



**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Not Reportable  
Case no: C10/2020

In the matter between:

**BUYELEKHAYA CHRIS NKWALI**

**Applicant**

and

**TRANSNET NATIONAL PORTS AUTHORITY**

**First Respondent**

**TRANSNET BARGAINING COUNCIL**

**Second Respondent**

**COMMISSIONER T ERASMUS N.O**

**Third Respondent**

**Heard: 31 July 2024**

**Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 09 July 2025**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J**

*Introduction:*

- [1] In this opposed application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the third respondent (Arbitrator), in which it was found that his dismissal by the first respondent, Transnet National Ports Authority ('TNPA'), was procedurally and substantively fair.
- [2] The applicant further sought condonation for the late filing of his supplementary affidavit. An explanation was proffered in that regard which the Court has no

reason to reject. Accordingly, good cause was shown and the interests of justice given the nature of the matter and the period since dismissal, dictate that for the late filing of the supplementary affidavit in the review be condoned.

#### **Background:**

[3] The TNPA is one of Transnet SOC Ltd's operating divisions and is responsible for the provision of port services and facilities. The applicant was employed as its Maritime Technical Manager (MTM) since October 2014. He was based in the Marine Operations Department in Transnet, Port Saldanha, and reported to the then Marine Operations Manager (MOM), Mr Dean Petersen.

[4] Amongst the duties of the applicant were the maintenance and Lay-up of all Tugboats for the Port of Saldanha; management of all Marine projects; mentoring of marine employees; procurement; management of marine building projects; aligning TNPA with the South African Maritimes of South Africa (SAMSA) which is the regulator in ensuring safety and property at sea and also with Independent Communications Authority of South Africa (ICASA); compliance with Health, Safety and environmental legislation; management and coordination of all Human Resources related issues; and procurement of new Tugboats and scrapping of old ones.

[5] A tug/vessel is a powerful boat used to move or pull vessels to the port and to fetch vessels from the sea. It is used for certain cargo activities or cargo handling from large vessels. It is piloted by a captain (Tug Master) with a crew. The TNPA at the Port of Saldanha had four tug-boats/vessels (*Tug-Marcus, Tug Meeuw, Pilot Inyoni and Pilot Avocat*), which were due for lay-ups during 2016/2017.

[6] The applicant was suspended in March 2017 and dismissed on 19 April 2018 following upon a disciplinary enquiry into various allegations of misconduct. The charges were formulated as follows;

6.1 *Gross dishonesty, gross negligence, dereliction of duties pertaining to Noise and Vibration testing.* In this regard, the applicant is alleged to have in September 2016, breached Transnet Procurement Policy Manual (TPM) by

separating requisitions for noise and vibration testing services into 8 different requests ('parcelling'), in order to bypass the requests for quotes (RFQ) process and/or delegation of authority, enabling him to sign off each quotation as it fell under his delegation of authority (of R150.000.00).

6.2 *Gross Dereliction of duties: Non-compliance with Health and Safety Prescripts – Noise and vibration testing*, the applicant is alleged to have in September 2016, failed to ensure compliance Health and Safety prescripts during the procurement of services from service providers to conduct noise and vibration testing on vessels at the Port of Saldanha.

6.3 *Breach of the Public Finance Management Act (PFMA)*<sup>1</sup>- *noise and vibration testing*, it was alleged that, in September 2016, he failed to take reasonable steps to prevent irregular, fruitless and wasteful expenditure for noise and vibration testing services on vessels in the Port of Saldanha, which were estimated at R199 687.88. These emanated from alleged failures to comply with health and safety prescripts, bypassing TNPA Health and Safety Department and failing to comply with procurement processes;

6.4 *Gross dereliction of duties, non-compliance with health and safety requirements and breaches of the PMFA*, the applicant is alleged to have failed to take reasonable steps to prevent expenditure in April – November 2016 related to the Lay-up of tug boats *Marcus* and *Meeuw* in the amounts of R636 185. 53, and R173 736.00 respectively. In addition was such non-compliance with work undertaken on *Pilot Nyoni and Avocate*:

6.5 Gross misconduct in that in 2016/2017, he breached Transnet Code of Ethics by failing to declare business interests.

6.6 Putting the image of Transnet into disrepute by not following correct and proper processes in the tug lay-up timeously and meeting the required standards.

[7] Aggrieved with the dismissal, the applicant lodged an unfair dismissal dispute with the second respondent, Transnet Bargaining Council (TBC). When the

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<sup>1</sup> Act 1 of 1999

dispute could not be resolved at conciliation, it came before the Arbitrator, who had issued the impugned award.

*The arbitration proceedings:*

- [8] The applicant had challenged both the procedural and substantive fairness of his dismissal. The arbitration proceedings took place over 8 days hence the voluminous record encapsulating the Arbitrator's 87-paged award, the pleadings and both parties' equally lengthy heads of argument.

*The challenge to procedural fairness and Arbitrator's findings:*

- [9] The applicant challenged the procedural fairness of his dismissal on the following grounds; viz – that he was denied an opportunity to present his version during investigations into the allegations; denied access to information in support of his case; the charges against him were vague and technical; there were excessive delays between the alleged misconduct, his suspension, scheduling the disciplinary enquiry, and ultimate dismissal; he was denied legal representation at the disciplinary enquiry; and that son had merely allowed that he be cross-examined based on the written statement he had made at the enquiry.
- [10] In these proceedings, I did not understand from the submissions made on behalf of the applicant that the complaint surrounding legal representation was pursued with any vigour. This contention however would have in any event lacked merit in that under cross-examination at the arbitration proceedings, the applicant had conceded that neither he nor his union representative had formally requested legal representation before the chairperson.
- [11] TNPA had called upon Adv. Bouwer, a director of Nexus Forensic Services ('Nexus'), who had investigated the allegations against the applicant in April 2017. He had submitted a report in that regard in September 2017. The investigations were initiated by a memorandum submitted by the General Manager Group Forensic at Transnet at the time, in which various alleged procurement irregularities in respect of vessels and service providers at the Port

of Saldanha were listed. Those allegations had also been reported by Mr Donovan Samuels (Samuels), the then acting Port Manager in March 2017.

- [12] Bouwer had testified that various individuals within the TNPA and from the service providers (i.e., Bayside Marine, Inyameko Trading, Argos Scientific South Africa and Safetech) were invited and had participated in the interviews. Despite the invitation having been extended to the applicant and Petersen who had both initially accepted, the two on the date of the interview (17 August 2017), had declined to participate despite being implicated in the allegations.
- [13] Despite assurances that the investigations were not a formal process and were merely meant for both the applicant and Petersen to provide their input, they had advised Bouwer of their uneasiness with the interviews and made various demands. These included to see confirmation of the appointment of the investigators by TNPA; the details of the investigations such as date of commencement; the status and stage of those investigations; copies of the interview notes, statements, and affidavits obtained during investigations. They further requested that all questions to them be in writing and emailed to them so that they could have time to apply their minds before they responded in writing. Bouwer had however proceeded with the finalisation of the report without their participation.
- [14] The applicant had confirmed that he was invited for an interview in August 2017 to be held at the premises of the TNPA. He contended that at the time, he was already served with a notice to appear before a disciplinary enquiry. He confirmed that he had made the various requests and contended that these were not acceded to. He had informed the investigators that he would only answer questions after he was provided with the information he had requested.
- [15] His further contention was that he merely sought clarity from the investigators, and that access to the documents would have assisted him in answering and contributing to the investigation during his interview. He contended that that despite the initial promise that such documents would be provided he never received them. He had testified that the report was used by the TNPA to

formulate the charges against him without his input, and further that it had created an impression of the guilt against him even prior to the hearing.

- [16] A second complaint raised by the applicant in respect of procedural fairness of the dismissal was that the charges against him were vague, too technical and legalistic, and had made reference to statute (PFMA), without providing specific sections allegedly contravened. He contended that he did not understand some of the charges. Under cross-examination, he refuted when it was put to him that the issue of vagueness was not raised at the internal enquiry with the chairperson.
- [17] The chairperson of the disciplinary enquiry, Mr Louis Eland, had testified that the charges were explained to the applicant and his representative (a Union Full-Time Shop Steward), and that the only issue that was raised was in regard to the sub-charges. Eland had clarified to them that he would deal with the primary charge incorporating the sub-charges and make a determination in that regard.
- [18] A further complaint raised by the applicant was that it was common cause that at the disciplinary enquiry, he had handed in written submissions on the charges, and he was thereafter cross-examined on the contents of his statement. The applicant however complained that the chairperson had merely accepted his written submissions, and did not warn him of the implications thereof.

*The Arbitrator's findings on procedural fairness:*

- [19] The Arbitrator had regarded Bouwer as an 'exceptionally credible witness', and concluded that the applicant failed to make use of the opportunity to make his input in the investigations and that he failed to raise his concerns about the interview with Samuels. The Arbitrator instead concluded that the applicant's refusal to participate in the interview showed flagrant disregard for the TNPA processes, resulting in it incurring wasteful and fruitless costs related to travelling of the investigators from Pretoria to Cape Town, and further driving from Cape Town to Saldanha. The Arbitrator found that neither the applicant nor his representative had raised concerns about the vagueness of the charges

to the chairperson (Eland) or Samuels (who had issued the letter of suspension and notices of disciplinary enquiry). Instead, at the disciplinary enquiry, he had confirmed before Eland that he understood the charges against him. The Arbitrator further concluded that the applicant chose not to testify at the disciplinary enquiry and merely submitted his written statement upon which he was cross-examined. He could not therefore claim to have been deprived of an opportunity to state his case. In the end, the Arbitrator concluded that there was no merit in the challenge to the procedural fairness of the dismissal.

*Substantive fairness and the charges:*

- [20] Other than Bower and Eland, TNPA called upon five other witnesses including Messrs Samuel; Miyela Mushwana (Finance Manager); Quentin Kordom (SHEQ Manager); Hilton Brent (Tug Master) and Steven Hamilton (Chief Maritime Engineer). The applicant was the only witness in his case.
- [21] Bower gave an overview of the allegations against the applicant. He testified that investigations had established that the applicant and Petersen failed to follow the relevant procedures in the lay-up of these boats, resulting in delays and therefore fruitless and wasteful expenditure. Their conduct entailed poor planning and non-compliance with relevant regulations and legislative prescripts.
- [22] A lay-up is a process that involved the tug being taken to the dry dock where it was to spend two to three weeks undergoing maintenance. During a lay-up period, the water will be drained from the vessel and contractors would repair the seawater pipes or any pipes that may have rusted and also perform any other repair work that needs attention on the vessel for it to continue to be operational for a further two years.
- [23] Any maintenance on tug at the time was to be in accordance with the Contract Management Standard Operating Procedure (SOP). In this case, it was the 'CM SOP 21', which regulated the procedure to be followed before, during and after any maintenance work was carried out on the vessels. The CM SOP 21 was presented at a workshop held at the Port of Saldanha in February 2016, with the aim of ensuring that all employees who utilised the services of service

providers or contractors within the TNPA premises complied with the relevant legislation, Transnet SHEQ Risk Management Policy Statements and other legal requirements under the Occupational Health and Safety Act (OHS)<sup>2</sup>.

- [24] In respect of the first charges related to Gross dishonesty (alternatively gross negligence) pertaining to noise and vibration testing, and the alleged breach of the PFMA, it was common cause that a noise and vibration project was to be undertaken with respect to eight vessels, which received 8 separate quotations from Argos. The applicant in his position was to lead the project, and the total value of the quotations combined was R437 912.00, which quotations he had accepted and Argos was awarded the contract. This exceeded the applicant's delegation of authority of R150.000.00.
- [25] Boucher had found that procurement prescripts were by-passed, and that the aspect of the maintenance of tugs which Argis had in turn subcontracted, had caused a mark-up to be too high resulting in fruitless and wasteful expenditure. This was as a result of travel and testing costs, and misrepresentations made in the invoices which included travelling that did not take place. This effectively had resulted in '*parcelling*'<sup>3</sup>, which essentially means instances where the full scope of work is known, were however deliberately split into smaller portions to keep the transaction value within the applicant's delegation of authority the tune of R150.000.00.
- [26] The above conclusions were further based on a variety of factors including that; there was a separate loading of requisitions in order to create eight separate RFQ's for the same services rendered. Ordinarily, a RFQ can only happen when a requisition is made by the end user (person or unit requiring services), i.e., the Department of Maritime or the applicant. In such circumstances, the procurement unit would then commence with the process.

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<sup>2</sup> Act 85 of 1993

<sup>3</sup> Section 14.2 of the PPM, Policy Procurement Manual of Transnet provides that, "Parcelling is considered a prohibited practice. Parcelling is defined as, when the full scope of work is known at the point in time and business is deliberately split into smaller portions to keep the transaction value within one's own DOA or to keep it below the threshold of an AC or a person with a higher DOA",

- [27] Bouwer further based his conclusions on the sending of RFQ's to Argos, which was not registered to provide the services and which had in turn sub-contracted 100% of the work to another entity (Safe Tech); the failure to follow full tender processes as required since the RFQ's were split into eight separate quotes for the same service and same amounts to ensure that they fell within the applicant's delegation of authority; the by-passing of the unit of Mr Q. A Kordam, the Transnet SOC Manager of Safety, Health and Environment (SHE) during the process of noise and vibration testing under the applicant; delays in the completion of the work on *Marcus* caused by the applicant's unavailability; Argos inflated pricing by making a mark-up of about 233% on the invoices for noise and vibration testing; the applicant's failures to comply with the provisions of OHS and regulations, and also with the internal SC SOP 21.
- [28] Bouwer further concluded that the applicant failed to declare interests in line with the Transnet Declaration of Interest and Related Party Disclosure Policy for Directors in that it was established that he was a director of a company which was operational during his employment with TNPA. Against the applicant's contentions that in March 2017 he was on suspension and that he was only a director of a shell company since 27 June 2016, Bouwer had testified that a recent search through the entity's IRP6 tax return for the 2018 tax year, and a Wind Director Report search, showed that the applicant was the director and that the entity was active.
- [29] In the end, Bouwer in the report concluded that the applicant failed to take reasonable steps to avoid the fruitless and wasteful expenditure and/or irregular expenditure in respect of the two tug boats in the sum of over R1m, made up of VAT, tug Markers in the amount of R636 185.53 that included variation orders plus the additional work done by another contractor, *Bay Side Marine*, additional time spent at Armscor during the lay-up; R173736 spent on *Meeuws* and paid to *Inyameco Trading* for the foam storage tanks; and R199 687.00 for noise and vibration testing paid to Argos. Those amounts were paid to contractors, which Bouwer further concluded could have involved fraud and corruption during the invoicing of the noise and vibration testing. It was against

these conclusions it was recommended that disciplinary action be taken against the applicant and Petersen.

- [30] Mushwana was the Finance Manager at the Saldanha Port, and had acted as Procurement Manager during February 2015 – November 2017. Amongst his duties was health environment. He testified that it was a requirement with all procurement processes, to be in line with the Transnet Procurement Procedures Manual (TPPM), which all employees were aware of. He confirmed that the conduct of the applicant in regard to the requisitions and acceptance of the Argos quotations amounted to parcelling which was prohibited by the TPPM. Parcelling was essentially aimed at avoiding to follow proper adjudication processes by the Procurement Adjudication Committee (PAC), and prevented the latter from opening the bid for the project to more than one service provider, and which could have cost the TNPA less than what Argos had claimed or quoted for the project.
- [31] In relation to the charges against the applicant, Mushwana testified that the lay-up of the tugs had to take place in Simonstown and after ARMSCOR (the owner of the dock) had issued a quotation. The tugs were supposed to be docked for three weeks in accordance with the quotation, but took seven weeks. Delays were as a result of unavailability of equipment and material needed for the task, which the applicant as project manager ought to have arranged on time. He had testified that some work, such as the washing of the hull of vessels and the removal of rust before painting work could be done, had to be re-done as paint material was not delivered on time. Because of the delays resulting from the lack of equipment to perform the task, AMSCOR charged Transnet for the standing on site, and an additional amount of R173 000.00 for equipment. Furthermore, additional costs had to be paid for work done that had to be re-done on the hulls.
- [32] Mushwana attributed the delays to incorrect tender processes being followed in awarding the bid to Argos; numerous failures to adhere to the 3-route system, to rely on the marine department to give an overview of services required, to identify specifications, to secure correct service providers and to verify whether the service provider had the correct technical qualifications to

provide the service required. He contended that there was an overall incorrect planning of the project.

- [33] Kordom testified in regards to the failures when sourcing procurement services at Transnet. The process involved adherence with health and safety prescripts, completion of SHE specifications, and sanctioning of projects by his unit (SHEQ). He had testified that he was unaware of an appointed contractor to perform noise and vibration testing on vessels, until he received a call from a Dr Williams from Safetech. He had then established that through the applicant, the bid for the work on the vessels was granted to Argos which had then sub-contracted to another entity, Safe Tech. The applicant had however not gone through Kordom's unit to seek guidance on the process even prior to the sourcing of the services. There was a requirement that the SHE specifications had to be requested for all marine services, which the applicant partially complied with. It was further established that Argos was not an approved inspection authority or registered with the South African National Accreditation System (SANAS) to conduct noise testing. Safe Tech was however accredited. Kordom was also presented with a recommendation to pay Argos and had realised that the costs for its services were exorbitant.
- [34] Mr Hilton Brent, the Tug-Master (Captain) at Transnet confirmed that lay-up of vessels was done every two years and included painting, pipe work and checking of the hull of the vessels. He had assisted in getting the vessels to sail from Saldanha to Simonstown with a crew of 10, after the applicant had assured him that everything was arranged with ARMSCOR. Four of the crew members were to remain in Simonstown during the lay-up. When the crew arrived at the Simonstown harbour, nothing had been arranged for the docking with ARMSCOR, and they had to stay overnight in the vessel which could not dock. They had to call the applicant to come to Simonstown to assist with the necessary arrangements for docking, food supplies and accommodation. The crew had at some stage after they were allowed to dock, ended up overstaying at a hotel in Simonstown as proper accommodation arrangements were not done.

- [35] The lay-off took over six weeks during which they only saw the applicant on no less than six occasions and in some instances he was not contactable on his mobile phone nor did he respond to emails. Material for the work such as paint had not been ordered and despite attempts, the applicant could not be reached. During that period, the rust removed from the hull of the vessels had resurfaced as it could not be painted on time. That task had to be repeated once the paint became available. At some point, AMSCOR informed them that they had to leave the harbour with their vessels which had overstayed. They could not however do so as the work was not completed. He described the project as a mismanaged contract with costs having escalated due to equipment hire. After the applicant was suspended he had discovered discrepancies in payment to service providers.
- [36] Mr Stephen Hamilton, the Chief Engineer, Marine Department in Saldanha was responsible for the maintenance of the vessels. If there were problems and breakages, he first had to communicate with the applicant as Marine Technical Manager for the latter to fix the problem and if he could not, to get external assistance. At the commencement of the lay-up of the vessels, Hamilton showed the applicant the foam tanks of the vessels that needed repairs. Each vessel had three foam tanks that needed to be opened immediately in case they were rusted, and which could have major consequences if not attended to. The applicant had however failed to do so despite being reminded by Hamilton on numerous occasions. By the time the foam tanks were opened towards the end of the lay-up, they were completely rusted and could have led to a loss of the vessel. A further problem was encountered when the tanks were opened, and it was realised that there were not enough foam containers to transfer the foam from the tanks. The applicant however had a responsibility to ensure that enough containers were available. At all times despite being needed, the applicant was hardly available or contactable to deal with problems. He failed to honour appointments with contractors who had to delay the completion of the work due to his unavailability or due to arriving late at meetings
- [37] In relation to the charge of gross dereliction of duties and non-compliance with the Health and Safety requirements pertaining to *Inyoni* and *Avocet Pilot Boats*

in November 2017 to February 2017, Kordom had testified that the applicant was after his request, issued with a SHE specification for work to be performed at the at either the slip way or the dry dock in Saldanha. A site inspection however revealed that the vessel to be worked on was not ready as it still had scaffolding erected on its front part. That scaffolding had not been declared safe for use by a qualified inspector at the commencement of the work as it did not have a 'tag' to declare it as safe. Kordom then had to issue a 'stop work certificate' for work not to proceed on the pilot boat, in view of non-compliance with the SOP21 and other health and safety requirements. He conceded that at the time he conducted an inspection, no work was being done and there was no personnel on site.

- [38] The 'stop certificate' is issued to indicate amongst other things, areas of non-compliance. After he had issued it, the applicant and Petersen had acknowledged and signed a copy in that regard, and also furnished with their signed copies. Had work commenced in circumstances where the area had not been declared safe, this would have had consequences for Transnet as it would have entailed non-compliance with legal requirement and led to contravention penalties or imprisonment being imposed on senior management by Inspectors of the Department of Employment and Labour.
- [39] To the extent that the applicant was said to have put the image of Transnet into dispute, the evidence of the then acting port manager, Samuels, was that he was party to the formulation of the charges against the applicant. He testified that the service providers (Inyabeko Trading) held the view resulting from unavailability of the applicant when needed by contractors and the crew of the vessels, that the delays caused by him resulted in them carrying the costs. Delays related to the emptying of the foam tank, painting etc. The applicant was indecisive and unavailable resulting in a longer than budgeted lay-out. Equipment needed by the service providers was not available on time and this had resulted with a pay dispute which the providers threatened to expose to the media, and a loss of confidence in conducting business with Transnet. These complaints were also brought to the attention of the Transnet Port Group by the contractors

*The applicant's case:*

- [40] The applicant had refuted all the allegations of misconduct against him. Regarding the first charge of gross dishonesty/gross negligence and breach of the PFMA, the applicant conceded that his delegation of authority was limited to R150.000.00. He conceded that he had received the quotations from Argos which were loaded on the SAP system. He however contended that he was not solely responsible for the loading of requisitions on the SAP system during a procurement process. To the extent that he had released the requisitions as loaded on the system in the procurement process, he could not recall whether he had made enquiries with any other individual that had loaded a requisition.
- [41] He denied that he was involved in 'parcelling' during the process of procurement and payments, as he had nothing to gain from it. He contended that Petersen, to whom he reported directly, had the necessary delegation of authority to load requisitions as he was given a budget to manage.
- [42] He conceded that he was involved in procurement related to the testing for noise and vibration on the tugs. He contended that the splitting of invoices and the loading of such requisitions was done by Petersen, as it was further a norm known as 'Marine Services'. This was as a result of different vessels which had different budgets and costs centres, and that he had merely followed instruction from Petersen, discussed the matter with the finance manager, and had also advised Petersen before releasing requisitions. In that regard he contended that he had signed a comparative statement and approved the payment of the invoices for payment through the SAP system
- [43] Related to the charge of placing the image of Transnet into disrepute, the applicant had conceded that he was the project manager for the tug boats *Meeuw* and *Marcus*. He did not dispute that the tugs were not allowed to dock by AMSCOR and that the crew was inconvenienced due to lack of proper arrangements. He contended that he had however apologised for what he termed a misunderstanding/miscommunication with AMSCOR, and further bought the crew food to take it back to the vessels whilst waiting for approval to dock.

- [44] The applicant conceded that the unavailability of paint to be used on the project also caused delays, which had also caused the removal of rust on the hulls to be re-done. He however denied responsibility for the late payment of invoices submitted by one contractor, *Siyameko*, contending that he was not solely responsible, and attributed it to shortcomings within procurement, the service provider and the marine staff generally.
- [45] In regards to the fifth charge related to failure to disclose interests, he conceded that he had registered *BNK Transport Services* in or around 2016. He further conceded that Transnet was equally involved in the transport business. He however testified that the entity was registered as a future endeavour as he sought to own his own company in the future. He further testified that the interests were not disclosed as the entity was a 'shell', or that at the time, despite being a director since 2016, he could not disclose in 2017 as he was placed on suspension with no access to the workplace's portals or means to make the declaration. He was suspended in March 2017 prior to the next declaration window being April 2017, and that at the last period of declaration during April 2016, he had no interest to declare as his entity was only registered in June 2016. He contended that the TNPA did not show any prejudice resulting from the failure to declare.

*The Arbitrator's findings on substantive fairness:*

- [46] The Arbitrator after a detailed summary of the evidence and its analysis, observed that on the whole, the applicant was not a credible witness; had evaded questions put to him; gave long and irrelevant answers to questions and propositions put to him under cross-examination; gave new versions and tailored his versions as he testified; and even denied certain aspects of his own version that were confirmed by TNPA's witnesses under cross-examination.
- [47] Against the seriousness of which he was found guilty of on the five principal charges, the Arbitrator concluded that the dismissal was appropriate sanction. The Arbitrator further concluded that the applicant failed to take responsibility for his action, lacked remorse whatsoever, failed to take his responsibilities seriously, and had flagrant disregard for workplace rules and policies.

- [48] In respect of the first charge (Gross dishonesty, alternatively gross negligence) related to the testing and vibration testing, the project entailed eight vessels which were quoted separately by Argos in different amounts totalling of R437 912.00. The applicant had accepted the quotation despite the total amount exceeding his delegation of authority. The Arbitrator accepted that the total project and the manner with which it was quoted would have been adjudicated by the PAC, and would have led to the project being opened to more than one service provider, which process could have cost the TNPA less than what Argos had claimed.
- [49] The Arbitrator accepted that the mere acceptance of the quotation and awarding of the project to Argos constituted 'parcelling' and a breach of clause 14.3.5 of the TPPM. She rejected the applicant's version that Petersen was to blame and held that the processing of the invoices with the applicant's approval went through his own cost centre in the SAP system.
- [50] The Arbitrator had further accepted that based on the evidence of Mushwana and Kordon, the costs of the project could have been substantially less than what Argos had quoted. To the extent that the applicant had received and accepted the quotations which were loaded onto the SAP system by Petersen for processing and payment, confirmed and signed the comparative statements and approved the invoices for payment, he had therefore breached the PPM despite his knowledge of what was required of him in compliance thereof. A comparative statement is a document produced by procurement department used to compare the prices/costs of the service providers and the services they offer.
- [51] In regards to the second charge related to gross dereliction of duties: non-compliance with Health and Safety requirements related to the project, the Arbitrator accepted that during the noise and vibration testing, Argos or the sub-contractor, Safetech, did not receive any SHEQ induction on site; that Kordon had issued the 'stop work certificate' as there was non-compliance with internal SOP 21. Accordingly, the applicant had committed misconduct in that regard due to various failure with safety and health procedures and prescripts, which he was well aware of

- [52] In regards to the third charge related to the breach of PFMA pertaining to the lay-up of *Meeuw*, the Arbitrator had regard to the evidence of Bouwer, Hamilton and Mushwana. She concluded that as a result of the applicant's failures to attend to the site inspection, ignoring calls and messages by colleagues, delays as a result of lack of proper planning and unavailability of the necessary equipment, the late arrival of material, further costs not that were not budgeted for had exposed TNPA to wasteful and irregular expenditure in breach of the PFMA.
- [53] Regarding the charge of putting the name of TNPA into disrepute, the Arbitrator accepted that Mushwana had to intervene in relation to non-payment of a service provider, and thus the applicant was guilty of the charge.
- [54] Related to the charge of failure to declare interests in a private business, the Arbitrator accepted that *B & K Transport*, which was in the transport business like Transnet, was registered in the name of the applicant, and in breach of the Transnet Code of Ethics. The Arbitrator rejected the applicant's version that the entity was a shell or that he could not make a declaration because he was suspended during the period of its registration. She concluded that the obligation was to declare as soon as the entity was registered, and that the applicant could have done so before his suspension

*The grounds of review and evaluation:*

- [55] Central to the applicant's grounds of review was that the Arbitrator committed gross irregularities and misconduct in her application of the law to the facts, and thus arrived at a conclusion that no reasonable decision maker would have arrived at. In this regard, it was submitted that the Arbitrator reached a conclusion that is unreasonable and illogical when evaluated against the facts presented, the charges alleged, and the prevailing laws.
- [56] In particular, the applicant complained that the Arbitrator found that he was guilty as charged in relation to the breaches of the PFMA, in circumstances where TNPA failed to show that the PFMA was a valid workplace rule, and how it applied to him. It was submitted that the Arbitrator misconstrued evidence when a reasonable decision maker would have understood that to find an

employee guilty of the allegation of dishonesty required the employer to provide evidence of the elements of such dishonesty

*The test on review:*

- [57] This Court in reviews of this nature must determine whether the commissioner's conclusions on the evidence presented, falls within a range of decisions that a reasonable decision maker could make<sup>4</sup>. Because the test on review is stringent, in determining whether the result of the award is unreasonable, the Court will broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator<sup>5</sup>.
- [58] In *Goldfields*<sup>6</sup>, the LAC held that a review court must ascertain whether the commissioner considered the principal issue before him/her; evaluated the facts presented at the hearing, and came to a conclusion which was reasonable to justify the decisions he or she arrived at. Where the applicant seeks a review on the basis of alleged irregularities in the assessment of the evidence, it was further held in *Goldfields* that the court must be cautious to ensure that the line between an appeal and a review is not crossed. The Labour Appeal Court added that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the

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<sup>4</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

<sup>5</sup> *Heroldt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 13; *Quest Flexible Staffing Solutions (Pty) Ltd (A division v Lebogate)* [2015] 2 BLLR 105 (LAC); (2015) 36 ILJ 968 (LAC) [2014] ZALAC 136; [2014] ZALAC 55.

<sup>6</sup> *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 18 and 20.

award. Thus, the review court was cautioned against adopting a piecemeal approach, as it is the totality of the available evidence that must be determined<sup>7</sup>.

*Evaluation:*

[59] The enquiry therefore in this case is whether the Arbitrator's conclusions on procedural and substantive fairness of the dismissal, can be said to fall within a range of reasonableness.

(i) *Procedural unfairness:*

[60] The principles applicable to procedural fairness of a dismissal are fairly trite. Effectively, at the core of a procedural fairness of the dismissal is the protection of employee's rights to fair labour practices as guaranteed under section 23 of the Constitution. As was reiterated in *McGregor*<sup>8</sup>, every employee, irrespective of the nature of misconduct, is entitled to fair labour practices and procedurally regular dismissals. This requires that an employee faced with disciplinary steps must be aware of the allegations against him/her; be afforded sufficient time and representation to properly mount a defence against those allegations, and in an informal process that is transparent, unbiased and geared towards an objective and fair outcome to the employee.

[61] The provisions of section 188 (1)(b) of the LRA<sup>9</sup> read with Item 4 of Schedule 8 of the Code of Good Practice<sup>10</sup> are also relevant in the determination of

<sup>7</sup> At para 18

<sup>8</sup> *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (CCT 270/20) [2021] ZACC 14; (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC); 2021 (5) SA 425 (CC); 2021 (10) BCLR 1131 (CC) At para 35.

<sup>9</sup> Section 188 of the LRA provides:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove that-
  - (a) the reason for dismissal is a fair reason-
    - (i) related to the employee's conduct or capacity; or
    - (ii) based on the employer's operational requirements; and
  - (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act

<sup>10</sup> Item 4 of the Code provides

**"Fair Procedure**

- 1. Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case

procedural fairness of a dismissal. The Labour Appeal Court has recently in *Gauteng Department of Education v General Public Service Sectoral Bargaining Council and Others*<sup>11</sup> re-affirmed the above principles by stating that;

“An employer is required to notify the employee of allegations of misconduct raised against the employee in sufficient detail and in a form and language that the employee can reasonably understand in order to allow the employee to answer to such allegations. It is not required, as was suggested in *Murray and Roberts Cementation (Pty) Ltd v Association of Mineworkers and Construction Union on behalf of Dube and Others*, that “when formulating charge sheets, employers must advise the accused employee of the precise charge he or she is required to answer in the disciplinary hearing”. This Court has made it clear that disciplinary proceedings are not criminal trials, nor are they intended or required to resemble highly technical civil trials. Employers in disciplinary proceedings may not be lawyers and may at times define the nature of the alleged misconduct raised against an employee imprecisely, too narrowly or even erroneously record the legal basis for such misconduct,

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in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

2. Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.
3. If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.”
4. In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

<sup>11</sup> (JA141/2022) [2025] ZALAC 2; [2025] 5 BLLR 435 (LAC) (22 January 2025) at para 13. See also *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA4/18) [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC). At paras 15 – 17. See also *SASBO-The Finance Union and Another v Standard Bank and Others* (SASBO) (JA32/2021) [2022] ZALAC 100; (2022) 43 ILJ 1794 (LAC); [2022] 10 BLLR 934 (LAC) at para 24, where it was held;

“The workplace disciplinary hearings are not criminal proceedings. This Court held in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*, that:

‘...(T)he misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant’s disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained...’”

for example as fraud when the legal requirements of theft may in fact be met. As has repeatedly been emphasised by this Court, it is not necessary that the employee be given notice of the precise legal basis for a complaint of misconduct in a highly technical charge sheet. Rather the employee must be informed in the appropriate manner of the allegation of misconduct raised in sufficient detail to enable the employee to understand such complaint and answer to it.”

*(a) Alleged vagueness of the charges and reliance by the chairperson on the written submissions:*

- [62] It was not in dispute that the applicant was properly notified of the disciplinary enquiry. Prior to then, he was placed on precautionary suspension on 15 March 2017 and the notice<sup>12</sup> set out the details and nature of the allegations against him. The notice<sup>13</sup> to attend the enquiry (which initially referred to ‘An Inquiry by Arbitration’), sets out 6 ‘charges’ and gave details of what the applicant was accused of, inclusive of the sub-charges.
- [63] I did not understand that in his capacity as Marine Technical Manager, which is an important and highly qualified and technical position, the applicant would have had difficulties in appreciating and understanding the substance of the allegations against him. In my view, his contentions that the charges were vague, or were formulated in English, or that he was a “*marine person, and not a legal person*”, are clearly mere red herrings.
- [64] The Court accepts that at a mere glance of the charges may appear to be technical to an outsider and someone who has no clue about vessels/tug boats, TPP Manual, delegation of authority or Transnet Code of Ethics or anything to do with marine services. Samuels had conceded under cross-examination that the details and technicalities in the charge sheet were not discussed with the applicant. However, I find it improbable that any senior employee within Transnet or the TNPA such as the applicant, and with defined delegation of authority within his costs centre, would have difficulties in appreciating the basic

<sup>12</sup> Page 1191 – 1194; 1197 - 1198 (Index to Arbitration Bundle Vol 4)

<sup>13</sup> Page 1199 -1201 of Bundle 4

implications of or the meaning of the PMFA, noise and vibration testing RFQ or health and safety prescripts.

- [65] It is indeed an indictment on the applicant in his position, to claim that he did not understand the nature of the charges against him in the manner that they were formulated. If the applicant during the tenure of his employment as Marine Technical Manager with its concomitant responsibilities had difficulties in understanding these concepts, the probable inference to be drawn is that he was clearly unsuited for the post. These concepts were or ought to have been daily routine for him in that position. Even moreso, where the minute details of those charges were ventilated at length at both the disciplinary hearing and the arbitration proceedings.
- [66] To the extent that the applicant for some reason still did not understand the substance of the allegations, evidence was led by the chairperson of the enquiry that the applicant, being represented by a union official, was afforded an opportunity to clarify anything he could not understand with the charges including the sub-charges, and had confirmed that they understood them.
- [67] Equally so, I find it illogical for the applicant to seriously contend that he did not understand the allegations, when for the purposes of the internal hearing, he had prepared written submissions in defence against the very charges he professed not to understand, and upon which he was cross-examined. In the applicant's 21-paged 'Written response to the charges'<sup>14</sup> he had addressed each charge with such detail and clarity that it clearly belies any contention that he could not have understood their substance. Whether the chairperson had warned him or not of the consequences of merely relying on the statement is neither here nor there in that in the end he was afforded an opportunity to answer to the allegations made against him and had do so in his written statement. Clearly there is no substance in the applicant's contentions that he was prejudiced by the chairperson's mere acceptance of his written statement and allowing him to be cross-examined on it. He had elected the manner with which he wanted to present his defence.

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<sup>14</sup> Pages 2029 -2051 of 'Loose Bundle' Pages – Bundle #5 & #6

*(b) The Nexus Investigations:*

- [68] To the extent that the applicant disputed the fairness of the investigation process, it is trite that the purpose of such investigation prior to a disciplinary enquiry, is merely to establish whether material evidence exists demonstrating that the employee committed the allegations of misconduct made against him or her. They are not meant to establish guilt or innocence of an employee, *albeit* it can be found during that process, that the employee has or no case to answer to at a formal disciplinary enquiry.
- [69] In this case, the applicant was made aware of the Nexus investigation and he was invited for an interview which he did not attend. When he was invited, he had made certain demands or requests. It is not necessary to deal in detail with the applicant's list of demands which were clearly unreasonable for the purposes of an investigation. All he needed to do was to communicate with Samuels, who he knew or ought to have known was the Acting Port Manager at the time, and enquired about the status of the investigators who had called him to an interview, which was to take place at his workplace. Equally so, Bouwer had confirmed that had the applicant in any event sought the information on time prior to the interview, and instead of having made demands on the date of the interview, it could have been given to him. The end result of the interview not proceeding as scheduled, was that fruitless and wasteful expenditure were incurred in respect of the travelling costs of the investigators.
- [70] The investigation report together with the necessary documents relied thereon were presented at the internal enquiry and the arbitration proceedings. I did not understand the applicant's case to be that an application was made before the Arbitrator to exclude it as inadmissible evidence or that it could not be relied for some reason. Equally so, it would have been unreasonable for the chairperson to have denied him access to the very documents that were going to be used in the hearing, let alone a postponement for the applicant to familiarise himself with the contents of those documents. There does not however appear to be any evidence presented demonstrating that the applicant or his union representative had made such requests.

- [71] Bouwer was cross-examined at length on the Nexus report as well as all the other witnesses mentioned in the report in support of its conclusions and the allegations against the applicant. Both the disciplinary enquiry and the arbitration proceedings were avenues for the applicant to challenge both the report and the witnesses that testified to it.
- [72] The facts and principles set out in *Oliver vs Universiteit van Stellenbosch*<sup>15</sup>, as sought to be relied upon by the applicant, are clearly distinguishable from those in *casu*. Other than the fact that *Olivier* in that case had disavowed reliance on the provisions of the LRA, he had specifically requested clarity on the charges and made an application for certain documentation and a postponement in his hearing, which requests were refused. I did not understand the applicant's case as already stated, to be that he had requested and was denied documents or postponement of the proceedings even at that belated hour. In any event, and as already indicated, there was nothing conclusive in regards to the applicant's guilt in the report as argued on behalf of the applicant, as that was not the purpose of the investigations. Its purpose was to investigate the allegations upon which TNPA had formulated the charges, and which were ventilated at both the disciplinary hearing and the arbitration proceedings.
- [73] In the end, a disciplinary enquiry cannot be deemed to be unfair, in circumstances where the applicant was afforded an opportunity for an interview during investigations into allegations of misconduct and had rebuffed that opportunity. Furthermore, there can be no unfairness as correctly observed by the Arbitrator, in circumstances where even at the disciplinary enquiry, the applicant had not made any request for documents or a postponement to go through the documents. In circumstances where the applicant was invited to an interview, Bouwer and Nexus were entitled to regard him as having waived his rights to an interview and proceeded with it in his absence.

*(c) Alleged time delays in the disciplinary process:*

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<sup>15</sup> (unreported 2181/2004 Cape Provincial Division); (Contemporary Labour Law Vol. 14 No. 9 April 2005, as referenced in the Applicant's Heads of Argument at para 14.2.3 and *fn* 10)

- [74] A further issue raised in regard to procedural fairness related to the time period between the alleged misconduct and the timing of the disciplinary enquiry, which the applicant viewed as being unreasonably protracted and unfair. It was not in dispute that the applicant was suspended during March 2017 and only dismissed during April 2018. Nexus was appointed in April 2017 to conduct investigations, which were concluded with its report released in September 2017<sup>16</sup> The disciplinary proceedings as per the minutes<sup>17</sup> took place between November 2017 and February 2018, resulting in the dismissal on 9 March 2018
- [75] It was submitted on behalf of the applicant that he was prejudiced as a result of the delay to the extent that he was kept out of the workplace for an excessively long period of time, denied access to workplace and that this delay created a space for the employer to dismiss him.
- [76] It is equally common cause that the applicant was placed on precautionary suspension with pay and it is not clear what prejudice he had endured from any delays in convening the hearing. The time period between his suspension, the investigations and the ultimate disciplinary process and the dismissal, cannot in my view be deemed unreasonable given the nature and magnitude of the allegations against the applicant.
- [77] The applicant's contention that he was merely kept out of the workplace for nefarious reasons is mere conjecture and no more need be said in that regard. Furthermore, it was submitted on behalf of the TNPA that the applicant through his legal representative during the course of pre-arbitration conducted by the Arbitrator, did not raise the issue of the delay as part of his challenges to procedure, nor was the issue raised with the witnesses in their cross-examination. To this end, there is no merit in the suggestion that the delays in the process leading to his dismissal made that dismissal procedurally unfair.
- [78] On the whole, the grounds upon which the applicant alleged any procedural unfairness in his dismissal are without substance. Based on the overall evidence, the legal principles set out elsewhere in this judgment regarding

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<sup>16</sup> Pages 1174 – 1805 of the Arbitration Bundle #5 & 6

<sup>17</sup> Page 1811 – 1814 of Arbitration Bundle #5 and #6

procedural fairness, there is no basis for any finding to be made that the Arbitrator's findings in that regard fell outside a band of reasonableness.

(ii) *Substantive fairness:*

- [79] It was submitted on behalf of the applicant that the enquiry into substantive fairness turned on the interpretation and application of the PFMA to employees in his position. The applicant complains that the Arbitrator confirmed that he had breached the PMFA along with other allegations of misconduct. The primary contention of the applicant is essentially that the PFMA is not a general workplace rule. It was submitted that if the Court found that the applicant was not an accountable person in *lieu* of the permits of the PFMA, then it must be found that his dismissal was substantively unfair. Axiomatically, it follows that if the Court finds otherwise, then the dismissal on that ground was substantively fair.
- [80] The applicability of the PFMA came about in relation to the first charge 1 and 1.2 of gross dishonesty (alternatively gross negligence)- Noise and Vibration Testing. The allegations were that the applicant breached the TPPM in that he engaged in parcelling by separating requisitions into eight different requests for noise and vibration testing services in order to bypass the RFQ process and his delegation of authority.
- [81] The breach of PFMA in this regard is said to have occurred in that he failed to prevent irregular, fruitless and wasteful expenditure on the testing services in that he also failed to comply with Health and Safety prescripts, bypassed the TNPA Health and Safety Department, and failed to comply with procurement prescripts.
- [82] Under charge 2.1, the applicant is said to have breached the PFMA in regard to the lay-up of the *Tug Marcus* in that he failed to take reasonable steps during the lay-up, to prevent irregular, fruitless and wasteful expenditure in the amount of about R636 185.53. In this regard, it was alleged that he had failed to heed advice and complaints from crew; failed to timeously and diligently perform his duties; and failed to be available to address unforeseen events that caused delays

- [83] The PFMA also arose under charge 3.1 related to the lay-up of the *Tug Meeuw*. It was alleged that between April and November 2016 during the lay-up of *Tug Meeuw*, the applicant failed to take reasonable steps to prevent irregular, wasteful and fruitless expenditure in the amount of R173 736.00 incurred during the lay-up, in that he failed to heed to advice and complaints from Chief Engineer not to delay the docking dates provided by the Dock Master; prevent the late opening of foam tanks and to be available at all times to attend to any that may cause delays
- [84] It is my view that the starting point with the debate surrounding the applicability of the PFMA are the various prescripts applicable to Transnet and the applicant's own contract of employment<sup>18</sup>. At its clause 8.3.5, the contract stipulates that the employee agrees to comply with all legislation applicable to the execution of his duties. Aligned to these provisions are the provisions of the Delegation of Authority<sup>19</sup> which enjoins the applicant in the scope of that delegation, to comply with any law or regulation. Equally under clause 3 of the Transnet Delegation of Authority Framework (effective from 1 September 2016)<sup>20</sup>, it is specifically stated that the Framework applies to all employees of the company, including its Operating divisions and Special Units, and persons granted delegation of authority must perform their functions and responsibilities subject to exercising their powers and authority not in conflict with the PFMA amongst other prescripts. Clause 37.3 of the Group Company Secretariat (Code of Ethics)<sup>21</sup> provides that Transnet complies with all regulatory requirements in its regulatory universe, including the PMFA. The TPPM in its introduction<sup>22</sup> provides that the TPPM gives effect to the statutory requirements under section 217 of the Constitution read with section 51(1)(a)(ii) of the PFMA.
- [85] It is not necessary to elaborate on all the other applicable policies and manuals. However, the point needs to be made that under section 3 of the PMFA, it is specifically provided that the its provisions applies to all institutions and major public entities of which Transnet is one of them under its Schedule 2. As

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<sup>18</sup> Page 1211 –1220 (Page 1223 -1232) of the Arbitration Bundle #4

<sup>19</sup> Page 1245-1246)

<sup>20</sup>At Page 1220

<sup>21</sup> Page 1348

<sup>22</sup> Page 1364

correctly pointed out on behalf of the TNPA, the PFMA is an important statute in the regulatory environment that affects public entities and regulates their financial management<sup>i</sup>. The point being emphasised is that against all these policies and manuals and legislative provisions, I find it inexplicable that the applicant would seriously contend that the PMFA is not applicable to him in the performance of his duties, or that it was not a workplace rule.

- [86] It is not necessary for an employer in a contract of employment or in its disciplinary code to specifically state the provisions of a statute under which an employee would conduct his duties and responsibilities, especially in circumstances where that particular statute is applicable to an employer and employee in day to day activities and operations of the business. The contention that the TNPA did not prove that the PFMA is a workplace rule or that an employee in a public entity is exempt from a particular statute in the performance of his duties when that statute is a requirement in the overall running of the business of the employer is in my view lacking in logic. At the very least, the applicant ought to have appreciated from the various prescripts already referred to above and his own contract of employment under clause 8.3.5 as already indicated, that he agreed to to comply *with all legislation applicable to the execution of his duties*.
- [87] To the extent that reference was made to the PMFA in the charges without specifying which provisions, it was not necessary for the TNPA to in any event be legalistic in the charges as warned the authorities already referred to. All that was required in the charge notice even if reference was made to a statute, was context and substance of the allegations, which was provided by reference to specific incidents. Bouwer had in giving context, referred to fact that the specifics of the allegations were contained in the wording of the charges. These included that the applicant had failed to take reasonable steps to prevent irregular and fruitless wasteful expenditure, in relation to various incidents that formed the subject of those charges such as parcelling, bypassing health and safety prescripts (As confirmed by Kordom); the excessive amounts quoted by Argos; the delays and concomitant extra expenses incurred at the ARMSCOR dockyard in respect of the lay-up of the vessels; delays in making proper

arrangements for the emptying and transferring of foam from the tanks as testified to by Hamilton.

- [88] The provisions of section 51(1)(e) of the PFMA enjoins accounting authorities in public entities to take effective and appropriate disciplinary steps against any employee of the public entity who is found to have contravened or failed to comply with its provision; commits an act which undermines the financial management and internal control system of the public entity; or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. Section 57 of the PFMA on the other hand addresses itself to what is required of an official in a public entity. The applicant's contention that he was not classified as an 'official' or accountable person in his position and given his delegation of authority is again baffling, and no more need be said in that regard.
- [89] Under Charge 1 related to gross dishonesty (alternatively gross negligence) noise and vibration testing, the applicant sought to argue that the Arbitrator failed to take into account that it was unchallenged that acts of 'parcelling' were prevalent within the practices of the TNPA; that the separations of the purchase orders were in fact committed by the Petersen; that the comparative statements were prepared and presented by the procurement department which in effect authorised the process of 'parcelling'
- [90] The difficulty with the applicant's contentions as the Arbitrator had correctly found, is that they are intended to deflect attention from his own wrong-doing, and essentially refused to take responsibility. Against the common cause fact that the loading of requisitions and ultimate payment was a chain involving various individuals within procurement, it was nonetheless accepted that he had a delegation of authority to authorise amounts to a maximum of R150 000.00. The requisitions and quotations for noise and vibration testing as received from Argos in respect of the eight vessels in total exceeded his delegation of authority. He nonetheless, irrespective of the chain and role of other officials including Petersen in the loading of requisitions and payment of invoices, initially accepted those quotations without question, and assisted in the chain of loading them unto the SAP system which he solely attributed to Petersen. Petersen was his supervisor, and the quotations and the requisitions would not

have come to his attention or payment processed unless through the applicant. The mere fact that other officials had access to the loading of the requisitions on the SAP system is neither here nor there. The requisitions received were in respect of a project under his control and management. I fail to appreciate the reason the applicant would wash his hands off any event that took place in the course of the management of that project. It was equally disingenuous for the applicant to seek to blame the other officials and attempt to make a case of inconsistent application of discipline, when this was not even a case seriously pursued before the Arbitrator.

- [91] Clearly the applicant bypassed procurement prescripts when he as end -user, authorised the split of requisitions for noise and vibration testing as received from Argos into eight different requests and signing off each quotation. This was a classic case of parcelling under section 14.2 of the PPM, and I fail to appreciate how it could have been prevalent and condoned as the applicant had argued, since it was a prohibited practice which he in his position ought to have guarded against.
- [92] The Court accepts that evidence was led by Mushwana under cross-examination that there were instances where requisitions were separated and this was not considered to be parcelling. He cited specific instances where there was a deliberate local sourcing strategy, and which involved certain aspects of the work which could be done by any one of the local company service providers. With that sole objective, the work would then be split into separate components following recommendations by a relevant committee and final approval by the Port Manager or the divisional acquisition council. In this case, I did not understand it to be the applicant's case that the parcelling was done for any specific purpose and that it was sanctioned by any committee or the Port Manager.
- [93] His conduct and that of Petersen of allowing parcelling clearly constituted dishonesty. In *SASBO*<sup>23</sup>, the Labour Appeal Court held that dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving

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<sup>23</sup> *Ibid* at para 17

deception, a lack of integrity or straightforwardness. It was added that deceitfulness can manifest itself in various forms, which includes providing false information, non-disclosure of information, pilfering, theft and fraud, and that the fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal.

- [94] The invariable conclusion to be reached by this court upon an objective analysis of the evidence before the Arbitrator and her analysis thereof in respect of the contentions raised in respect of the issue of the PFMA and the specific incidents already dealt with above, and further in view of the adverse findings made by the Arbitrator on the applicant's credibility, is that the Arbitrator had no reason to reject the evidence presented by all the witnesses on behalf of the TNPA in respect of these charges, and her conclusions in that regard are unassailable.
- [95] A further charge related to the breach of Transnet Code of Ethics in that the applicant failed to declare his external business interests. In this regard and to summarise Bouwer's testimony arising from the investigations, the applicant was a director of *B & K Transport* since June 2016, and that he had not disclosed this interest in 2016/2017. The entity was in the transport sector like Transnet. Investigations had revealed that the entity was still in business as at the time that the investigations were conducted and at about the time was also placed on precautionary suspension.
- [96] It is trite that an employment relationship is based on the common-law principle of good faith. That principle was reaffirmed in *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v CCMA*<sup>24</sup>, when it was held that an employee that fails to disclose a conflict of interest acts manifestly in violation of his duty of good faith to the employer, and that employees act in bad faith if conflict of interest arises even though no real competition actually results<sup>25</sup>. In *City of Cape Town v SALGBC and Others*<sup>26</sup>, it was further held that an employee's failure to declare his involvement in other business entities warranted his dismissal by the

<sup>24</sup> CA8/2020) [2022] ZALAC 4; [2022] 4 BLLR 319 (LAC); (2022) 43 ILJ 1272 (LAC)

<sup>25</sup> At 15 -16

<sup>26</sup> (C353/16) [2017] ZALCCT 35 (2 August 2017)

employer. In *De Beers Consolidated Mines Ltd (Venetia Mine) v National Union of Mineworkers and Others*<sup>27</sup>, it was reiterated that where an employee has a duty to disclose information and fails to do so, this constitute a breach of the rule and as such, he was guilty of the misconduct complained of<sup>28</sup>.

- [97] The duty of good faith is further embodied in the Transnet Code of Ethics which should be read with '*Declaration of Interests and Related Disclosure Policy for Employees*'. That provision is made in clause 36.1.1 of the '*Group Company Secretariat – Code of Ethics*<sup>29</sup>. It is not clear on what basis the applicant would contend that the TNPA did not submit into evidence the actual declaration of interest policy at arbitration, when he in any event ought to have known about it given his position. It is trite that it is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully<sup>30</sup>.
- [98] Amongst the reasons proffered by the applicant in not submitting his declaration were that the entity was a shell. That contention in my view does not take his case any further in that the entity was indeed registered and he was its director. Against Bouwer's investigations with reference to the entity's IRP6 tax return for 2018 tax year, and a Wind Director Report which showed that the applicant was the director and that the entity was active, his defence was to insist that the company was a shell. That defence however without more, was not sufficient in the light of the documentary evidence adduced to demonstrate that the entity was in operation.
- [99] The explanation that the applicant was suspended at the time of submissions of the declarations and thus unable to do equally lacks merit. It is not sufficient for the applicant to merely allege constraints without demonstrating how he made any endeavour to overcome those constraints. As the Arbitrator had correctly found, the obligation was to declare as soon as the entity was registered. During his period of suspension, he remained under the duty of good faith and subject to the employer's policies and procedures. If he was indeed

<sup>27</sup>JA83/18) [2019] ZALAC 72; [2020] 3 BLLR 251 (LAC); (2020) 41 ILJ 884 (LAC)

<sup>28</sup> At para 15

<sup>29</sup>Pages 1338 - 1348 of Arbitration Bundle #4

<sup>30</sup> *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para 7

serious about making any declarations, and being fully aware of that fact whilst on suspension, nothing prevented him from contacting Samuel or any other relevant official. In the end, there was a rule about conflict of interest which the applicant knowingly breached, and which breach deserved censure. The Arbitrator's conclusions in regard to this charge cannot be faulted.

*Conclusions:*

- [100] Upon a holistic consideration of the evidence as it was before the Arbitrator, the latter in the light of the common and disputed essential facts, properly considered that evidence, and fairly and reasonably determined the matter. The summary of the extensive and in some instances technical evidence, which summary I did not understand to be disputed in these proceedings, contained all the core facts, and the Arbitrator properly and correctly identified all the factual and legal questions to be determined. Her detailed analysis of the facts and reasoning for all the conclusions she arrived at findings made are easily identifiable and reasonable, and there is no basis for any conclusion to be made that her conclusions were disconnected with or unsupported by the evidence, or involves speculation.
- [101] A perusal of the applicants' pleadings and the heads of argument indicates that that the fine line between an appeal and a review that the LAC in *Goldfields* warned against, was indeed crossed in this case. This is so in that from the equally voluminous heads of argument, it is apparent that the applicant sought to dissect each and every factor in the voluminous evidence, in a futile attempt at finding a ground to sustain interference with that award. This approach cannot be countenanced as it is not the role of this Court in review proceedings to approach this matter in the manner suggested by the applicant, in an attempt to find whether there was some form of unreasonableness in the path followed by the Arbitrator.
- [102] The starting point for the Arbitrator was to make a credibility finding against the applicant, and she was best placed to make that finding as the trier of facts. There is on a whole reading of the transcribed record, no basis for this Court to interfere with that finding. The record is replete with instances of evasiveness, long-winded irrelevant answers even to the most basic questions and even on

the common cause facts as observed by the Arbitrator. What was further apparent from the record is that the applicant was bent on adopting a deflection rather than a self-reflection approach. He persistently refused to take responsibility for his own project, its failures, short-comings and obstacles which he created through his conduct.

[103] Against the above observations, the Arbitrator's conclusions that the applicant failed to show any form of remorse are unassailable. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>31</sup>, it was held that it would be difficult for an employer to re-employ an employee who has shown no remorse, as acknowledgment of wrongdoing is the first step towards rehabilitation. It was further held that in the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. The LAC concluded that where an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.

[104] Against the clear lack of remorse, it is concluded that a sanction of dismissal was appropriate in the light of the most glaring forms of misconduct, i.e., engaging in parcelling, failure to declare interests, dereliction of duties, blatant non-compliance with internal prescripts or refusal to accept that the provisions of crucial national legislation under which TNPA operated was applicable to him, that the applicant was accused of. Equally unassailable were the Arbitrator's conclusions on the procedural fairness of the dismissal. Clearly all the grounds raised by the applicant were at best meritless, and at worse, mere red herrings as already pointed out in this judgment.

[105] In the end, the Court is satisfied that in line with the approach set out in *Goldfields*<sup>32</sup>, the Arbitrator in terms of her duty to deal with the matter with the minimum of legal formalities, applied a process that gave the parties a full opportunity to have their say in respect of the dispute; properly identified and

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<sup>31</sup>(2000) 21 ILJ 1051 (LAC) at para 25

<sup>32</sup> At para 20

understood the nature of dispute she was required to arbitrate; dealt with the substantial merits of the dispute; and that her decision is one that another decision-maker could reasonably have arrived at based on the evidence that was before her.

[106] In regards to costs, the Court must with regard to the provisions of section 162(1) of the LRA, consider the requirements of law and fairness in determining whether such an order is warranted. It is my view that this review application was ill-conceived in the light of the well-reasoned award issued by the Arbitrator, after hearing extensive evidence. TNPA was accordingly compelled to defend the award and had in the process, incurred costs. It was argued on behalf of the applicant that a cost order was not warranted in that he had a right to challenge the award.

[107] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*<sup>33</sup>, it was held in reference to *Dorkin*<sup>34</sup>, when considering a cost order under the provisions of section 162(1) of the LRA, the Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to Court frivolous cases that should not have been brought in the first place

[108] On the facts, clearly the review application lacked merits *albeit* it cannot be classified as frivolous in the light of the issues to be determined. Against that view, it is however upon a consideration of the requirements of law and fairness, that a costs order against the applicant is not warranted. Accordingly, each party must be burdened with its own costs.

[109] Accordingly, the following order is made;

Order:

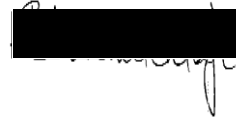
1. The late filing of the Applicant's supplementary affidavit is condoned.

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<sup>33</sup>(CCT136/17) [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC) at para 24

<sup>34</sup>*Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) at para 19

2. The Applicant's application to review and set aside the arbitration award issued by the Third Respondent under case number TCR012962 under the auspices of the Second Respondent is dismissed.
3. There is no order as to costs



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Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant:

Mr. Z Parker of Parker Attorneys

For the First Respondent:

Mr. G. Cassells of Maserumule  
Attorneys.

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<sup>i</sup> In reference to *Dyasi v Onderstepoort Biological Products Ltd & others* [2011] 7 BLLR 671 (LC) at para [13]; *Naidoo and SA Civil Aviation Authority* (2008) 29 ILJ 2044 (CCMA) at para 5.2.4

LABOUR COURT