquiry, her employer imposed the primary sanction of dismissal. The employee's case at arbitration concerned whether her employer had been permitted to substitute the chairperson's lesser sanction with that of dismissal, it having been contended that such substitution was unfair. The arbitrator found that such substitution had been impermissible, and awarded the employee reinstatement. In upholding the review

[2] Although it is apparent from the award that such closing arguments were delivered as had been agreed, neither of the parties' submissions formed part of the record.

application subsequently instituted by the employer the court remitted the matter to be arbitrated *de novo*, having concluded,

> *'The arbitrator clearly failed to apply his mind to issues which were material to the determination of the case before him, and does commit a reviewable irregularity. The issue before him was not whether he was required to impose a 'correct sanction' or not. To the extent that the arbitrator approached the issue before him by reference to imposing the 'correct sanction' it follows that the arbitrator failed to appreciate his mandate, and essentially misconceived the nature of the enquiry before him and invariably arrived at an outcome that did not fall within the band of reasonableness.'*

Although the Labour Appeal Court did not concur with the reasoning of the Labour Court, it nonetheless agreed that the award had been reviewable, and that remittal had been the appropriate order.

[20] The applicants were accordingly correct that neither of the cases upon which the third respondent relied could have served as dispositive authority for the proposition advanced by Transnet that it was entitled to have revisited the decision of the chairperson of the disciplinary enquiry and to substitute both the verdict and the sanction which had been imposed *ab initio*. The issue in the present proceedings is then accordingly whether his finding that substitution was indeed permissible constituted a gross irregularity; whether by having misconceived the nature of the enquiry before him, or by having arrived at an unreasonable result.[3]

[21] Assuming for present purposes that the process of an internal review may be construed as being equivalent to the convening of a second disciplinary hearing, as was asserted by the applicants, the third respondent was required to consider whether and under what circumstances a second disciplinary hearing may permissible be convened. The Labour Appeal Court established the applicable standard in BMW (SA) (Pty) Ltd v Van der Walt (2000) 21 ILJ 113 (LAC),

[3] Herholdt v Nedbank Ltd 2013 (6) SA 224 (SCA) at paragraph 25

'Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in Amalgamated Engineering Union of SA and Others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC) at 596 A-D that it is unnecessary to ask oneself whether the principles of autrefois acquit or res iudicata ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. … I should make two cautionary remarks. It may be that the second disciplinary enquiry is ultra vires the employer's disciplinary code. … That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in exceptional circumstances.'[4]

[22] In order to have determined the permissibility or otherwise of the substitution of the chairperson's verdict and sanction by way of the process undertaken by Transnet it was incumbent upon the third respondent to have conducted two enquiries. In the first instance, he was required to determine whether the provisions of Transnet's Disciplinary Code operated as a bar thereto, it appearing from the document itself that the power to determine the appropriate sanction had been vested in the presiding officer. If the third respondent found, for whatever reason, that it was permissible for Transnet to subject the outcome of the disciplinary enquiry to a process of internal review, he would then have been enjoined to have considered whether it was, in the circumstances of the case, fair to have done so.

[23] Insofar as the first of such enquiries was concerned, it is clear from the award that the third respondent did no more than consider whether a second disciplinary enquiry was, as a matter of law, permissible. He did not, however, give any consideration to the question whether Transnet's Disciplinary Code operated as a bar to the convening thereof, and nor did he give any consideration to the issue of

[4] At paragraph 12

fairness. Moreover, neither of these contentious issues could have been resolved in the absence of any evidence having been introduced in relation thereto.

[24] As to the meaning and effect of the provisions of Transnet's Disciplinary Code, the parties had agreed in the pre-arbitration minute no more than that the documents which were to be provided to the third respondent were what they purported to be; self-evidently insufficient to have served to have established either the meaning of the terms of the Disciplinary Code or the effect thereof.

[25] As regards the issue of fairness the Labour Appeal Court explained the concept of fairness in the context of the convening of a second disciplinary enquiry in Branford v Metrorail Services (Durban) and Others (2003) 24 ILJ 2269 (LAC),

> *'The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.'*[5]

Such enquiry could equally only have been undertaken by reference to evidence introduced by the parties.

[26] The third respondent cannot, however, be blamed for not having conducted the necessary enquiries for it was the actions of the union official who represented Mr Seabata at the arbitration, which led to such eventuality. Transnet had at the outset evinced its intention to introduce evidence to establish the fairness of Mr Seabata's dismissal and, to that end, had led the evidence of one witness. Whatever the totality of its intended evidence may have been, it was ultimately induced not to introduce it as a result of the trade union official's insistence that the question of the fairness of Mr Seabata's dismissal could be determined as a point of law without the need for the introduction of oral evidence. However, regardless of the question of blame, in light of the cumulative failures on the part of the third respondent to have

[5] At paragraph 14

considered and determined the aforesaid issues, the award falls to be reviewed and set aside. This being the case, the applicants' further grounds of review need not be decided.

[27] This court cannot grant the applicants an order of substitution. As the parties introduced no evidence in substantiation of either of their respective positions concerning (1) the permissibility of Transnet's actions in having undertaken an internal review with reference to its own Disciplinary Code, or (2) the fairness of its decision, this court is unable to determine the question of either the substantive or the procedural fairness of Mr Seabata's dismissal. The matter will accordingly be remitted to the second respondent to be arbitrated *de novo* before a commissioner other than the third respondent.

Costs

[28] Albeit that the applicants sought an order of costs, this court is of the view that this is not a matter in which such an order would be justified. Each party will be required to bear its own costs.

Order

1. The arbitration award issued by the third respondent under case number TNBC 189-22 on 14 December 2022 is reviewed and set aside.

2. The applicants' dispute under case number TNBC 189-22 is remitted to the second respondent to be arbitrated *de novo* before an arbitrator other than the third respondent.

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

Appearances

Applicant: Mr M van As, Instructed by Fluxmans Attorneys Inc

Respondent: Mr F Sangoni, Instructed by Ncube Incorporated