THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR38/22

In the matter between:

MANFRED JERRY LOUW	**Applicant**
and	
TRANSNET SOC LTD (TRANSNET ENGINEERING – KILNER PARK)	**First Respondent**
COMMISSIONER DG LEVY *N.O.*	**Second Respondent**
TRANSNET BARGAINING COUNCIL	**Third Respondent**

Heard: **16 May 2024**

Delivered: **20 May 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date of hand down is deemed to be 20 May 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] This is an application brought in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside an arbitration award issued by the second respondent (commissioner) following a section 188A inquiry by arbitrator. The review is against the commissioner's award on sanction dated 30 January 2022.

[2] On 13 August 2018, the first respondent (Transnet), charged the applicant with two primary charges – sexual harassment and abuse of power and/or bullying. These allegations were instituted post an internal grievance laid by the complainant (Ms. G) against the applicant and the investigation which recommended that the applicant be disciplined. The sexual harassment charge had two counts. The acts of harassment were allegedly committed against Ms. G in 2014, 2015 and 2016.

[3] Following the inquiry in terms of section 188A of the LRA under the auspices of the third respondent, the applicant was found not guilty of the charge of sexual harassment. He was however found guilty of the second charge. Charge 2 reads as follows:

> '**ABUSE OF POWER AND/OR BULLYING**
> In that on or about 14 November 2017, in your capacity as employee Relations Manager: you abused your power or position of authority by adding the following … charges against [Ms. G] where there was no evidence to support your allegations, in an attempt to secure a dismissal sanction against [Ms. G]
> "2.3. In that during the 18 November 2017, in your WhatsApp conversations between yourself and Mr. Erika van der Merwe, you used these words or words to the same effect, "This man really has a chip on his shoulders and wants to fire me", referring to Mr. Manfred Louw, the Senior Manager: Employee Relations. Your conduct is viewed as being grossly disrespectful to your superiors.
> **Gross Misconduct / Assuming a Threatening Attitude**

[1] Act 66 of 1995, as amended.

In that during the 18 November 2017, again in your WhatsApp conversations between yourself and Mr. Erika van der Merwe, you used these words or words to the same effect, “And people like him, will suffer in life”.’

[4] The genesis of charge 2 is the section 188A inquiry against Ms. G, where the applicant acted as an initiator. Ms. G was charged with assault and gross insolence or inappropriate conduct. During the section 188A inquiry, the applicant added the above allegations against Ms. G. these WhatsApp messages were added as part of the record during Ms. G’s inquiry.

[5] On 20 February 2018, Ms. G, represented by her trade union, sent a letter to Transnet proposing settlement of her inquiry. She stated in this letter that she never intended to offend the applicant and proposed that she be issued with a final written warning valid for 12 months.

[6] Transnet accepted the proposal. On 13 June 2018, Transnet issued Ms. G with a final written warning valid for 12 months. The final written warning was in respect of all allegations of misconduct that she faced, including the charges added by the applicant.

[7] Shortly thereafter, Ms. G lodged a grievance against the applicant, which led to the investigation and the charges against the applicant. The disciplinary hearing against the applicant was also conducted in terms of section 188A of the LRA. Subsequently, the commissioner found the applicant guilty of charge 2 only and ordered dismissal. Aggrieved by this decision, the applicant approached this Court on review. That application came before Lallie J, who on 17 January 2022, reviewed and set aside paragraph 89 of that award. Paragraph 18 of the award related to the sanction of dismissal. The finding of guilt against the applicant was not interfered with. The learned Judge remitted the matter to the commissioner to determine sanction afresh, based on the same material that served before him.

[8] On 30 January 2022, the commissioner issued the award which is now the subject of this review. In this award, the commissioner found that in terms of the disciplinary code, the charge relating to abuse of position of authority is a dismissible offence. He concluded that it was evident that Transnet wanted to dismiss the applicant when it invoked the section 188A inquiry instead of an internal disciplinary hearing.

[9] The commissioner proceeded to make reference to Transnet's closing arguments, where it was submitted that the charge of sexual harassment and abuse of power and bullying attracts a sanction of dismissal and that the trust relationship has broken down. The commissioner then concluded that from the time Transnet formulated the charges, it "*expected a sanction of dismissal in the event of a guilty verdict on either of the primary charges*".

[10] The commissioner then considered the evidence whether the additional charges were preferred with the consent of the applicant's line manager or not. He found that the line manager did not participate or contribute in the applicant's decision to add the charges. In any event, he concluded that the line manager's consent was not necessary for the applicant to add the charges.

[11] The commissioner then deals with the circumstances that led to the applicant adding the charges against Ms. G. He refers in particular to the applicant's closing arguments where he said that he considered it to be his responsibility to report the WhatsApp messages to his line manager and that if management found nothing wrong with the messages, the enquiry would have ended there. The commissioner then concludes that the applicant excludes himself from the decision to issue the charge and criticised him for being unrepentant and not remorseful.

[12] Referring to the applicant's argument that the charge is not serious to warrant dismissal despite the charge of abuse of power being categorised as serious to warrant dismissal, the commissioner found that:

> ‘My concern is therefore that if he were (sic) not dismissed and in the ensuing five years before his retirement a similar situation was to arise, he would once again have no hesitation to abuse his position of authority for his own ends. There is little likelihood of the principle of progressive discipline yielding the desired outcome in these circumstances.’

[13] The commissioner stated he was not aware of any approach by the applicant to Transnet concerning any alternatives to dismissal. Regarding the applicant’s length of service, he found as follows:

> ‘Neither his length of service nor the fact that [Ms. G] does not work in the same corporate division as [the applicant] are of relevance in these circumstances as they do not address the shortcoming in his ability to provide a consistently professional and reliable service to [Transnet]’.

[14] The commissioner concluded:

> ‘Having considered the matters raised above, the seriousness of the misconduct, the mitigating and aggravating factors presented to me, the provisions of the Transnet Disciplinary Code, the absence of remorse and the absence of any shared responsibility for the misconduct, I find that [Transnet] is justified in regarding the relationship of trust to be irremediably damaged (as expressed in [Transnet’s closing argument] and that consequently a sanction of dismissal be applied.’

Analysis

[15] The applicant seeks to impugn the award on six grounds. Five of these grounds are that the commissioner committed gross irregularities, misconstrued the evidence, made incorrect findings of fact and applied the wrong test (the primary grounds). The sixth ground is that the conduct of the commissioner demonstrated an apprehension of bias.

The test for review

[16] The test to review an award was established in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[2]. The question is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach?[3]

[17] In *Duncanmec (Pty) Ltd v Itumeleng NO and others*,[4] the Labour Appeal Court (LAC) restated the common basis upon which awards are reviewed:[5]

> 'The principles relating to review of arbitration awards are now trite and need not be restated. Suffice to say that arbitration awards may be set aside if the award is disconnected from the evidence resulting in an unreasonable outcome.'

Reasonable apprehension of bias

[18] The applicant's contention is that because of the approach adopted by the commissioner, the alleged irregularities committed and the findings he reached which are based on insufficient or no evidence, the commissioner created an apprehension of bias. In other words, the applicant's case is that the commissioner should have recused himself. During the hearing, Mr Boyens did not argue the ground neither did he abandon it.

[19] The applicant's contention is grounded on the fact that the commissioner's findings against him, and nothing more. He raised no issues during the arbitration proceedings about the conduct of the commissioner. He raises no issues in these proceedings and has not referred this Court to any specific conduct to base the conclusion of an apprehension of bias. This ground is dismissed.

[2] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).
[3] Ibid at para 110.
[4] [2020] 7 BLLR 668 (LAC).
[5] *Ibid* para 23.

The primary grounds

[20] The common cause fact is that Transnet did not lead evidence regarding the breakdown of the trust relationship. It simply made a submission in its opening and closing argument that in the event that the applicant was found guilty of sexual harassment and abuse of power, the only appropriate sanction would be dismissal, taking into account the applicant's seniority. Well, the applicant was found not guilty of the charge of sexual harassment.

[21] In *Sidumo*, the Constitutional Court set out the approach to be adopted by a commissioner when dealing with a dismissal dispute. Whilst I accept that the commissioner was not dealing with a dismissal dispute but was considering what the appropriate sanction should be for the misconduct, the approach set out in *Sidumo* remains relevant and applicable to the enquiry. The Court said:

> '[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
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> [79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[22] The Court continued:

> 'The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo's attitude and efficiency. In my view, the commissioner carefully and thoroughly considered the different elements of the code and properly applied his mind to the question of the appropriateness of the sanction.'[6]

[23] Although the charge is formulated as abuse of power or bullying, and appears or sounds serious, a closer inspection of the facts and evidence relied on to establish the charge provides a contrary picture. The charge has nothing to do with workplace bullying. The charge was based on the WhatsApp messages from Ms. G which made accusations against the applicant that he had a grudge against her and that he was determined on dismissing her. Ironically, Ms. G had pleaded guilty to the charge which forms the basis of the charge against the applicant and his subsequent death sentence. The charge does not involve deceit and there was no evidence whatsoever presented regarding the impact the applicant's conduct had on the operations of Transnet.

[24] The commissioner's reasoning in coming to the conclusion that the charge warrants a sanction of dismissal is based on what the disciplinary code provides. Clause 6.6.3 of the disciplinary code provides that primary offences, including "abusing a position of authority", are considered serious misconduct and may attract a sanction of dismissal. The commissioner's finding was that because the disciplinary code says that abuse of power may attract a sanction of dismissal, the applicant must be dismissed.

[25] There was no independent and objective enquiry conducted by the commissioner to establish the seriousness of the charge and why a sanction short of dismissal would

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[6] *Sidumo* at para 117.

not be appropriate. This was significant in this case because the charge against the applicant does not involve an element of deceit or dishonesty. This is a material misdirection and a gross irregularity with the distorting effect.

[26] The commissioner then criticised the applicant for submitting that the misconduct is not serious enough to warrant a sanction of dismissal. He found that this compounded the applicant's misery. The commissioner then strayed and engaged in baseless speculation and conjecture that if the applicant was not dismissed, he would "*have no hesitation to abuse his position of authority*" and that the principle of progressive discipline would not yield the desired outcome.

[27] The commissioner relied on the written submission that the trust relationship has broken down. In the process, he elevated the arguments into evidence. This is a material error and a misconception of the enquiry.

[28] The commissioner also found that the length of service and the fact that the complainant, Ms. G, does not work in the same department as the applicant are irrelevant factors. He therefore deliberately ignored these crucial factors in favour of treating arguments unsubstantiated by facts or evidence about the alleged breakdown of trust relationship and his speculation and conjecture regarding the applicant's conduct if he was to remain in the employ of Transnet. These are gross errors and irregularities which had the ultimate impact on the decision to dismiss the applicant.

[29] According to the commissioner, his decision to impose a sanction of dismissal was fortified by Transnet's decision to follow the section 188A process and that from the time Transnet drafted the charge sheet, it contemplated dismissal. This reasoning is poor, hollow and untenable. It suggests that when employers seek dismissal subsequent to a guilty finding on any charge, commissioners or arbitrators must accept the argument, even in the absence of evidence to justify such a conclusion. It further suggests that arbitrators who preside over enquiries in terms of section 188A of the LRA must adopt an approach that they carry a mandate from employers to dismiss the

employees. This is a material error and undermines item 7 of Schedule 8 of the Code of Good Practice: Dismissal.

[30] The evidence whether the applicant consulted with his line manager or that the line manager was part of or contributed to the decision to charge Ms. G is immaterial and of no moment. I therefore do not consider it necessary to address it or any findings made to that effect.

[31] During the hearing, I asked Mr Mbuyisa, appearing for Transnet, whether the person who charged the employee with sexual harassment was disciplined? Of course, this was to demonstrate the irony of the charge against the applicant and why it is not serious. This was not an attempt to revisit or reopen the finding of guilt on the charge, which remains valid as it was not been set aside. The context of my question was that employers cannot charge managers for abuse of power simply because they charged their subordinates or other employees if they fail to secure a guilty finding and dismissal. Such a charge will require more than an unsuccessful guilty finding or dismissal. It will require proof of connivence, contrivance and conspiracy. There was no such evidence presented. As indicated already, Ms. G offered an apology for her conduct and pleaded guilty.

[32] The award is untenable. It is grossly unreasonable and disconnected from the material placed before the commissioner. It cannot be rescued from its inevitable fall. It is liable to be reviewed and set aside.

Remedy

[33] The full record of the proceedings is before this Court. This Court is therefore in the same position as the second respondent to determine this matter. It is almost five years since the dismissal of the applicant. I see no reason not to determine the appropriate remedy.

[34] The applicant seeks an award of reinstatement. The primary remedy of reinstatement must be awarded if the employee so wishes.[7] In *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*[8], the Constitutional Court reaffirmed the principle that reinstatement is the primary remedy that follows a finding of substantively unfair dismissal.[9]

[35] As evident from what is set out above, there was no evidence led regarding the breakdown of the trust relationship and that continuation of an employment relationship would be intolerable and/or reasonably impracticable. Transnet had the onus to prove intolerability or reasonable impracticability. It failed to show this at the arbitration proceedings and has again failed in these proceedings. There are no facts before this Court why reinstatement should not be retrospectively awarded.

[36] Regarding the finding of guilt, which as I have found, was on a less serious misconduct, the appropriate sanction is a verbal warning, valid for three months from the date of the award.

[37] The issue of costs is reserved for the Court's discretion. The parties did not seriously pursue and argue this issue. There is no reason to deviate from the trite legal principle that costs do not follow the result.

[38] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent under case number TCR012325 dated 30 January 2022 is reviewed and set aside.
2. The award is substituted with the following order:

[7] Section 193(2) of the LRA; see *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC).
[8] [2018] ZACC 44; (2019) 40 ILJ 87 (CC).
[9] Ibid at para 46.

'2.1. The applicant is issued a verbal warning valid for a period of 3 months from 30 January 2022 to 30 April 2022.

2.2. The dismissal of the applicant by the first respondent is hereby declared substantively unfair.

2.3. The first respondent is ordered to reinstate the applicant retrospectively from the date of his dismissal, on the same terms and conditions of employment that existed prior to his dismissal and without any loss of benefits.

2.4. The first respondent is ordered to pay the applicant backpay from the date of dismissal until the date he reports for duty within 10 court days of this order.

2.5. The applicant is ordered to report for duty on 27 May 2024.

3. There is no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. M.J. Boyens of Joubert Galpin Searke Attorneys.

For the First Respondent: Mr. N. Mbuyisa of Mamatela Attorneys Inc.