

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 82/2014

In the matter between:

UTATU SARWHU

First Applicant

E.S BESENT

Second Applicant

And

RUSSEL MOLETSANE N. O

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Heard: 6 March 2018

Delivered: 28 February 2019

JUDGMENT

TLHOTLHALEMAJE, JIntroduction:

- [1] The second applicant (Besent) seeks an order reviewing and setting aside the arbitration award issued by the first respondent (Arbitrator) dated 6 November 2013. In the arbitration award, the Arbitrator had found that the dismissal of Besent on account of allegations of misconduct was procedurally unfair but substantively fair. The third respondent (Transnet) was ordered to pay to Besent, compensation in an amount of R47 446-53 being the equivalent of three months' remuneration. Transnet has opposed this application. The first applicant (UTATU SARWHU) has since withdrawn from these proceedings.

Condonation:

- [2] Besent also seeks condonation for the late filing of the review application and the supplementary affidavit. The award having been issued on 6 November 2013, the review application was filed on 22 January 2014, making it just over four weeks out of time. The delay in my view is not excessive, and the explanation proffered in that regard is more than adequate. On the whole, the considerations of the interests of justice dictate that condonation in respect of the late filing of the review and subsequent supplementary affidavit be granted.

Background:

[3] Besent commenced his employment with Transnet in June 2005. At the time of his dismissal on 31 May 2013, he was employed as a Track Master by Transnet at its Infra Depot. The dismissal followed upon a disciplinary enquiry held in Besent's absence into the following allegations:

- i. "Gross insubordination: In that you in your capacity as a Track Master refused a lawful and reasonable instruction on the 04th April 2013 at approximately 13:15 when instructed to calm down and stop swearing at security guards.
- ii. Gross misconduct: That in your capacity as a Track Master contravened Transnet Code of Good Ethics when you behaved in an unbecoming behaviour when you used vulgar language against Transnet Contracted security guards which is also contravention of Transnet Culture Charter (Treating each other with dignity and respect) on the 04th April 2013 at 13:15
- iii. Gross misconduct: That you in your capacity as Transnet Freight Rail employee you brought the company's name into disrepute when you used vulgar language and attempting to fight with Transnet Contracted security guards on the 04th April 2013 at approximately 13:15
- iv. Gross misconduct: That you in your capacity as a Transnet Freight Rail employee threatened the Transnet security guards with murder on the 04th April 2013".

The arbitration proceedings:

[4] After his dismissal, Besent referred a dispute to the Bargaining Council and when attempts at conciliation failed, the matter came before the Arbitrator for arbitration.

[5] At the arbitration proceedings, Besent denied the allegations against him, and further contended that his dismissal was unfair as Transnet had applied

discipline inconsistently in that it had in the past, treated similar transgressions by other employees lightly; and further that the sanction of dismissal was inappropriate in the light of his clean disciplinary record.

[6] Seven witnesses were called to testify on behalf of Transnet at the arbitration proceedings. In summary, the evidence of Ms. Jwalane Bodibe, a security officer employed by a private security company providing guarding duties at the depot where the incident in question took place on 4 April 2013 was as follows;

6.1 She was on duty with two other officers when Besent arrived at the exit point in his vehicle. He had a passenger in the vehicle. Besent was then requested to open the boot of his vehicle for normal security checks. Besent had refused to do as instructed and had without reason started to verbally abuse her and other officers in Afrikaans and Setswana, calling her *'fat woman'*; *'ma se p...s'*; and *'vet p...s'*. He further referred to her as *'securities that don't wash'*.

6.2 At some point, Besent got out of his vehicle as he continued swearing, pointed a finger at Bodibe and threatened to hit her. When Bodibe's colleague, Mr. Seetelo tried to intervene, Besent turned his attention to him and also verbally abused him, further threatening to assault him and calling other people from 'outside' to come and assault him.

6.3 Besent at some point left his vehicle and went back inside the premises to call his manager (Mr Lesiba Ramahladi). When he and Ramahladi came back, Besent continued with his verbal abuse towards the security officers in the same crude terms despite Ramahladi's attempts to calm him down. Ramahladi according to Bodibe gave up in his attempts to calm Besent down and left. Besent ultimately opened the boot of his vehicle whilst he continued swearing, and after a search of his boot the security officers opened the gate for him to leave. As he left, he continued swearing at them.

- 6.4 Upon Besent's return to the premises, the security officers refused to let him through the gates, as he had not yet calmed down. The security officers called their control room, and ultimately the Transnet security officers were called to the scene. When the Transnet Security officers arrived, Besent had continued with his outbursts and vulgar language towards security officials, further telling them that he was not going to kill them himself, but would sent people to do so. At that point, security officials from Transnet (Messrs Phofi and Potgieter) attempted to calm him down but he had refused to do so.
- 6.5 Bodibe had testified that as a result of threats made by Besent, she had reported the matter to the police, and was still scared of him. She testified that even though the incident took place on 4 April 2013, she only reported it to the police on 12 August 2013, a day before the arbitration proceedings. She took long to report the matter to the police as she wanted to wait for the outcome of the arbitration as she did not know whether Besent would be reinstated or not. She had testified that she felt more threatened when Besent repeated his threats in front of officials from Transnet Security.

[7] Ramahladi's evidence was essentially that;

- 7.1 Besent reported to him. He confirmed that on the day of the incident, Besent came to him to complain that he had problems with security officials as they had asked him to open the boot of his vehicle, whilst they had let other vehicles through without searching them.
- 7.2 He confirmed that he and Besent went back to the security officers and upon their arrival, Besent had uttered profanities attributed to him by Bodibe, including calling her '*vuil p...s*'. He had also threatened the security officers.

- 7.3 He had testified that his attempts at calming Besent down were unsuccessful, and had told Besent that his behaviour was unacceptable in the workplace, and that he should stop swearing.
- 7.4 He also pointed out both Besent and the security officers were swearing at each other at some stage. When he could not calm Besent down, he had then left the scene as he could not handle the situation in the light of the threatening words uttered by Besent, including pointing of fingers and making threats that people from outside would be used to kill security officers. Ramahladi had equally felt threatened and disrespected by what Besent had said. He had then sent one of his managers to go and investigate the matter. Once a report was compiled, charges of misconduct were then formulated against Besent.
- 7.5 Ramahladi further testified in regards to Transnet Culture Charter which applied to all employees and persons doing business with Transnet including the contracted security, and which further provides for employees to treat each other with respect. He testified on the impact of Besent's conduct on Transnet's reputation since it dealt with subcontractors. He further testified that a trust relationship with Besent was broken due to his conduct as he had disrespected him and was not willing to conduct himself in an acceptable manner.
- 7.6 In regards to the specific charges, Ramahladi had testified that the refusal to obey a reasonable instruction came about when Besent refused to stop swearing at the security officers and refused to behave in an acceptable manner; that he was fighting and threatening to kill the security officer and had called them names, which was a dismissible offence. Besent had further violated safety and security rules as he had refused to have his vehicle checked, and had brought the company's name into disrepute.
- 7.7 Under cross-examination, Ramahladi testified that he did not know who had started with the swearing. He however stated that Besent swore at

the security officers in English and Afrikaans, and that they had also responded in kind.

[8] Ms Rebecca Matshoele, a security officer who was also manning the main exit/entrance to the premises confirmed the incident.

8.1 She added that when Besent refused to open the boot of his vehicle, he had also in the course of insulting them, told them that they 'did not wash themselves' (were stinking), and had called Bodibe names including 'vet vark'.

8.2 Matshoele confirmed that at some point Besent had opened the boot of his vehicle as requested and was allowed to exit the premises. When he came back to the premises, the security officers had decided to call Transnet officials to deal with him, as he had continued with his verbal abuse and threats. She denied that the security officers swore back at Besent.

[9] Mr Seetelo, another security officer confirmed the evidence of Bodibe and Matshoele in regards Besent's conduct and response when he was asked to open the boot of his vehicle. He confirmed that Besent had also pointed a finger at Bodibe, and had also threatened him (telling them that he will meet them in the township) before opening the boot of his vehicle. He also confirmed that there was another unidentified person in the vehicle who had also attempted to calm Besent down without success, and who had then left the scene.

[10] Mr Besent in his evidence essentially denied having insulted or verbally abused the security officers. He testified that when he approached the exit point, he was asked to open the boot of his vehicle by Bodibe, who had without reason, told her colleagues in Setswana that *'this thing does not want*

to open the boot'. He became angry at being insulted by Bodibe and had reprimanded her not to talk to him in that manner. He had then turned to his passenger, Mr Louw and told him that Bodibe, whom he referred to as '*dik cherrie*' had insulted him. When Seetelo intervened, he (Besent) told him that he would hit (*moer*) him too. He denied having insulted either of the security officers in the manner described by them. He further denied having threatened them or telling them that they did not wash.

- [11] Mr Louw, who was with Besent at the time of the incident testified that it was Bodibe who had provoked Besent by saying that '*this thing does not want to open the boot*'. When Besent reprimanded Bodibe not to speak to him in that manner Seetelo had intervened and it was at that time that Besent had also said that he would hit him too, but outside of the workplace. He denied that Besent insulted or threatened the security officers.

The arbitration award:

- [12] In his award, the Arbitrator concluded that Besent was correctly found guilty on the first charge of refusing to obey a reasonable instruction when told to calm down by his manager. In respect of the second charge, the Arbitrator concluded that Besent had conceded that he had uttered the words '*moer*'; '*securities that did not wash*'; and '*dik cherrie*'. The Arbitrator however concluded that there was no evidence to support Transnet's witnesses' contentions that Besent had verbally abused the security officers in other crude terms attributed to him, on the basis that not all of them could confirm that those terms were uttered by him. In any event, the Arbitrator concluded that Besent was guilty of the charge of verbally abusing the security officers.
- [13] In respect of the other charges, the Arbitrator found that Besent had attempted to fight with the security officers in the light of the language used,

and had also as a result of his conduct, brought the name of Transnet into disrepute. In respect of the last allegations pertaining to threats made to the security officers, the Arbitrator concluded that Besent was not guilty on that charge as he had simply told the security officers that he would get them in the township, which did not necessarily equate to a threat to kill them.

- [14] In regards to the appropriateness of the sanction of dismissal, the Arbitrator dismissed Besent's claims of inconsistent application of discipline, and took into account Ramahladi's testimony that as Besent's manager he could no longer trust him as he did not respect him. The Arbitrator concluded further that Besent had not shown any remorse, and therefore the sanction of dismissal was appropriate.

The grounds of review and evaluation:

- [15] Central to a determination of a review of an arbitration award is whether the decision of the Arbitrator to uphold the dismissal in this case is one that is reasonable in relation to the facts proven before him. Besent's grounds of review are that the Arbitrator committed certain gross irregularities. It is trite that this court will interfere with an arbitration award if the arbitrator misconceived the nature of the enquiry or committed a reviewable irregularity which had the consequence of an unreasonable result. In the end, the primary consideration is whether the decision sought to be reviewed, falls outside of a band of decisions to which a reasonable decision-maker could come on the same material¹.

- [16] In regards to the first charge, Besent contends that the Arbitrator erred in finding that he had refused to obey a reasonable and lawful instruction, as no instruction was issued to him as opposed to a request to calm down. He

¹ *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)

contends that the request was unheeded by both him and the security officers, and even if it could be said that he had failed to heed the instruction, that offence did not merit a sanction of dismissal. It was further argued on his behalf that, since his conduct was in the heat of the moment, it could not be regarded as serious or deliberate.

- [17] As I understood the evidence from the record, Besent upon having refused to open the boot of his vehicle had then left the scene and approached Ramahladi to complain. Upon coming back to the scene accompanied by Ramahladi, Besent had continued from where he left off earlier by swearing at the security officers and threatening them. Ramahladi's version that he told Besent to calm down and to stop swearing at the security officers was not seriously challenged other than being met with Besent's denials. Ramahladi had left the scene as Besent had refused to calm down and continued with his verbal abuse and threats, which had made him (Ramahladi) feel disrespected and equally threatened.
- [18] The gross nature of Besent's conduct (insubordination) must be viewed within the context of the fact that Ramahladi was his direct manager. Despite calling upon Ramahladi to intervene, he (Besent) had nonetheless refused to listen to him to calm down. It is irrelevant in my view whether Besent considered Besent's instructions to calm down as a mere request rather than an instruction. The fact of the matter remains that Besent had called upon Ramahladi to resolve a problem which in any event should not have escalated to where it was, had he simply complied with the security officers' request to open the boot of his vehicle for it to be searched like that of any other person entering or leaving Transnet's premises. Ramahladi had testified that he had on several occasions told Besent to calm down and to desist from his conduct, and the latter had refused, resulting in Ramahladi giving up and calling other people to investigate the matter. It cannot therefore be correct that Besent's conduct of disobeying Ramahladi was not serious, persistent, or

deliberate. There is further no merit in the contention that Besent's conduct was on a spur of the moment. On the contrary, it was relentless.

[19] In regards to the second and third charges, Besent's contention was that even though these related to the use of vulgar language during his altercation with the security officers, Transnet had nonetheless listed them separately and thus split the charges against him with the aim of bolstering its case. The second charge related to the contravention of the code of good ethics, whilst the third related to bringing the name of Transnet into disrepute.

[20] *Prima facie*, there might appear to be a splitting of charges, but this is however not so. In circumstances such as in this case, where a single incident had different factual components that comprise different offenses with distinguishable consequences, there would be no merit in any contention that a formulation of different charges from that single incident results in a splitting of charges.

[21] Bodibe, Ramahladi, Seetelo, Matshoele had all confirmed that Besent had verbally abused the security officers, and in particular, Bodibe in the most vile, uncivilised and dehumanising manner. The single incident or altercation (as Besent preferred to refer to it) that led to the various charges and ultimate dismissal, involved multiple acts on his part. In fact, on the facts, there were four interrelated incidents in that Besent went on his tirade when initially asked to open the boot of his vehicle. He had refused and went to fetch Ramahladi and continued with his verbal abuse when he came back. The third occasion was when he came back to the premises and still continued with his unacceptable conduct. The fourth occasion was when the Transnet security officers were called and he had continued with his tirade.

[22] These various acts and resultant consequences, whether individually or collectively in any event were serious. Any justification on the part of Besent that he was provoked was clearly contrived, as the record does not in any

event demonstrate that such a defence was put to any of Transnet's witnesses.

[23] By the use of vulgar language against the security officers (contractors), Besent clearly transgressed Transnet's Culture Charter, which enjoined employees to treat each other with respect. That code extended to contractors, and it followed that his conduct in relation to the security officers brought the name of Transnet into disrepute. There is therefore no merit in the contention that the charges were split, as the conduct of using vulgar language and attempting to fight with the security officers had the consequences of both contravening the Charter, and also bringing the name of Transnet into disrepute.

[24] Besent further complained that Transnet had applied discipline inconsistently in that at the time that Ramahladi had intervened, he had instructed both him and the security officers to calm down and not to swear, and yet only him was found guilty of gross insubordination, whilst the security officers were not disciplined despite being also bound by the Charter. In this regard, it was submitted that the Arbitrator failed to consider this inconsistency, thus committing a gross irregularity.

[25] A complaint of inconsistent application of discipline as against the security officers is misplaced, as the latter are mere contractors, and were not employed by Transnet. At most, it was for Transnet to treat any form of misconduct on the part of contracted security officers in terms of the contractual provisions governing its relationship with the contractor rather than by way of its own disciplinary procedures.

[26] Any complaint of inconsistency in regards to the two other Transnet employees Besent had compared himself with must be determined in regards to whether there is differentiation between the conduct of those employees as against that of Besent, taking into account their personal circumstances, the

severity of the misconduct in question, and any other relevant material factor². Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal, but is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss³.

- [27] Besent's contention was that the other two employees, Robbie Wier (who had used vulgar language against a colleague) and Jan Niemand (who was accused of assault and swearing, and also threatening to kill Besent) had committed the same misconduct of equal severity, and were only issued with a final written warning and two weeks' suspension respectively. The Arbitrator had indeed accepted that there was some form of inconsistency, but that the distinguishing features were that Besent was also charged with bringing the name of Transnet into disrepute, and that there were third parties involved. To that end, there were differences in the nature of the charges.
- [28] It is my view that any challenge to the Arbitrator's conclusions in regards to whether discipline was applied consistently or not is without merit. Even on the Arbitrator's liberal analysis of the evidence and findings that Besent had not verbally abused and insulted the security officers (Bodibe in particular) in the manner they and Ramahladi had described, the limited concessions he (Besent) had made that he had uttered words such as 'moer', and 'dik cherrie', and further told the security officers that they did not wash as accepted by the Arbitrator were sufficient, for a finding to be made that his misconduct was indeed gross. To refer to a female employee irrespective of her position and standing in the organisation as a 'dik cherrie' is body shaming in the extreme, which by its nature undermines the dignity, privacy and integrity of the individual concerned. Such conduct should be not only be frowned upon in the workplace, but must also be met with harsh consequences.

² *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at par [10]

³ *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) at par [31]

- [29] The Arbitrator's conclusions that the facts and circumstances of Besent's case were distinguishable cannot be faulted. The incident or misconduct in question was not only as between Besent and Transnet. It also involved a third party (contracted security officers) towards whom Besent had behaved in the most appalling manner. Notwithstanding his manager's appeal to him to desist from his conduct he had persisted. There is nothing to suggest from the record that Besent had shown any contrition. On the contrary, he either made bare denials or sought to justify his conduct with contrived defences of provocation. Even if there was such provocation as Louw had attested, the latter had equally left the scene after his failed attempts to calm Besent down failed, which can only attest to the conclusion that he had behaved badly. In the circumstances, and taking into account the overall effects of the conduct in question, Besent's clean disciplinary record became secondary, and there was no other conclusion to be reached other than that a sanction of dismissal was appropriate.
- [30] Besent's other complaint was that the amount of compensation in the light of a finding of procedural unfairness by the Arbitrator was not sufficient. It was common cause that Besent was dismissed following a disciplinary hearing held in his absence. This was in circumstances where on the date of the disciplinary hearing, Besent had informed the initiator (Ramahladi), that he was not feeling well, and was granted permission to consult a medical practitioner. Ramahladi had however failed to disclose those facts to the chairperson of the enquiry, resulting in the hearing being held in his absence. The Arbitrator had found that the dismissal of Besent was procedurally unfair and had ordered payment of compensation in the amount of three months.
- [31] An award of compensation for procedural unfairness in terms of the provisions of section 194(1) of the LRA must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of

dismissal. It is trite that the amount of compensation for procedural unfairness is equivalent to a *solatium* for the unfairness committed. Furthermore, an arbitrator has broad discretion whether to grant any compensation, and if so, for what amount within the confines of section 194(1) of the LRA. The court will not readily interfere in that discretion, especially not on review.⁴

[32] Besent merely alleges that the compensation amount is inadequate. In the founding affidavit, it was averred that the compensation amount ought to be increased as it was not just and equitable. In the supplementary affidavit, nothing much is added to the averments made in the founding affidavit. It is

⁴ See *Cf Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC); *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para [50], where it was held that;

“To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA. Zondo JP outlined the applicable factors in these terms:

“There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors.

However, some of the relevant factors may be given. They are:

(a)...

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.

(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer’s deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer’s deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.” (Citations omitted)

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.”

not known on what basis Besent contends that he is entitled to more compensation. There is nothing in the pleadings that suggests that in exercising his discretion, in regards to the amount of compensation, the Arbitrator had acted improperly. Accordingly, there is no basis for the court to interfere with the Arbitrator's discretion in that regard.

[33] In conclusion, I am satisfied that in the light of the material presented before the Arbitrator, his conclusions are unassailable, as the decision arrived at falls within a band of reasonableness. I have further had regards to the requirements of law and fairness, and deem it appropriate not to make any costs order.

[34] Accordingly, the following order is made;

Order:

1. The late filing of the review application and the supplementary affidavit is condoned.
2. The application to review and set aside the arbitration award issued by the first respondent dated 6 November 2013 is dismissed.
3. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Second Applicant:

A Davies of Johanette Rheeder Inc

For the Third Respondent:

D. Norton of Mkhabela Huntley
Adekeye Inc

LABOUR COURT