



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 284/2021

In the matter between:

**UNITED NATIONAL TRANSPORT UNION
obo ZP NKAMBULE**

Applicant

and

SEELE MOKWENA N.O.

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Heard: 10 October 2023

Delivered: 13 October 2023

(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 SAFLI. The date on which the judgment is delivered is deemed to be 13 October 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent (the arbitrator) on 24 December 2020. In his award, the arbitrator found that the applicant (the employee) had been fairly dismissed by the third respondent (Transnet).
- [2] The employee was employed by Transnet in 2000, and by 2007 had advanced to the position of section manager, with responsibility, among other things, for signing off crew, communicating with crew members and ensuring that they were fit for duty. On 11 November 2019, the employee was charged with serious neglect of duty and two counts of sabotage. The charges emanated from an incident that occurred on 7 November 2019, when a train assistant on board train 0424 on the main line had reported sick, and had to be replaced by another employee. Transnet contends that at the relevant time, the employee failed to ascertain what the problem was with the sick train assistant, or ascertain the nature of his illness. Train 0424 stood on the main line for 350 minutes, the crew on board, including the sick train assistant. At issue in these proceedings, as will appear below, is an instruction given to the effect that the sick train assistant should not be transported by a kombi sent to take a relief crew to the train, with the result that he remained on the train with the consequence of the delay. The employee avers that she acted in accordance with an instruction given to her by her line manager; Transnet contends that the sick employee was and remained the responsibility of the employee, and that she was guilty of a gross dereliction of duty by failing to discharge that responsibility.
- [3] After an internal enquiry, the employee was dismissed from Transnet's employ. The employee contested the fairness of her dismissal, a matter that was ultimately referred to arbitration. The arbitrator found that Transnet had established a case against her in respect of only one of them, the alleged serious neglect of duty. The present proceedings thus concern the arbitrator's decision in respect of that finding only.

- [4] At the arbitration hearing, the first witness called by Transnet was Mr MM Mashele, a depot manager. He testified that the employee's responsibilities included the rostering of employees for train operations, the running of train schedules and the execution of the integrated train plan in relation to train services. The employee reported to a Ms Campbell. Mashele testified further that the traffic control officer had informed the employee that a train assistant had reported that he was ill. The employee sent a reliever to the train, but with instructions that the sick employee should not be transported in the kombi that had been dispatched to the train. Mashele confirmed under cross-examination that an ambulance had been activated by the central traffic controller in Ogies. The sick employee remained on board the train, with the consequence that the train had to stand on the main line for some 340 minutes until another vehicle was sent to fetch the sick employee. This caused significant delays across the service and a paralysis of the schedule. The employee was asked whether she had established the nature of the employee's illness, which she had not. When asked how he knew that the employee had instructed the driver not to pick up the sick employee, Mashele stated that he had been told this by Campbell when they had discussed the incident. The consequence of the employee's conduct was that the main line was blocked, causing disruption and delay. Mashele stated that for as long as the train stood on the main line with a sick employee on board in circumstances where the employee was responsible for all employees on board, she remained responsible and that her conduct was inconsistent with Transnet's code of ethics and disciplinary code.
- [5] The kombi driver, Mr Nkosi, testified that on the employee's instruction, he dropped a train driver and assistant at the train and returned with the relieved train driver, leaving behind the sick train assistant.
- [6] The employee testified that at about 8h00 on 7 November 2019 she received a call from the traffic control officer reporting a sick train assistant, and requesting a replacement. She and her team resolved to divert the kombi to relieve the sick train assistant, a decision that was communicated to Campbell. Campbell told them that because the kombi would arrive at the

train before the ambulance, the train assistant should not be transported in the kombi. At about 13h00 another call was received from the traffic control officer to inform them that the train was still waiting, with the sick train assistant. This was reported to Campbell, who called them and told them to send a kombi to fetch the sick train assistant.

- [7] Mr Mlotshwa testified that he was an acting section head at the time of the incident, and that the central traffic controller had called to report that the train assistant was not feeling well. A reliever was arranged in liaison with the crew manager. The witness stated that he was informed by the employee that Campbell had called her and told her that the sick train assistant was not to be transported in the kombi that carried the reliever.
- [8] The arbitrator's findings and the reasoning in support of those findings are apparent from the arbitrator's analysis of the evidence. The arbitrator records that an ambulance had been activated by the central traffic controller to attend to the sick train assistant. The arbitrator found that while the employee had sought to rely on this fact to absolve her from responsibility for the sick train assistant, the employee was not so absolved. The arbitrator made the following findings:

'35. According to the documentary evidence which Mashele confirmed under cross-examination, an ambulance to attend to the sick train assistant was activated by the central traffic controller in Ogies. The applicant resented this documentary evidence to demonstrate that Ogies was responsible to deal with the situation. This may have been the case, but it did not absolve her from responsibility over the sick train assistant who fell under her command. If it was a joined (sic) responsibility because it involved a train that blocked the mainline and an employee who required medical attention, there is no way that she would not be involved in resolving the matter. It was for that reason that she arranged a replacement for the sick train assistant. If train operations were affected by reason of an employee who was her responsibility, her continued involvement was required until the matter was resolved. It is immaterial that on the day in question she was responsible for exceptions. He was aware of the existing problems of

which her office has a duty to help resolve but elected to get partially involved in their resolution and left behind a part that still involved her responsibilities, the crew on the train.

36. ... There was conflicting evidence on whether or not the applicant or the crew monitor instructed the driver not to return with the sick train assistant. However, this does not change the fact that the source of the instruction was the applicant because her own and Mlotshwa's evidence was that the applicant was told by her line manager not to transport the sick train assistance (sic) in the kombi. This instruction was ultimately conveyed to the service driver who transported relief personal to and from various points.
37. Her evidence was informed by her line manager that the sick train assistant should not be transported in the company vehicle was also opportunistic because this version was not put to the respondent's first witness. This is so and it is important because the first respondent's first witness stated the applicant's line manager was the one who informed him that the applicant instructed the service driver not to transport the sick train assistant in the kombi. Her failure to challenge the evidence of the first respondent's first witness in this regard meant that the evidence was accepted as a true reflection of events.
38. I am mindful of the fact that the applicant and her colleague at the time, Mlotshwa, shared the office responsibilities for which the applicant alone was charged. I am however of the view that consistency as one of the factors I have to consider in determining the fairness of the dismissal, cannot be the only factor that an employee guilty of misconduct should escape culpability. The fact that Mlotshwa was not disciplined does not take away the fact that the applicant before me was correctly disciplined for an omission that fell within the purview of her responsibilities and that the omission was of such a serious nature that dismissal was an appropriate sanction on this charge alone.

[9] In summary, the arbitrator held that the welfare of the sick train assistant was the employee's responsibility, that she discharged this responsibility in part by arranging a replacement for him, but that she failed properly to discharge her

responsibility toward him in circumstances where he was left unattended on the train for more than 4 hours where the main line was blocked for that period. The employee's attempt to place blame at the feet of Campbell was rejected on the basis that the employee did not put this version to Transnet's witnesses when they gave evidence in chief. Further, Mashele's evidence that Campbell had informed him that the employee had instructed the service driver not to transport the sick train assistant had not been challenged. In short, the employee had omitted to discharge her responsibilities in circumstances where her omission was of such a serious nature that dismissal was warranted.

- [10] The first ground for review relates to the arbitrator's finding that the evidence disclosed that the employee was guilty of a serious dereliction of duty. While not clearly articulated in the founding affidavit, the applicant appears to contend that the arbitrator failed to take the employee's explanation into account, and that it is therefore not a decision which a reasonable decision-maker could have reached. In particular, the employee contends that in finding that she was correctly convicted on the charge of gross dereliction of duty, the arbitrator relied on the fact that her version had not been put to the Transnet witness and that given that the parties were not legally represented, a degree of latitude ought to have been allowed when assessing the evidence that was tendered.
- [11] During argument, the applicant submitted that the arbitrator had erred by relying on what was clearly hearsay evidence, being the evidence of Campbell's statement to Mashele to the effect that the employee had instructed the driver not to transport the sick employee in the kombi. The second ground for review relates to the arbitrator's finding Transnet had not inconsistently applied discipline by dismissing the employee and not one of her colleagues, Mlotshwa.
- [12] In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1

BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The LAC has cautioned against adopting a piecemeal approach, since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). When an arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

- [13] To summarise: the threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. The second stage is one in which the review court must establish whether despite any retrievable irregularity, the award nonetheless falls within a band of decisions to which a reasonable decision – maker could come on the available material.
- [14] The ground for review premised on the admission of hearsay is not raised in the founding affidavit. The ordinarily applicable rule is that the employee is bound by the grounds of review as they are expressed in her founding affidavit (the employee did not file a supplementary affidavit as envisaged by Rule 7A (8)), and that it is not open to her to introduce additional grounds for review in the heads of argument. In any event, there is no merit in this ground of review, given that the arbitrator's finding does not turn only on the hearsay evidence as to what Campbell had said to Mashele. The arbitrator canvassed all of the evidence before him in concluding as he did, and especially had regard to Mashele's evidence as to what was expected of the employee in relation to the sick train assistant, regardless of anything that may have been

said by Campbell. To the extent that the first ground for review amounts to no more than that the arbitrator erred by failing to take into account the explanation for her conduct as tendered by the employee, and that the arbitrator misdirected himself by basing his factual finding relating to the instruction given by the employee on the failure to put her version to Transnet's witnesses, the arbitrator's award discloses that he had specific regard to the employee's explanation. For the reasons stated, he elected not to accept the explanation. I fail to appreciate how it can be said in these circumstances that the arbitrator committed any reviewable irregularity. In the determination of who had communicated the decision to leave the sick train assistant on the train, the driver had testified that this decision was communicated to him directly by the employee, a version confirmed by Mlotshwa. The employee stated that she could not recall speaking to the driver. In other words, the arbitrator had regard to the totality of the evidence, and decided to reject the employee's version on account of the fact that it had not been put to Transnet's witnesses in cross-examination. This is a perfectly acceptable basis on which to make a factual finding to the effect that it was the employee who made the decision not to remove the sick employee, regardless of the fact that the parties' representatives may not have been legally qualified and aware of the obligation to put a version to a witness under cross-examination. As I have indicated, and in any event, the arbitrator went further than a determination that the employee was the source of the instruction not to remove the sick employee from the train – he considered the employee's obligations in context and concluded that she had particular responsibilities toward the sick employee which she neglected. There is nothing irrational, arbitrary or unreasonable about this conclusion, having regard to the evidence that served before the arbitrator. In short, the arbitrator did not commit any reviewable irregularity in his assessment of the evidence, and his conclusion in any event is one that falls within a band of decisions to which reasonable decision-maker could come on the available evidence.

- [15] The second ground for review, one based on the alleged inconsistent conduct in the application of discipline, was not pursued with much enthusiasm at the hearing, but the arbitrator was clearly alive to the fact that Mlotshwa in

particular shared an office with the employee and to some extent, had shared responsibilities with the employee. The arbitrator considered nonetheless that the employee could not escape culpability on the basis that Mlotshwa was not disciplined. Inconsistency is not a rule unto itself; it is a factor to be considered in an overall consideration of the fairness or otherwise of a dismissal. In any event, the employee was senior to Mlotshwa, and deferred to her. The arbitrator's decision is not so unreasonable that it fails to meet the reasonableness threshold that applies.

- [16] In summary: the test to be applied is one that sets the threshold for interference high. It is not for the court to determine whether it would have come to a different conclusion on the same facts. In the words of *Gold Fields*, the arbitrator understood the nature of the enquiry, had regard to all of the available evidence and came to a conclusion that cannot be said to be so unreasonable that no reasonable decision-maker could not have come to it. The application stands to be dismissed. Neither party sought costs, and no order for costs will be made.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the applicant:	MJ van As
Instructed by:	Fluxmans Attorneys
For the third respondent:	S Bismilla
Instructed by:	Ningiza Horner Attorneys