



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA17/2019

In the matter between:

SOLIDARITY obo J KRUGER

Appellant

and

TRANSNET SOC LTD T/A TRANSNET NATIONAL

First Respondent

PORTS AUTHORITY

Second Respondent

COMMISSIONER BHEKI KHUMALO N.O.

Third Respondent

TRANSNET BARGAINING COUNCIL

Heard: 12 November 2020

Delivered: 1 December 2020

Coram: Phatshoane ADJP, Kathree-Setiloane and Savage AJJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (Gush J), delivered on 17 April 2019, in terms of which the application to review the arbitration award of the second respondent ('the arbitrator'), was dismissed with costs.

- [2] The appellant, Mr James Kruger ('the employee'), was employed as a Marine Operations Manager at the Richards Bay Port by the first respondent, Transnet National Ports Authority ('the employer'). He was dismissed in July 2016 following an inquiry held by an arbitrator, previously known as a pre-dismissal arbitration, held in terms of section 188A of the Labour Relations Act 66 of 1995 ('the LRA') under the auspices of the third respondent, the Transnet Bargaining Council. The arbitrator found in his award, on 12 July 2016, that the employee had committed a gross dereliction of duty by failing to ensure the provision of full marine services on 25 December 2015; and to have threatened or intimidated the employer's human resources and employee relations managers on 21 January 2016 by stating: "*When this is over, I am coming to get you*". The employee was found not guilty of a third charge related to dishonesty. Dismissal within ten (10) days of the award was determined to be the appropriate sanction. At the date of his dismissal, the employee had been employed by the employer for 21 years and had a clean disciplinary record.

Relevant factual background

- [3] In mid-2015, in response to a request from a client, the employer agreed that limited marine services, in the form of only one manned tugboat, would be provided at the Richards Bay Port on Christmas day. The employee raised a concern that past practice was that work on Christmas day was treated as voluntary and that staffing on the day may be a problem. He escalated the matter to his superior, the Senior Marine Operations Manager, Mr Eugene Rapetti, and a decision was taken that an incentive of R1000 would be paid to employees who worked.
- [4] On 9 December 2015, the client requested that full services be provided at the port on Christmas day. The employee raised employees' concerns regarding the incentive payment. In response, on 10 December 2015, he was told to obtain assistance from the relevant managers. On 11 December 2015, a roster was circulated making it clear that there was a shortage of two tug masters.

- [5] On 21 December 2015, the Chief Harbour Master responsible for marine services at eight national ports, Mr Rufus Lekala, instructed the employee to ensure that full services were provided on 25 December 2015 at the Richards Bay Port using the normal duty roster. This instruction was confirmed by Mr Preston Khomo, the Port Manager. In response, the employee put a full team together and issued an instruction to employees to work. He stapled the instruction into tugboat engine room logbooks and bridge logbooks, which was signed by all staff members, and a copy was put up on the window of the administrative building where staff clock in and out. The employee included a note on the roster that the instruction was an order and not up for negotiation. In addition, each member of the crew rostered to be on duty on Christmas day was informed that they were instructed to work. The employee sent the roster to his seniors, including the Harbour Manager's office and the Port Manager, noting that there were no spare staff available. A list of all personnel was included to allow Port Control to phone staff to verify arrangements or in the event that a staff member did not report for duty on 25 December 2015.
- [6] On 22 December 2015, the employee had a discussion with Ms Lungelo Mthethwa, who was rostered to work as Tug Master on the second shift from 18h00 on Christmas day. She told the employee that she considered work on the day to be voluntary. In response, the employee instructed her to work on the day.
- [7] Full marine services were provided for the first shift on Christmas day. However, Ms Mthethwa failed to arrive for work and the second shift was unable to work. After the employee had been made aware of Ms Mthethwa's absence, he telephoned her and instructed her to report for duty. She informed him that work on the day was voluntary, that she could not attend work and that she had informed Port Control of the reasons. The employee described Ms Mthethwa as somewhat disorientated during the conversation. He asked human resources to telephone every other tug master to ask them to work, without success. As a result, the port was closed at 18h00 due to a shortage of crew.

- [8] On 7 January 2016, following his return from leave, the employee sent a letter to the Port Manager and Acting Port Manager explaining the steps he had taken to roster employees and ensure that they worked on Christmas day. In response to a query from Mr Lekala for a “compelling reason” why marine services were not provided on Christmas day, on 11 January 2016 the employee confirmed the contents of the 7 January letter. On 15 January 2016, the employee emailed Ms Winnie Mpanza, the Marine Technical Manager, stating that in view of Ms Mthethwa’s failure to arrive at work as instructed, a statement be obtained from her explaining her actions. Ms Mthethwa informed Ms Mpanza on 18 January 2016 that she had not reported for duty as she had had an asthma and panic attack on Christmas day, after seeing her sister who had been kidnapped, raped and nearly killed in mid-October 2015. She said she had taken sleeping pills for insomnia and was woken up after 18h00 by Port Control asking where she was. Her response was that she would not be coming to work as she would “*be a danger to everyone on the tug*”.
- [9] On 21 January 2016, the employee was suspended from duty. Mr Sbusiso Dlamini, the employee relations manager, and Mr Mbuso Shezi, the human resources manager, in the presence of Mr Dering Joyce, the Chief Security Officer, served the suspension notice on the employee. The employee’s colleague, Ms Thandeka Khanyile, attended the meeting with him at his request. Having been given the notice, the employee pointed a finger at Mr Dlamini and Mr Shezi and said: “*When this is over I am coming to get you*”. Mr Dlamini cautioned the employee not to make the situation worse. Although the Security Manager was in the vicinity, his services were not sought to come to the aid of Mr Dlamini or Mr Shezi who, after the incident, went together to a restaurant for lunch.

Inquiry by arbitrator

- [10] At the ensuing inquiry the arbitrator recorded the first issue before him to be whether the employee “*did all within his capacity as a responsible manager to ensure the work attendance by all rostered subordinates on the 25th December 2015*”. Mr Lekala testified that the employee had failed to ensure that tug masters worked on Christmas day or put a contingency plan in place

in the event that they did not. He also said that the employee had failed to alert him to the staff problem which caused a “reputational blow” to the employer and had broken the trust relationship with the employee. He stated that the tone of the employee’s response to his request for an explanation had taken him aback and that he realised he was dealing with an “*activist manager*” with no distinction between management and labour.

- [11] The employee’s evidence was that he could have done nothing else to obtain a replacement for Ms Mthethwa as there were no standby tug masters available and no budget to pay for standby tug masters, and that the employer had been aware of this predicament. Two other employees had also threatened not to report for duty but did arrive on the day. As a result of the unavailability of funds for standby staff, the employee took the view that it was not possible to prepare for staff who might not arrive for work on Christmas day.
- [12] Ms Mthethwa was found not to have committed any misconduct arising from her failure to report for duty. A copy of the arbitration award in that matter was placed before the arbitrator at the employee’s inquiry.
- [13] The arbitrator found that the employee had conducted himself in an unreasonable and grossly negligent manner in failing to ensure the availability of full marine services for the night shift on Christmas day, causing the employer to fail to honour its undertaking made to its client. It was found that the employee had failed to report to his seniors that Ms Mthethwa would not attend work on 25 December 2015 when a reasonable person in his position would have done so. The arbitrator rejected the employee’s contention that he did not foresee that Ms Mthethwa would not comply with his instruction to work on Christmas day, and found that he should have foreseen such harm and lined up an alternative tug master to work on the day. His efforts were found to be “*insufficient and half-hearted*” when he “*could and should have done more*”, with his conduct “*highly unreasonable*” and grossly negligent.
- [14] There was no dispute that the employee, when receiving the disciplinary notice in the matter, directed the words he did to Mr Dlamini and Mr Shezi,

both of whom testified that they regarded the words as a threat and had felt intimidated by them. In his evidence the employee stated that, not having been disciplined before, he spoke out as he felt frustrated by the situation. The arbitrator found that the employee had threatened and intimidated the managers and that his conduct was serious and had “*meant to inflict fear and subjugation*”. Placing reliance on the case of *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration & others*¹ and the evidence of Mr Lekala, the arbitrator found dismissal to be the appropriate sanction.

Labour Court

- [15] Aggrieved with his dismissal, the employee sought that the arbitration award be reviewed and set aside by the Labour Court. On review, Gush J was satisfied that the evidence had showed that the employee had failed to ensure the availability of full marine services for the night shift of 25 December 2015, although he was aware of the need to ensure that such services were provided and the serious consequences of not doing so. As to the threatening words uttered by the employee and directed at Mr Dlamini and Mr Shezi, the Court noted the evidence that both managers had felt intimidated by his conduct.
- [16] Despite the employee’s long period of unblemished service, the Labour Court found that there was nothing in the record to suggest that the sanction of dismissal was unfair. The award was therefore found not to be unreasonable and the review application was dismissed with costs. It is against this order that the employee now appeals.

Evaluation

- [17] An arbitrator appointed to conduct an inquiry in terms of s 188A has all the powers conferred on a commissioner by s 142(1)(a) to (e), (2) and (7) to (9),²

¹ (2001) 22 ILJ 1799 (LAC).

² Section 188A(7).

with the general provisions which apply to arbitration proceedings in terms of s 138 applicable to such inquiry.³ Section 188(8) provides that:

‘The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling’.

[18] Arbitration awards issued by an arbitrator in terms of s 188A are final and binding.⁴ Such awards may be reviewed by the Labour Court in terms of s 145(1) when issued by an arbitrator acting under the auspices of the CCMA or a bargaining council; and are capable of enforcement as if an order of the Labour Court in respect of which a writ has been issued.⁵

[19] Section 188A(9) provides that an arbitrator -

‘...must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, rule as to what action, if any, may be taken against the employee.

[20] The arbitrator found, in relation to the first misconduct complaint, that the employee had acted in an unreasonable and grossly negligent manner. He rested his decision in this regard on three distinct findings. The first of these was that on 22 December 2015 the employee was aware, or ought reasonably to have foreseen, when he spoke to Ms Mthethwa that she would not report for work on Christmas day despite his instruction to her that she do so. The second was that a reasonable person in his position would have reported as much to his superiors. The third was that despite his knowledge in relation to Ms Mthethwa, he failed to put in place a contingency plan or line up an alternative tug master to work when it was incumbent upon him to do so.

[21] The undisputed evidence before the arbitrator was that the employee had instructed employees, including Ms Mthethwa, to work on Christmas day in compliance with the instruction he had been given by his superiors. The employee took various steps to ensure staff were aware of this instruction and

³ Section 188(6).

⁴ S 143.

⁵ S 146 is concerned with the exclusion of the Arbitration Act 42 of 1965 to arbitrations held under the auspices of the Commission for Conciliation Mediation and Arbitration.

the contents of the roster he had drawn up. He expressly indicated to Ms Mthethwa and other employees that work on the day was not voluntary. Furthermore, in his conversation with Ms Mthethwa on 22 December 2015 he reiterated his instruction to her to work. Ms Mthethwa and two other employees took issue with the instruction, relying on past practice that work on Christmas day was voluntary, but did not indicate that they refused to work on the day. While Ms Mthethwa was absent on the day, the other two employees, who had also taken issue with the instruction, did report for duty. It does not follow therefore that the employee was aware, or ought reasonably to have foreseen, that Ms Mthethwa, who was not found to have committed misconduct at her own pre-dismissal arbitration, would not report for duty. The facts simply do not support such a finding.

- [22] Turning to the arbitrator's second finding that the employee had failed to report to his seniors that Ms Mthethwa would not attend work on 22 December 2015 when a reasonable person in his position would have done so, given that he should have foreseen such harm, the evidence established that the employee had instructed Ms Mthethwa to work on the day. She did not indicate that she would not work but stated that she considered work on the day to be voluntary, a view shared by at least two other employees. It was not disputed that the employee responded by instructing Ms Mthethwa to work on the day. The employee could not in the circumstances have known, after having given an unequivocal instruction to Ms Mthethwa that she would not comply with his instruction to work on the day, nor could he have reasonably been expected to know as much. It is therefore difficult to understand why he would have been required to advise his superiors of something that was not a certainty. Of relevance is the fact that the reasons later provided by Ms Mthethwa to explain her absence did not display a refusal on her part to work but the existence of particular personal circumstances which led to her not reporting for duty. It follows that the finding of the arbitrator that the employee should have alerted his superiors, is simply not sustainable on the evidence placed before the arbitrator.

[23] The arbitrator found further that the employee was obliged to put in place a contingency plan and line up an alternative tug master to work on Christmas day. Yet, the undisputed evidence before the arbitrator was that the employee's superiors, including his immediate manager, Mr Eugene Rapetti, were aware that no budget was available for this purpose and that no standby tug masters were available to work. The employee had repeatedly expressed his concerns about the issue, with the evidence being that he had considered obtaining staff from elsewhere to work. What contingency plan could, given these undisputed circumstances, reasonably have been put in place is therefore entirely unclear, as is why it fell to the employee to resolve what was a known operational and logistical problem. The employer led no evidence demonstrating that it fell to the employee to put in place a contingency plan or secure the services of a standby tug master in view of the difficulties in doing so, which were well known. The arbitrator's finding that the employee's efforts were "*insufficient and half-hearted*" when he "*could and should have done more*", with his conduct "*highly unreasonable*" and grossly negligent, was not borne out by the material placed before the arbitrator. The evidence showed that the employee had, acting on instructions, prepared a roster and notified employees that they were instructed to work in terms of it as he was required to do. Concerned about the lack of staff availability on the day, the employee had raised the issue on a number of occasions. He also provided Port Control with contact numbers of all tug masters in the event that any problem arose. With it difficult to understand what more he could reasonably have been required to do, the finding that he committed misconduct did not accord with the conspectus of the material placed before the arbitrator. In finding differently the Labour Court erred.

[24] As to the second misconduct complaint, it was not disputed that the employee uttered the words that he did to Mr Dlamini and Mr Shezi and that his conduct was unwarranted, threatening and intimidating. The arbitrator, relying on the decision of *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration & others*,⁶ found that the employee had "*meant to inflict fear and subjugation*" by his conduct. In *Adcock Ingram*, in the context of

⁶ Ibid.

a violent strike, a member of the union's negotiating team threatened the management team by stating: “*You can treat this as a threat – there will be more blood on your hands.*” This Court, prior to the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁷ relied on *Carephone (Pty) Ltd v Marcus NO & others*⁸ to find that interference with the arbitration award was warranted on the basis that the “*finding of the disciplinary inquiry was clearly correct*” and dismissal was “*obviously an appropriate sanction*”.⁹ On appeal, this Court found that the commissioner, in setting aside the dismissal, had relied “*on a totally incorrect view of law and facts*”, adopting reasoning that was “*not rationally justifiable*”.

- [25] Counsel for the employee contended that the arbitrator's reliance on *Adcock Ingram* was misplaced since the threat in that matter was made in the context of a violent strike, which was distinguishable from the circumstances of the current matter. It is so that the facts in *Adcock Ingram* are not on all fours with the facts of this appeal. The evidence in the current matter was that the employee was angered by the fact that disciplinary action was being taken against him, an anger which was not without foundation given the findings above. Although his words constituted a threat and must reasonably have aimed to intimidate, it is not clear precisely what he meant by them. There was no suggestion that Mr Dlamini or Mr Shezi were fearful of the employee or considered their lives to be in danger and the arbitrator did not indicate how the words were “*meant to inflict fear and subjugation*”. In fact, Mr Dlamini immediately took charge of the discussion and cautioned the employee not to aggravate the situation, conduct which clearly reflected that he understood the employee to be angry. Neither Mr Dlamini nor Mr Shezi called on the Security Manager, who was in the immediate vicinity, to come to their aid and both left for lunch at a restaurant after the incident.

- [26] In considering sanction in the inquiry, the arbitrator sat in the stead of the employer. In doing so he was required to have regard to relevant circumstances. These included the nature and importance of the rules

⁷ [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

⁸ (1998) 19 ILJ 1425 (LAC) 1435B–E.

⁹ At para 22.

breached, the gravity of the misconduct, the harm caused by the employee's conduct, whether the trust relationship had broken down, whether progressive discipline or dismissal for a first offence was appropriate, whether continued employment was intolerable, the employee's personal circumstances, length of service and previous disciplinary record, the nature of the job and any relevant aggravating factors.

- [27] The arbitrator determined dismissal to be a fair and appropriate sanction for the two acts of misconduct committed, having regard to the relevant mitigating and aggravating factors and the evidence of Mr Lekala that the trust relationship with the employee had broken down. The employer took the view that the employee's long service and clean record could not save him from dismissal since "*there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal*".¹⁰ Furthermore, it was submitted that his lack of remorse were aggravating factors and, with reference to *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration*,¹¹ that it would be difficult for the employer to re-employ the employee in such circumstances.
- [28] While the second act of misconduct was serious, the arbitrator was required to carefully consider the circumstances in which it occurred, together with its precise nature and effect. The employee's anger at the decision to discipline him was not without justification, as is evident from this Court's findings in relation to the first charge. It was not clear what the employee meant by the threat made; and neither Mr Dlamini nor Mr Shezi testified that they were fearful of the employee or that they believed that it would be intolerable to continue working with him in future. No other employee testified that a continued working relationship with the employee given this conduct was intolerable. The employee's long service and clean disciplinary record were important mitigating factors, which required careful consideration to determine whether dismissal was appropriate or whether, having regard to the principle of progressive discipline, the imposition of a sanction short of dismissal was warranted. The failure on the part of the arbitrator to have proper regard to

¹⁰ *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) at 344C-F.

¹¹ (2000) 21 ILJ 1051 (LAC) at para 25.

such factors constituted a material irregularity and resulted in an outcome which was one, on the material before him, that a reasonable commissioner could not reach.¹² In finding differently the Court *a quo* erred.

[29] It follows for these reasons that the appeal must succeed and the orders of the Labour Court set aside. Given that the dismissal of the employee was unfair, there is no reason why the primary remedy of reinstatement into the same or similar position should not be granted, with a final written warning valid for twelve (12) months cautioning the employee not to commit similar misconduct in the future.

[30] Having regard to considerations of law and fairness, costs must follow the result.

Order

[31] For these reasons, the following order is made:

1. The appeal succeeds with costs.
2. The order of the Labour Court is set aside and substituted as follows:
 - “1. The review application succeeds with costs.
 2. The dismissal of the applicant, Mr James Kruger, is found to be substantively unfair.
 3. The applicant is to be retrospectively reinstated into his employment with the respondent, Transnet Soc Ltd t/a Transnet National Ports Authority, on the same or similar terms and conditions of employment with no loss of benefits, within ten (10) days of the date of this order.
 4. The applicant is to receive a final written warning valid for twelve (12) months for misconduct in the form of threatening and intimidating behaviour.

¹² At paras 78 and 110.

Savage AJA

Phatshoane ADJP and Kathree-Setiloane AJA agree.

APPEARANCES:

FOR APPELLANT:

Mr P Kirstein

Instructed by

FOR THE FIRST RESPONDENT:

Mr B Mgaga

Garlicke & Bousfield Inc.