

SOUTH AFRICA / JUDGMENT

Fritz v Transnet Port Terminals and Others (PR129/20) [2023] ZALCPE 25 (24 November 2023) [2023] ZALCPE 25

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

PR129/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

CASE

NO: PR129/20

In the matter between:

SULLIVAN
DANVIC FRITZ
Applicant
And
TRANSNET
PORT TERMINALS
First
Respondent
COMMISSIONER
BOTH A DU PLESSIS, N.O
Second
Respondent
TRANSNET
BARGAINING COUNCIL
Third
Respondent
COMMISSIONER
ROBBERTSON, N.O
Fourth
Respondent
Heard: 01 June 2023

Delivered: This judgment was handed down electronically by circulation to the Applicant's and First Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h00 on 24 November 2023.

JUDGMENT

LALLIE, J

- [1] The applicant was employed by the first respondent as a Technical Supervisor at the Electrical Department. He was dismissed for misconduct on 22 October
2018. He challenged the unfairness of the dismissal at the third respondent (the bargaining council). When the resolution of the dispute was being processed at the bargaining council, the applicant applied for legal representation at the planned arbitration. The application was opposed by the first respondent. The fourth respondent who determined the application on the papers issued a ruling refusing the applicant legal representation at arbitration. The applicant was consequently represented by his two co-employees at arbitration while the first respondent was represented by its Employee Relations Manager, Mr Moolman (Moolman). Having arbitrated the dispute, the second respondent issued an award in which he found the applicant's dismissal fair. The applicant subsequently filed the application at hand seeking an order reviewing and setting aside both the ruling on legal representation and the arbitration award. The application is opposed by the first respondent.
- [2] By agreement between the applicant and the first respondent the only issue for determination is the review of the ruling refusing the applicant legal representation at arbitration. The fourth respondent expressed his reasons for refusing legal representation in the following words:
- "The applicant was employed as a Technical Supervisor and well versed with the policies and procedures in respect of which he is charged. It does not appear that any complex legal issues will arise or that the matter will be unduly factually complex. The dispute will be about whether the applicant was guilty or not of the charges brought against him and the applicant, given his experience while in the employ of the respondent as a technical Supervisor, will not be placed at a disadvantage in presenting his own case."*
- [3] The applicant's main grounds for review are that the fourth respondent committed a reviewable irregularity by unreasonably expecting the applicant to proceed without legal representation at the arbitration. The first respondent opposed the application on the grounds that the applicant failed to prove the irregularity of the fourth respondent's finding

that his lack of experience in arbitration proceeding when compared to Moolman's experience did not tilt the scales in favour of granting the application for legal representation. The first respondent added that the applicant failed to disclose the experience of his co-employees who represented him.

- [4] Rule 27.2.2 of the bargaining council provides that a party may be legally represented at arbitration when the arbitrator has ordered so after taking into account the following the nature of the questions of law raises by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute.
- [5] It is apparent from the reasons the fourth respondent gave for his decision that he did not consider the comparative ability of the opposing parties or their representatives to deal with the dispute. He only considered the applicant's knowledge of the first respondent's policies on which his charges of misconduct were based. He concludes that he would not be disadvantaged in presenting his case based on his experience as a Technical supervisor. The fourth respondent did not deal with the ability of the first respondent's representative. The omission resulted in his inability to compare the ability of the representatives to deal with the dispute. The fourth respondent's reliance on the applicant's ability to understand the first respondents policies is materially different from his ability to deal with the arbitration of the dispute.
- [6] I accept the applicant's argument that the fourth respondent committed an irregularity in not considering the comparative ability of the parties to deal with the arbitration. Section 138 (1) of the Labour Relations Act[1] (the LRA) enjoins arbitrators to conduct arbitrations fairly. Fairness requires that the ability of the parties or representatives to deal with the dispute being arbitrated be similar. This requirement is intended to protect a party with less ability by granting that party the right to be legally represented with the view of balancing the ability of the parties to present their respective cases. In *Head of Department of Education v Mofokeng*[2] it was held that a commissioner's error of undertaking the enquiry before him or her in the wrong manner or arriving at an

unreasonable decision results in the misconception of the enquiry which justifies having the decision reviewed.

- [7] A commissioner misconceives a dispute when that commissioner conducts the enquiry before him or her incorrectly. Rule 27.2.2 of the bargaining council prescribes how the inquiry into whether a party should be granted legal representation should be conducted. The fourth respondent conducted the enquiry incorrectly by his failure take into account an essential step of the enquiry. By so doing he misconceived the dispute before him. The misconception resulted in him reaching the unreasonable result of refusing the applicant legal representation.

- [8] As the ruling on legal representation has been reviewed and set aside any decision, ruling or arbitration award flowing from it cannot stand.
- [9] The first respondent did not act unreasonably in defending the ruling in its favour. A costs order against it will not be appropriate.
- [10] In the premises, the following order is made:
1. The ruling issued by the fourth respondent under case number TCR012698 and dated 22 April 2019 is reviewed and set aside.
 2. The matter is remitted to the first respondent to be arbitrated de novo by an arbitrator other than the fourth respondent.
 3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Dwayi

Instructed by Butler Attorneys

For the First Respondent: Mr C. Unwin of Kaplan Blumberg

[1] Act 66 of 1995 as amended.

[2] [2014] ZALAC.

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