IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2400/17

In the matter between

CHRISTOPHER MZIMBA **Applicant**

and

TRANSNET BARGAINING COUNCIL **First Respondent**

TRANSNET SOC LIMITED **Second Respondent**

MBONGENI MOTSOENENG N.O **Third Respondent**

Heard: 17 July 2019

Delivered: 15 November 2019

Summary: Labour Relations Act 66 of 1995 – review application in terms of section 145 – test for review restated – ultimate test is the reasonableness of the decision of the Commissioner - decision of the Commissioner falling within the band of reasonableness - application dismissed – review application not frivolous and thus costs not warranted - no order as to costs.

JUDGMENT

KHOZA AJ

Introduction

[1] This is an application brought by Mr Christopher Mzimba, the Applicant, in terms of section 145 of the Labour Relations Act[1] (the LRA) to review and set aside the Arbitration Award (the Award) issued by the Third Respondent (the Commissioner) acting under the auspices of the First Respondent, in the dispute concerning the fairness of the dismissal of the Applicant by the Second Respondent (Transnet).

[2] The grounds of review are set out in the Founding Affidavit delivered by the Applicant when instituting the review proceedings before this Court. The factual background of this matter does not require a complete regurgitation in this Judgment but the following should suffice.

Factual Background

[3] The Applicant was, until his dismissal, employed by Transnet in the position of Operations Manager in the Freight Rail Division and was dismissed for misconduct on 30 March 2017. As at the date of his dismissal the Applicant had a total of sixteen years' service, having been employed initially on 1 February 2001. It was common cause during the arbitration proceedings that the Applicant's position at Transnet was a senior position.

[4] It was also common cause during the arbitration proceedings, that the Applicant was dismissed on allegations of serious misconduct made against him by his employer, Transnet. These allegations appear in the Notice to Attend a Disciplinary Hearing as follows:

> "Charge 1
>
> In your capacity as the Operations Manager, around October 2016, you indirectly influenced or pressurised that the promotion letter of Mr H

[1] No. 66 of 1995, as amended.

Scheepers be issued to him prior to the completion of his disciplinary hearing which is in breach of clause 11.2.2 of the Transnet Code of Ethics.

Charge 2

In your capacity as the Operations Manager, around October 2016, you abused your position of authority when interfering with the disciplinary process of Mr H Scheepers when persuading Mr Mothutsi Mutheketela who presided over his disciplinary hearing not to impose the most severe sanction which is the breach of clause 11.3.1 of the Transnet Code of Ethics.

Charge 3

In that in your capacity as the Operations Manager, you violated and or breached the suspension conditions when engaging with Transnet employees on the voluntary severance package for managers (VSP) without first seeking permission through your immediate superior as provided for in your suspension Notice…" (sic)

[5] The first Notice to Attend a Disciplinary Hearing is dated 3 March 2017 but was signed for by the Applicant on 6 March 2017 at 12h06 pm.

[6] The relevant facts relating to the disciplinary process that was initiated by Transnet to enquire into the allegations of misconduct against the Applicant is briefly as follows (as appearing from the record).

[7] The Applicant was suspended from work on 31 October 2016 and was served with the Notice to Attend a Disciplinary Hearing on 6 March 2017. The Notice to Attend a Disciplinary Hearing stipulated that the hearing would take place on 9 and 10 March 2017. It was common cause during the arbitration proceedings that this Notice to Attend a Disciplinary Hearing did not stipulate the venue at which the hearing would be held. Although it appears from the Record that the Applicant was told belatedly of the venue of the hearing, he declined to attend the hearing on the basis that the Notice to Attend a Disciplinary Hearing itself did not specify the venue of the hearing.

[8] That hearing did not take place and in due course the Applicant was notified to attend the hearing on 22 and 23 March 2017 at the School of Rail. It appears that there was some confusion between the officials of Transnet regarding the hearing on 22 and 23 March 2017. One of the witnesses who was called to testify on behalf of Transnet at the arbitration proceedings, Mr Bheki Tshabalala (Mr Tshabalala), testified that the Applicant had submitted a request to be legally represented at the disciplinary hearing. He testified that this matter had been referred to the Executive Manager responsible for Employee Relations, who had to make a decision whether the Applicant was entitled to be legally represented at the hearing.

[9] It appears that the Executive Manager responsible for Employee Relations had in fact made a decision declining the request by the Applicant to be legally represented but that Mr Tshabalala did not pick this up, resulting in him assuming that the matter would not be proceeding on 22 and 23 March 2017. The evidence, which is not contradicted on record, is that Mr Tshabalala made many attempts to contact the Applicant on 21 March 2017 to inform him that the hearing would not be proceeding on 22 and 23 March 2017 but that the Applicant was not reachable.

[10] It appears that the Applicant attended the hearing on 22 March 2017 but there was no one who was going to conduct the hearing. Instead, there was a Mr Muzi Zwane (Mr Zwane) who was sent there to inform the Applicant that the hearing would not be taking place on that date. It appears from the record that from this date, the Applicant considered that the disciplinary process had been abandoned by Transnet. The basis of this appears to be the mere fact that there was no one to represent Transnet for the continuation of the hearing on 22 March 2017. It was certainly not the Applicant's case at the arbitration proceedings that there was any express abandonment of the proceedings by Transnet in this regard.

[11] Transnet, however, later scheduled the hearing for 30 March 2017. The Applicant attended these proceedings but only to raise points *in limine,* including the fact that he considered the matter to have been finalised

because there was no application for postponement made by Transnet during the proceedings which were scheduled for 22 and 23 March 2017. The Chairperson considered this point and ruled that the matter had not been finalised and that it must proceed as scheduled.

[12] It is at this stage that the Applicant then brought an application for the postponement of the hearing. His reasons being that he wanted to access his laptop so that he could retrieve the evidence that he needed to prepare for his defence. When asked what he needed the laptop for, the Applicant stated that he needed certain documents between himself and Mr Mutheketela and witnesses' information. As I understand the factual background from the record, he needed information from the laptop that would enable him to identify which witnesses he would call. He stated that one of the witnesses was in Newcastle, Kwa-Zulu Natal and another one was a Train Driver based in Pretoria. The Chairperson refused the postponement required by the Applicant stating that, in his view, the Applicant's application was merely a means to delay the process.

[13] Upon the Applicant's application for postponement at the disciplinary hearing being dismissed on 30 March 2017, the Applicant decided not to participate in the proceedings and left on his own volition. Having left the proceedings, the Chairperson conducted the disciplinary process in which Transnet presented its case and thereafter the Chairperson issued a finding in terms of which the Applicant was found guilty of all allegations made against him and a sanction of dismissal was ultimately imposed.

Arbitration Proceedings

[14] Aggrieved by the outcome of the disciplinary proceedings, the Applicant referred the dispute to the First Respondent and the Commissioner was appointed to preside over the dispute. At the arbitration proceedings Transnet called six witnesses who are as follows: Mr Mothusi Mutheketela (Mr Mutheketela); Ms Thembi Radebe (Ms Radebe); Mr Zolile Dlamini (Mr

Dlamini); Mr Tshabalala; Mr Azwindini Luvhengo (Mr Luvhengo); and Mr Jeyi Enock Hlatshwayo (Mr Hlatshwayo).

[15] It is not necessary to regurgitate the entire evidence of these witnesses and I will not do so in this judgment.

[16] In respect of Charge 1, the evidence led by the witnesses of Transnet was to the effect that at the time that a Mr Scheepers was facing disciplinary proceedings, the Applicant had brought pressure to bear on the Human Resources Department for Mr Scheepers to be given a letter of promotion which would then result in another employee, a Ms Hlatshwayo being released to another department. It appears from the record that there was no basis for the allegation that the Applicant had pressurised the Human Resources Department in this regard and I shall deal with the impact of this allegation when dealing with the analysis in what follows.

[17] Also, with regards to the allegation that the Applicant had breached his suspension conditions, the evidence led by Transnet was that the Applicant had made contact with some of the employees at Transnet, namely Mr Zwane in which he discussed with them, amongst other things, the possibility of a severance package. It was Transnet's case that in doing so, the Applicant breached his suspension conditions. It once again appears from the record that even the witnesses of Transnet ultimately conceded that the Applicant would not have been found guilty of this allegation had he presented himself at the disciplinary hearing and presented the defence that he was presenting at the arbitration proceedings.

[18] There was therefore, in my view and in fairness, no basis on which the Applicant would have been found guilty of this allegation if he had participated in the disciplinary proceedings.

[19] The evidence relating to Charge 2, which concerns the alleged interference by the Applicant with the disciplinary process of Mr Scheepers, was led in the main by Mr Mutheketela. He testified that he was employed by Transnet as an

Operations Manager and that he was appointed to preside over the hearing of Mr Scheepers.

[20] He testified that the Applicant interfered in the disciplinary process by asking him not to impose a sever sanction of dismissal. He testified that the Applicant pleaded with him in voice calls and in WhatsApp text messages that he sent to him. He testified that the Applicant had pleaded with him that, instead of a dismissal, he should consider imposing a final written warning valid for a period of 12 (twelve) months. He testified that he was nevertheless not influenced by the Applicant's conduct, which he considered to have been inappropriate, and that he imposed a sanction of dismissal on Mr Scheepers.

[21] Mr Mutheketela further testified that he had never interfered in any cases that were ongoing, although he had discussed cases with the presiding officers including the Applicant. He, however, sought to distinguish the case in which he and the Applicant had discussed the appropriate sanction, saying that in that case he himself was involved as an initiator whereas in the case of Mr Scheepers the Applicant had no involvement and therefore no business to be talking to him about the sanction.

[22] It was the Applicant's case that was put to Mr Mutheketela during his cross examination that he in fact also did the same thing in respect of a hearing that was presided over by the Applicant. Mr Mutheketela conceded that indeed he had had discussions with the Applicant regarding a matter in which the Applicant presided. He testified that in respect of that matter, he himself was an initiator and that they had a discussion as opposed to him pleading with the Applicant to impose a lenient sanction.

[23] Mr Luvhengo, employed at the time of the arbitration in the positon of Senior Manager: Operations, and to whom the Applicant reported, testified at length about the seriousness of the conduct for which the Applicant was dismissed. In particular, he testified that he had taken part in the processes that preceded the disciplinary hearing of the Applicant. He testified that he met with employees of Transnet, namely Tiyani and Vuyo and that he gave them his

view that if the Applicant were to be found guilty of the allegations against him, then an appropriate sanction would be dismissal.

[24] Significantly, however, Mr Luvhengo conceded that if the Applicant had participated in the disciplinary hearing he would not have been found guilty of breaching his suspension conditions. He also conceded that the Applicant was incorrectly charged for pressurising the Human Resources Department to issue a letter to Mr Scheepers.

[25] The Applicant's case was that he had 16 years' of service at Transnet and that he had not made himself guilty of the allegations of misconduct made against him by Transnet. He gave extensive evidence relating to the processes prior to the hearing proceeding 30 March 2017 and, in particular, the circumstances that led to the hearing not proceeding on 9 and 10 March 2017 as well as on 22 and 23 March 2017.

[26] In respect of Charge 2, he testified that he had received a call from Mr Mutheketela informing him that he was appointed to preside over the hearing of Mr Scheepers. He testified that Mr Mutheketela wanted to know from him if the case was serious and he confirmed that the case was in fact serious in his opinion. He testified that it was Mr Mutheketela who sought advice from him as to the appropriate sanction that should be imposed on Mr Scheepers and that he had recommended that, a sanction of a final written warning would be appropriate.

The Arbitration Award

[27] In the Award, the Commissioner first dealt with the issue of procedural fairness. Ultimately, the determination to be made in as far as procedural fairness was concerned related to two issues. First, whether the fact that the disciplinary hearing was conducted and concluded in the Applicant's absence resulted in Transnet having failed to follow a fair procedure in effecting the dismissal of the Applicant. Secondly, that the dismissal of the Applicant was

effected in circumstances where there was no compliance with the Delegation of Authority.

[28] The Commissioner ultimately reached a conclusion that the Applicant's dismissal was procedurally fair because, in the Commissioner's mind, the Applicant had deliberately absented himself in the disciplinary proceedings in circumstances where he should have been aware of the consequences of not participating in the disciplinary process. The Commissioner reasoned in this regard, amongst other things, that the Applicant was an experienced presiding officer in disciplinary proceedings and that there was no doubt that he was aware of the consequences of his non-participation in the disciplinary hearing.

[29] It also appears from the Award that the Commissioner was of the view that in fact the conduct of the Applicant in relation to his disciplinary hearing exhibited an intention to either delay or frustrate the continuation of the disciplinary process. Chief amongst the considerations is that despite the fact that the Applicant had been given the details of the person that he must communicate with in relation to the scheduling of his disciplinary hearing, namely Mr Tshabalala. The Applicant deliberately avoided communicating with Mr Tshabalala and even failed to copy him in his correspondence regarding the disciplinary process. The Commissioner also surmised that the reason given by the Applicant for requesting a postponement on 30 March 2017, was simply a way to delay the proceedings because, amongst other things, there was no real reason why he needed the laptop in order to respond to the factual allegations he had to respond to in the disciplinary hearing.

[30] With regards to the alleged non-compliance with the Delegation of Authority, the Commissioner reasoned that ultimately, the decision was whether the dismissal of the Applicant was an appropriate sanction and that it was not absolutely necessary that there must have been a written delegation. In this regard, in reaching this conclusion, the Commissioner took into account the concession by the Applicant that the decision on an appropriate sanction could be instructed verbally by those in authority and in this regard, the

Commissioner expressly held that the Applicant's preference for a written delegation was not a policy of Transnet.

[31] The Commissioner ultimately found no basis to find that the dismissal of the Applicant was procedurally unfair.

[32] With regards to substantive fairness, the Commissioner found that the dismissal of the Applicant was substantively fair. The Commissioner, in relation to Charges 1 and 3 appears not to have been persuaded that the Applicant was guilty of the misconduct alleged. He reasoned that although the evidence before him did not persuade him that the Applicant had in fact committed this misconduct, the fact that the Applicant was absent in the disciplinary hearing made it impossible for the Chairperson to have not found him guilty of the allegations. However, the Commissioner did not stop there, he continued to consider the conduct of the Applicant in relation to the conduct of the disciplinary proceedings and concluded, quite correctly in my view, that the Applicant did not conduct himself in a manner that is consistent with a person who wanted to have the matter finally heard and determined as have been set out by Transnet.

[33] In relation to Charge 2, the Commissioner reasoned that the evidence before him was such that this was serious misconduct by the Applicant in circumstances where he sought to interfere with the disciplinary process by asking Mr Mutheketela not to impose a severe sanction of dismissal. The Commissioner rejected the Applicant's version that it was common practice at Transnet to discuss the outcomes of the disciplinary processes. He distinguished this matter from the previous incident in which the Applicant and Mr Mutheketela had discussed what an appropriate sanction would be in a matter where the applicant had been a presiding officer.

[34] The Commissioner reasoned, correctly in my view, that this case was distinguishable in that Mr Mutheketela and the Applicant were both involved in that case whereas the Applicant had no business whatsoever to be involved

in the hearing for Mr Scheepers. But in any event, even if Mr Mutheketela and the Applicant had done that previously, it did not make it correct.

[35] After considering the parties' respective cases the Commissioner issued the Award, which is the subject of these review proceedings, dated 18 September 2017 in terms of which he found that the dismissal of the Applicant was both procedurally and substantively fair and dismissed the Applicant's referral of the matter to the First Respondent.

Grounds of Review

[36] On 31 October 2017, the Applicant instituted these proceedings seeking orders in the following terms:

> '1. Reviewing, correcting and setting aside the Award made by the Third Respondent dated 18 September 2017, under the auspices of the First Respondent;
>
> 2. Alternatively, to paragraph 1 above, remitting the matter back to the first Respondent, to convene and conduct a pre-dismissal arbitration before a Commissioner other than the Third Respondent;
>
> 3. ordering the Applicant's retrospective reinstatement to his position with all the benefits including back pay and annual increments;
>
> 4. directing any of the Respondents who may oppose the application to pay the costs, jointly and severally, the one paying the other to be absolved..." (sic)

[37] The grounds of Review are set out in the Founding Affidavit[2]. Although not succinctly pleaded, the grounds appear to be premised on a two-pronged approach, namely:

37.1 An attack on substantive fairness findings of the Commissioner; and

[2] See paras 64 onwards.

37.2 An attack on the Commissioner's findings relating to procedural fairness of the dismissal.

[38] The grounds of review can be summarised briefly as follows:

38.1 That the Commissioner not only misconstrued important aspects of the evidence but he failed to apply his mind to the Applicant's version and ignored crucial testimony of other witnesses. Also that the arbitrator perpetrated a gross irregularity in the conduct of the arbitration proceedings; and

38.2 Further grounds relate to Charges 1 and 3 in terms of which the Applicant contended that his line manager had made it clear that he had in fact not breached his suspension conditions. The applicant contends the Commissioner ignored this evidence and did not take it into account.

Analysis and Findings

[39] In determining the merits of this matter, I have considered the evidence on record and the pleadings.

[40] Although fairness dictates that I should, as far as possible, seek to deal with all the grounds of review, I need to point out that it is now settled in our law that this Court will not interfere with arbitration awards issued by Commissioners performing functions in terms of section 136, read with section 138, of the LRA unless the grounds set out in section 145 of the LRA have been established, rendering the relevant award liable to be reviewed and set aside.

[41] It is also trite that the grounds set out in section 145 of the LRA have been suffused by the standards of reasonableness.[3] What this means is that the critical question ultimately is whether, with all the possible flaws that may have been pointed out by the party seeking to impugn the arbitration award, is the

[3] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 (CC)

decision reached by the Commissioner in the award one that a reasonable Commissioner could not reach? Accordingly, even though I have considered each of the grounds of review for the purposes of fairness, it must be borne in mind that ultimately what this Court will have to decide is whether the ultimate decision of the Commissioner, taking into account all the contents of the record, is one that a reasonable Commissioner could not reach.

Procedural Fairness

[42] At the outset, I need to deal with the issue of the grounds of review that appear to be based on the applicability of, and compliance with, the Delegation of Authority. This Court has repeatedly drawn a distinction between attacks on the validity of a dismissal as opposed to fairness of a dismissal. The referral of dismissal disputes to the bargaining councils established in terms of the LRA is primarily there to consider and decide on the fairness of the dismissal. The fairness of a dismissal does not entail an enquiry whether in effecting the dismissal, the employer complied with a particular policy and/or contractual provision.

[43] In my considered view, the question of whether the dismissal of the Applicant was procedurally fair cannot be determined by having regard to whether there was compliance with the Delegation of Authority. If the Applicant wants to challenge the failure to comply with the Delegation of Authority and he believes that he had a right to compliance by Transnet with the Delegation of Authority, perhaps that is an entirely different matter. In light of the record in this matter, I agree with the Commissioner that what he needed to determine is whether the dismissal of the Applicant was procedurally fair, taking into account the procedure that was actually followed. The Commissioner conducted this enquiry and it is clear from the Award that he relied on the evidence led by the parties?

[44] It is settled in our law, in any event, that compliance with a particular policy and/or other legal instrument cannot in and of itself make the ensuing dismissal fair. Certainly, the failure by an employer to comply with its

disciplinary procedure, even an agreed disciplinary procedure, does not make the ensuing dismissal unfair. Put differently, the fact that the employer has complied with the policy in place does not make the ensuing dismissal fair. Accordingly, under normal circumstances, a determination of fairness does not entail the consideration of compliance or non-compliance with a particular provision in a policy or contract. By parity of reasoning, the fact that Transnet may not have complied with the Delegation of Authority would not in and of itself render his dismissal procedurally unfair, even if the Applicant is right that it was not complied with.

[45] A perusal of the evidence led at the arbitration reveals that the Commissioner cannot be faltered in accepting the evidence of Mr Luvhengo about the discussion he had with Tiyani and Vuyo where he gave them his perspective that in the event of the Applicant being found guilty, the sanction of dismissal would be appropriate. Sight must also not be lost that the issue of the alleged non-compliance with the Delegation of Authority arose in the context of the appropriateness of dismissal as a sanction. I have already made it clear that compliance with the provisions of the Delegation of Authority cannot per se make a dismissal fair. The opposite equally applies. The Commissioner painstakingly dealt with the issue of the appropriateness of the dismissal. He took the relevant evidence of Mr Luvhengo into account and applied the relevant legal principles as appearing at paragraphs 287 to 289 of the Award. I therefore, accordingly do not find fault in the Commissioner's finding in this regard.

[46] The ground that the Commissioner ignored Transnet's witnesses' evidence that was favourable to him in relation to Charges 1 and 3 has no merit whatsoever. The Commissioner clearly considered this evidence, as borne out by the Award. The fact of the matter is that Charge 2 appears to have carried the light of the day in this matter and in as far as there was evidence favourable to the Applicant by Transnet's witnesses in relation to Charges 1 and 3, this would pale into insignificance if the Applicant was guilty of Charge 2 as dismissal would have been an appropriate sanction in relation to that

charge alone, therefore the ultimate finding by the Commissioner in the Award would remain reasonable.

[47] Turning to the issue of the disciplinary process being conducted in the absence of the Applicant, the evidence overwhelmingly shows that the Applicant brought this unto himself and he only has himself to blame. There was clearly an understandable reason (caused by what appears to have been miscommunication between Transnet's own employees) why the hearing could not continue on 22 March 2019. The evidence of Mr Tshabalala to the effect that he tried to contact the Applicant to inform him that the hearing will not be proceeding was unchallenged at the arbitration. Transnet even arranged for Mr Zwane to be at the venue to inform the Applicant that the hearing would not be proceeding. There was nothing done by Transnet throughout the process that could properly have led to the Applicant believing that the disciplinary process had been abandoned.

[48] However, the reasons for the postponement application give an insight into the whole approach adopted by the Applicant to the disciplinary process. The Applicant needed a laptop which he preposterously failed even to subpoena during the arbitration proceedings. This gives rise to the impression that the reason given for the application for postponement was not *bona fide*, a matter on which I make no finding. But the Commissioner's reasoning that the Applicant simply wanted to delay the disciplinary process cannot be faulted for being unreasonable, certainly not based on a standard of balance of probabilities. The right to a fair disciplinary process cannot be used to frustrate disciplinary processes, which by their nature are to be dealt with expeditiously. In my view, the Applicant was granted an opportunity to respond to the allegations against him and he deliberately did not take it up.

[49] In the premises, the Commissioner's conclusions that the dismissal of the Applicant was procedurally fair is not one that, in the circumstances of this case, a reasonable commissioner could not reach. I now turn to deal with the grounds of review in so far as they relate to the issue of substantive fairness.

Substantive fairness

[50] I am of the view that the issue of substantive fairness can be disposed of quite expeditiously. I do so by first dealing with Charge 1 and Charge 3. Charge 1 relates to the alleged conduct of the Applicant in pressurising the Human Resources Department to issue a promotional letter to Mr Scheepers in circumstances where there was a pending disciplinary hearing. Charge 3 relates to the alleged breach by the Applicant of his suspension conditions. The survey of evidence on record demonstrates quite clearly to me that a finding of guilt on both of these charges by the chairperson of the hearing, and particularly in light of the witnesses of Transnet, Mr Luvhengo and Mr Tshabalala, cannot not be sustained.

[51] I do, however, take into account that the Commissioner considered the fact that the Applicant did not attend the disciplinary hearing and that it was his absence at the disciplinary hearing that contributed to him being found guilty on allegations on which he should not have been found guilty. In my considered view, and having regard to the requirements of equity and fairness, even if the Commissioner is correct in this reasoning, a finding of guilt and dismissal cannot be sustained simply by reason of failure by the employee to attend a hearing if, on consideration of all the facts, the finding of guilt and a sanction of dismissal was not correct.

[52] In short, I do not understand it to be part of our law, that where there are express rights involved, such as the right not to be unfairly dismissed, those entitled to enjoy such rights could be dismissed simply based on default. The fact that a hearing at the bargaining council is a hearing *de novo* provides adequate protection for the employees who may, either of their own fault or the fault of the employer, not have participated in a hearing. The Commissioner was therefore required to consider whether the Applicant was fairly found guilty of the misconduct alleged in Charges 1 and 3.

[53] I am satisfied that the Commissioner did conduct this enquiry and this is borne out by his express finding that, in his view, the evidence on record did not

establish that the Applicant breached his suspension conditions. It is also clear from the evidence of Mr Luvhengo that the Applicant could not have been found guilty and dismissed based on Charge 1.

[54] The question which arises therefore is whether, given the Court's finding that in relation to Charges 1 and 3 a sanction of dismissal could not be sustained, the decision ultimately reached by the Commissioner that the dismissal of the Applicant was substantively fair is one that a reasonable Commissioner could not reach. This hinges, in my respectful view, on the determination of whether the Applicant was in fact guilty of Charge 2 and whether dismissal was an appropriate sanction for this Charge if it was the only one against the Applicant.

[55] In making this consideration, the Court does not substitute its own reasoning or its own perspective on the issues, but rather considers the material that was before the Commissioner, the Commissioner's reasoning and the reasons provided for the decision. The ultimate aim of this exercise is to determine whether in light of the evidence contained in the record, the finding that the dismissal was substantively fair in respect of Charge 2 is one that a reasonable Commissioner could not reach.

[56] On the Applicant's own version, he had a discussion with Mr Mutheketela in terms of which he asked Mr Mutheketela not to impose a harsh sanction of dismissal on Mr Scheepers. The record also shows that there was at least one text message in which the Applicant literally pleaded with Mr Mutheketela not to impose a harsher sanction of dismissal on Mr Scheepers. This is despite the fact that the Applicant, on his own evidence as borne out by the record, considered that the misconduct committed by Mr Scheepers was serious. It is, and has always been common cause that the Applicant was a senior employee of Transnet and that he therefore held a position of trust.

[57] I have no doubt in my mind that it can never even be remotely suggested that the Commissioner was wrong in his finding that the conduct of the Applicant, in interfering in the disciplinary proceedings (and seeking to protect an employee who he himself considered to have committed serious misconduct),

constituted serious misconduct. In the first analysis, I therefore proceed from this premise: that the Applicant was employed in a senior position of trust and that the conduct complained of would constitute serious misconduct.

[58] The evidence on record does not support the Applicant's version that he merely gave advice to Mr Mutheketela. The contents of the communication between Mr Mutheketela and the Applicant, as borne out by the record, do not support the version given by the Applicant that he was responding to a request for an opinion by Mr Mutheketela. It is clear that the Applicant had deliberately set out to interfere in the disciplinary proceedings in order to protect Mr Scheepers by seeking to influence the decision of the chairperson. It boggles the mind why and how Mr Mutheketela would be seeking an opinion from the Applicant as to what an appropriate sanction is, when Mr Mutheketela had in fact not heard the evidence in the matter. This renders the version of the Applicant less probable and was therefore correctly rejected by the Commissioner. There is no basis to fault the Commissioner's finding that the Applicant misconducted himself in this regard.

[59] This is undoubtedly serious misconduct by a senior manager holding the position that was held by the Applicant at Transnet. This is more so when considering that Transnet is a big employer and that the employees who do not have '*protectors*' in senior positions would be severely disadvantaged in circumstances where, for other employees, it is easy to commit misconduct and be protected from getting harsher penalties.

[60] It is also an elementary principle of the fairness of the disciplinary process in the workplace that the decisions of those who preside over those hearings should not be tampered with and should carry the level of credibility that will ensure that, not only are the employees who are the subject of the decisions treated fairly, but are seen to be treated fairly and that they have no reason to believe that they are not being treated fairly and equitably.

[61] To the extent that it is argued by the Applicant's representatives that the Commissioner committed gross irregularities in the conduct of the arbitration

proceedings, the law is now settled in respect of what would constitute a gross irregularity. In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*[4] the Supreme Court of Appeal held as follows:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable"

[62] I do not understand it to be the contention of the Applicant that the Commissioner misconstrued the enquiry that he was required to undertake. In fact, the survey of the Award and the record clearly demonstrates that the Commissioner painstakingly went out of his way to deal with virtually every issue that was raised during the arbitration proceedings and correctly identified the nature of the enquiries that he was supposed to undertake.

[63] Ultimately therefore, it all boils down to the question, as I have alluded to above, whether the ultimate decision reached by the Commissioner is one that a reasonable Commissioner could not reach. This, in my view and in light of the record, can hardly be suggested. The Award demonstrates that the Commissioner took all relevant evidence into account, applied the correct rules of evidence and reached a decision that is certainly within the band of reasonableness. I stress at this juncture that it doesn't matter whether or not this Court would have arrived at the same decision. That is certainly not the

[4] [2013] 11 BLLR 1074 (SCA) at para 25.

test on review. As long as the contents of the record justifies the decision, as it does in this case, the Court has no basis to interfere in the absence of evidence of any impropriety.

[64] The Applicant also relied on the fact that the Commissioner did not take into account his length of service. In circumstances where a senior employee has made themselves guilty of undermining the processes of the employer, it is my considered view that the length of service should in fact serve as an aggravating as opposed to a mitigating factor. In *Toyota SA Motors (Pty) Ltd v Radebe and others*[5] the Labour Appeal Court held the following:

> "Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that 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."

[65] The award also shows that the Commissioner clearly appreciated that the nature of the conduct of the Applicant, considered in totality, was so serious that it rendered continued employment intolerable. In this regard, the Commissioner relied on established case law[6] where the Commissioner held as follows:

> "287. Whilst I may in the past have agreed with Pela that in the absence of evidence of trust relationship being led, the respondent could not justify a dismissal (Edcon v Pillemer & others [2010] 1BLLR). This position is no longer the correct law. That is, the current law finally dispelled this myth that the leading of evidence to show that the trust relationship had irretrievably broken down was necessary. The LAC in the matter between Impala Platinum Limited v Zirk Bernardus Jansen & Others (JA100/14) considered the applicability of Edcon v Jansen's

[5] (2000) 21 ILJ 340 (LAC).

[6] See p. 59 of the record at para 287 of the arbitration award.

conduct and concluded that Jansen's dismissal was fair, even though specific evidence was not led on the breakdown of the trust relationship.

288. The LAC held that considerations such as long service, an unblemished disciplinary record and remorse, albeit mitigating factors, do not bar any employee from avoiding the sanction of dismissal.

289. In the premises, I determine that the respondent had discharged the onus in terms of sections 192(2) of the Act."

[66] Accordingly, in determining the appropriateness of the sanction of dismissal, the Commissioner properly performed the duties of an arbitrator as one would expect an arbitrator to perform their duties. Accordingly, in the circumstances, although I agree based on the evidence contained in the record that the finding of guilt and certainly the sanction of dismissal cannot be sustained in relation to Charges 1 and 3, however, I find that the Applicant made himself guilty of serious misconduct alleged in Charge 2 and I find that, even if this was the only allegation before the Commissioner, a finding that the dismissal was fair would not be one that a reasonable Commissioner could not reach.

[67] In the circumstances, the review application stands to be dismissed. All that remains to be determined is the issue of costs.

Costs

[68] Both parties argued that the costs should follow the result. Whilst it is an elementary principle in civil law that costs normally follow the result, this Court has repeatedly held that this is not a hard and fast rule in proceedings before this Court. Ultimately, fairness and equity is what determines the outcome in relation to costs. I do not believe, even though I have found that the Applicant had made himself guilty of serious misconduct by interfering in the disciplinary process of Mr Scheepers, that the review application was a hopeless case. This is more so in light of my findings in relation to the sustainability of the finding of guilt and the sanction of dismissal in relation to Charges 1 and 3.

[69] In these circumstances, I do not find that the review application was frivolous and I am therefore not inclined to order costs against the Applicant. The Applicant has certainly borne the consequences of his serious misconduct and should not be mulcted with further burden of costs in circumstances where the review application was not a hopeless case. I therefore decide that fairness and equity dictates that there should be no order as to costs.

[70] In the circumstances, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

N. B. Khoza
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant : Ms Phakedi
Instructed by : Phakedi Attorneys Inc.

For the Second Respondent: Mr Selomo
Instructed by : Selomo Attorneys Inc.