

SOUTH AFRICA / JUDGMENT

Somi v Transnet Bargaining Council and Others (PR212/20) [2022] ZALCPE 40 (9 December 2022)

[2022] ZALCPE 40

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PR212/20

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, GQEBERHA****Not Reportable****CASE NO: PR212/20**

In the matter between:

ANDILE
SOMI
Applicant
And
TRANSNET BARGAINING
COUNCIL
First Respondent
CATHERINE WILLIOWS
N.O.
Second Respondent
TRANSNET NATIONAL
PORTS AUTHORITY
Third Respondent
Heard: 6 October 2022

Delivered:

This judgment was handed down electronically by circulation to the Applicant's legal representatives and the respondents 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 9 December 2022.

JUDGMENT

LALLIE, J

- [1] The applicant launched this application in terms of section 145(1) of the Labour Relations Act[1] hereinafter referred to as the LRA. He seeks an order reviewing and setting aside the arbitration award of the second respondent who will be referred to as the arbitrator in this judgment, in a pre-dismissal arbitration. In the award the arbitrator found that the applicant had made himself guilty of acts of misconduct which justified the sanction of dismissal she issued against him. It is that award which the applicant seeks this court to review and set aside. The application is opposed by the third respondent.
- [2] The applicant was employed by the third respondent as its Employee Relations Manager on 1 April 2012. On 18 October 2019, as the applicant was reporting for work at Port Admin, his workplace, he was required by Mr Mosipha (Mosipha), a member of the Security Personnel who was conducting search procedures to step out of his vehicle and open its boot. The applicant explained to Mosipha that owing to serious injuries he sustained in a motor vehicle accident alighting from a motor vehicle had become difficult. When Mosipha insisted that the applicant alight from his motor vehicle, the applicant informed him that owing to his condition, security guards searched his vehicle without requiring him to step out of it. The arrangement was communicated to Mrs Sinxoto (Sinxoto) the Security Operations Manager who was at that point aware of it. The applicant asked Mosipha to call Sinxoto to confirm the arrangement but he refused and insisted that the applicant stepped out of his vehicle. The verbal exchange between the applicant and Mosipha delayed Mr Mntuyedwa (Mntuyedwa) who also needed to access his workplace. A security guard who was working with Mosipha allowed Mntuyedwa to enter through the exit gate. The applicant then forced his entrance through the exit gate by tail-gating Mntuyedwa's vehicle.
- [4] On 4 March 2020 the applicant received a notice summoning him to a pre-dismissal arbitration as envisaged in section 188A of the LRA to answer to the following charges:

“Charge 1: Gross insubordination – On or about 18th October 2019 you refused to subject yourself to undergo substance screening which is breach of Clause 5.4.2 of the Transnet Substance

and Abuse Policy. Your conduct is further in breach of Clause 6.6.3 bullet points two (2) of the Transnet Disciplinary Code and

Procedure.

Charge 2: Gross insubordination – On or about 18th October 2019 you refused to be searched at the access control point of the Port Administration Security Gate which is in breach of Clause 4.2.8.2 bullet point (e) of the Transnet National Ports Security Policy.

Charge 3: Gross negligence – On or about the 18th October 2019 you grossly neglected to comply with the access control procedure when entering through the exit gate by tailgating another vehicle at the Port Administration Security Gate without permission. Your actions are a breach of clause 6.6.3 bullet point four (4) of the Transnet Disciplinary Code and Procedure.

Charge 4: Failure to conform to safety standards – On or about 18th October 2019 you failed to conform to safety standards when entering the Port Administration Security Gate through the exit point

tailgating another vehicle which caused the injury of Security Officer, Malose Mosipha, who was manning the access control gate.

Your actions are a breach of clauses 6.6.3 bullet points seventeen

(17) and thirty-nine (39) of the Transnet Disciplinary Code and Procedure.

Charge 5: Abusing a position of authority – On or about the 18th October 2019 you abused your position when refusing to comply to the instruction issued to you by Mr Malose Mosipha, a junior employee

when seeking your co-operation at the gate where you responded by saying “andizoyenza lonto (I am not going to do that)”.

Your conduct is in breach of clause 6.6.3 bullet point 27 of the Transnet Disciplinary Code and Procedure”.

[5] In an award dated 18 November 2020 the arbitrator found the applicant guilty of all the charges except for charge 1 which is based on the third respondent’s Substance and Abuse Policy and issued the sanction of dismissal. The applicant’s main grounds for review are that the arbitrator committed gross irregularities in the conduct

of the arbitration which resulted in her issuing an unreasonable award. The irregularities include the arbitrator’s alleged

failure to consider and attach weight to relevant evidence which led her to reach an unreasonable decision which is disconnected from the evidence properly placed before her. The third respondent’s grounds for opposing this application are that the arbitrator

conducted the pre-dismissal arbitration fairly and issued an award which falls within the bounds of reasonableness. The third respondent

further submitted that the award is consistent with the evidence tendered at arbitration. In the third respondent’s view, the applicant failed to establish valid grounds for this court to interfere with the award.

[6] For an award to survive the scrutiny of review it must fall within the bounds of reasonableness.[2] In interpreting the principle of reasonableness in circumstances where the attack on the reasonableness of an award is mounted on errors committed by an

arbitrator in the conduct of an arbitration, the court found that when the errors have a distorting effect on the arbitrator's decision, the decision is rendered unreasonable[3]. An arbitrator's failure to conduct the enquiry into the dispute before him or her correctly renders an award unreasonable. As an award that is disconnected from the evidence which was led at arbitration renders an award assailable, I will consider whether the applicant established the arbitrator's error of not basing her award on the evidence which served before her.

- [7] The arbitrator found the applicant guilty of the second charge of refusing to be searched at the access control point in breach of clause 4.2.8.2 of the Transnet National Ports Authority Security Policy. The reasons for her finding were that the applicant's responsibilities included conducting road shows to the third respondent's employees every 3 to 6 months educating them on various policies and procedures that govern their employment. She rejected the applicant's defence that he had no knowledge of the policy. The justification for her finding was that by virtue of his position, being the custodian of such policies, the applicant was reasonably expected to have had knowledge of the policy.
- [8] The arbitrator conducted the correct enquiry in that she enquired into the fairness of the applicant's dismissal for misconduct. She identified the manner in which the enquiry had to be conducted by stating that she had to be guided by the provisions of Schedule 8 to the LRA, Code of Good Practice: Dismissal. Item 7 schedule 8 provides

as follows:

"Any person who is determining whether a dismissal for misconduct is unfair should consider—

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not—
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard".
- [9] It is the employer party that bears the onus of proving the fairness of an employee's dismissal for misconduct. In determining the applicant's guilt the arbitrator was required to satisfy herself that the third respondent had proved on a balance of probabilities that the applicant had made himself guilty. I accept the applicant's submissions that the arbitrator erred in finding the applicant guilty of charge 2. Having identified that she had to conduct the enquiry in terms of item 7 of schedule 8 to the LRA, the arbitrator conducted the enquiry differently. The applicant challenged the existence of the policy. The third respondent did

not tender the security policy as evidence. Mrs Williams (Williams) corroborated the applicant's evidence by testifying that she made enquiries from the Human Resources Manager about the policy on searches but got no response. Further, no evidence was properly placed before the arbitrator to support the finding that the applicant refused to be searched. He refused to step out of his car for the last part of the access control procedure. On the evidence tendered at arbitration the existence of the policy the applicant had breached was not proved. The arbitrator therefore had no basis for her finding that the applicant was reasonably expected to have known about it. The arbitrator's finding on charge 2 is, in the

circumstances, not supported by the evidence before her and is vitiated.

[10] I accept the third respondent's submissions that the applicant did not prove the unreasonableness of the arbitrator's finding on charge 3. He conceded having acted in the prohibited manner but attempted to justify it. The submissions are consistent with the evidence led at arbitration.

[11] The essence of the fourth charge is that in the process of committing the misconduct referred to in charge 3, the applicant injured Mosipha. The applicant submitted that the arbitrator erred in finding him guilty of charge

4. It was argued on behalf of the applicant that the arbitrator would have reached a different decision had she applied the correct test in resolving the dispute of fact which resulted from the parties presenting different versions on the facts forming the basis of the charge. The arbitrator made reference to the correct authority for resolving disputes of fact, namely, Stellenbosch Formers Winery Group Ltd & another v Martell et Cie & others[4]. I accept the applicant's submission that arbitrator did not apply the test laid down in the authority correctly. It is common cause that the arbitrator only noted what she considered to be consistencies in the version presented by Mosipha and Gingxana and is silent on the contradictions in particular the contradiction in respect of the spot where Mosipha was allegedly bumped by the

applicant's vehicle. In finding the version of Gingxana and Mosipha clear and cogent she overlooked the effect of Gingxana's

untruthfulness in stating that the applicant drove into the third respondent's premises without undergoing the breathalyzer test when on that morning all the employees did not undergo the test. The breathalyzers had been taken for calibration. The reason given by the arbitrator for rejecting the applicant's version is:

"When one assesses the contradictions, caliber and cogency of performance, the Employee's version is regarded as improbable and I am of the opinion that both Mr Mosipha and Mrs Gingxana fared superior in the presentation of respective cogent probable versions."

- [12] The arbitrator's assessment of the evidence in an attempt to resolve the dispute of fact is inconsistent with the authority she relied on. When the incorrect assessment of evidence has an impact on the arbitrator's decision it becomes relevant in the determination of the reasonableness of the award. Had the arbitrator applied the authorities correctly she would have identified Gingxana's bias against the applicant and her unreliability, as well as the internal contradictions in the third respondent's version. The arbitrator would have concluded that the third respondent had not discharged the onus of proving that the applicant was guilty of charge 4. The finding on charge 4 is therefore vitiated
- [13] The arbitrator found that the applicant had made himself guilty of charge 5 for abusing his position when refusing to comply with the instruction issued by Mosipha when seeking his co-operation at the gate where the applicant responded by saying "he was not going to do that". I accept the applicant's submissions that the arbitrator's finding that the applicant abused his authority is not supported by evidence. It is common cause that when Mosipha insisted that the applicant should step out of his vehicle the latter told him that he had spoken to the former's supervisor, Sinxoto, the Security Operations Manager about his difficulty. The applicant suggested that Mosipha should call Sinxoto and confirm his explanation. It is after Mosipha had refused to call Sinxoto and insisted that the applicant stepped out of his vehicle that the applicant refused to co-operate. On the evidence before the arbitrator, the applicant's refusal to carry out Mosipha's instruction was not based on his position of authority but on the understanding he had with Mosipha's supervisor that the applicant was not required to step out of his vehicle during the search procedure. The applicant refused to carry out Mosipha's instruction because, based on past experience of being exempted from stepping out of his vehicle, he reasonably believed that Sinxoto had granted him the necessary exemption. The averment that the purported exemption was not granted in terms of the third respondent's policies has no impact on the reason for the applicant's refusal to carryout Mosipha's instruction. The applicant therefore proved the unreasonableness of the arbitrator's finding on the charge.
- [14] In defence of the reasonableness of the award, it was argued on behalf of the third respondent that the gravity of the applicant's misconduct justified the arbitrator's decision. Cogent arguments were forwarded on the importance of security at the third respondent. It was further argued that the arbitrator cannot be faulted for not using inconsistency against the third respondent because inconsistency in the conduct of access control procedures is consistent with ensuring security at the third respondent. I have taken into account all the submissions made on behalf of the parties. The totality of the evidence tabled at arbitration revealed that the third respondent deemed it important to have access control measures at the entrance where the incident which led to the applicant's dismissal took place. At the pre-dismissal arbitration the third

respondent did not present its access control policy. It is common cause that the policy was not applied consistently.

[15] The evidence further proved that the manner in which the policy had to be implemented was not clear. Sinxoto, the Security Operations Manager was unable to tell how the exemption from stepping out of a vehicle during the search procedure worked. It was her evidence that an employee was required to provide medical proof of his or her disability. When the applicant pointed out to her that he was allowed not to step out of his car during search procedures without submitting the proof, Sinxoto replied that his disability at that stage was visible to all as he was limping. The applicant submitted that owing to injuries which affected his mobility he was in pain on 18 October 2018. The altercation which culminated in the applicant's

dismissal resulted from the third respondent's failure to communicate to its employees its access control policy and the

failure to implement the policy consistently. The arbitrator erred in disregarding the evidence that the access control policy was not known to the third respondent's employees including the applicant. She further erred in rejecting the applicant's

version that the third respondent applied the policy inconsistently and to his detriment. For the reasons already given, the arbitrator's

findings on charge 2, 4 and 5 of the charges which had been preferred against the applicant have been vitiated. The pre-dismissal

arbitration award is therefore reviewed and set aside.

[16] I could not find a reason in law and fairness to grant a costs order.

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

Order:

1. The pre-dismissal award issued by the second respondent under case number TCR 014027 dated 23 November 2020 is reviewed and set aside.
2. The matter is remitted to the first respondent to the extent that the second respondent is directed to determine a fair sanction for the misconduct she found the applicant guilty of in charge 3 of the charges which were preferred against the applicant.
3. The applicant and third respondent may, if they wish, address argument at the hearing on the issue of sanction, with reference to the record of the pre-dismissal arbitration proceedings.
4. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Adv. Msizi

Instructed by Java Mama Inc.

For the Respondent: Adv. Mapoma

Instructed by Nongogo Guzana Inc.

[1] Act 66 of 1995 as amended.

[2] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] BLLR 1097 (cc)

[3] Herhold v Nedbank and Head of the Department of Education v Mofokeng and others

[4] 2003

(1) SA 11 (SCA)

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