



**THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG**

Not Reportable

Case no: JR 1572/2018

In the matter between:

**GIWUSA obo SIYABONGA
LUNGELOBUTHELEZI**

First Applicant

and

AEL MINING SERVICES LIMITED

First Respondent

**THE NATIONAL BARGAINING
COUNCIL FOR THE CHEMICAL
INDUSTRY ("NBCCI")**

Second Respondent

NOZIBUSISO FAITH GUMEDE N.O.

Third Respondent

Heard: 23 October 2024

Delivered: 20 June 2025

Summary: (Review – use of vulgar language in a SHEQ meeting directed at the convener – Arbitrator's findings on guilt and sanction not ones that no reasonable arbitrator could have arrived at – application dismissed)

JUDGMENT

LAGRANGE, J

- [1] This is a review application of an arbitration award in which the arbitrator found that the applicant's dismissal by the first respondent ('AEL') was substantively fair but procedurally unfair and awarded him three months compensation for the procedural unfairness.

Summary of salient evidence

- [2] The applicant, Mr S Buthelezi ('Buthelezi') had been charged and dismissed for displaying unacceptable behaviour when he used vulgar language towards a co-worker in a safety session facilitated on 20 October 2017 in the Nitrates Training Room. Buthelezi commenced working for AEL in 2005 and was an operator in the bagging department.
- [3] The incident arose during a so-called 'Brother's Keeper' meeting, a type of workplace safety awareness training, which was attended by employees and sub-contractors. The meeting was facilitated by a Safety, Health, Environment and Quality (SHEQ) practitioner, Ms Z Mmboneni ('Mmboneni') who gave the presentation. A power point presentation was displayed and Mmboneni explained it, after which questions were invited from attendees about the issues raised in the presentation.
- [4] However, some employees from the bagging department began raising questions concerning plant issues, which were not related to the presentation. Mmboneni responded by saying the meeting was not the right forum to address those issues and, for that reason, tried to curtail those type of questions. Moreover, there were other workers and sub-contractors from different departments who were not concerned with the

particular plant issues that were raised. When bagging shed employees started raising issues, some of the other attendees started to leave.

- [5] Buthelezi raised the need for a separate gathering room, which would be distinct from the mess room. He also said all the chairs and tables should be removed from the gathering room. At the time, one room fulfilled both purposes. She responded that there was no rule stating that a gathering room ('G room') could not also serve as a mess room and for emergencies but suggested that the topic be discussed during a plant meeting. According to Mmboneni, Buthelezi was started raising his voice and said she should not complain about building a G room because the company had enough money to do so. She reiterated it was not the forum to discuss that issue and proposed a separate meeting should be convened to deal with it. It was at that point, Buthelezi said what she was saying was "fuckin shit" while looking directly at her. She claimed a shop steward, Mr E Ramolobela ('Ramolobela') said Buthelezi was not supposed to say that, and asked her to forgive him, then told Buthelezi to apologise. She asked Buthelezi to continue speaking as it seemed he had grudges against her, but she believed that if Ramolobela had not intervened, Ramolobela would have continued to insult her. She recalled someone else who tried to close Buthelezi's mouth to stop him using vulgar language, but could not identify the person. According to her, there was a reaction from the meeting when Buthelezi uttered the objectionable words. She testified that other attendees then started to leave. She had felt embarrassed by being threatened and insulted in front of employees and contractors at the meeting.
- [6] When it was put to her that Buthelezi had not completed his sentence and was going to talk about the showers, Mmboneni said the discussion up to then had nothing to do with showers but concerned the issue of the mess room and G room.
- [7] The bagging shed manager, Mr P Masela ('Masela') who was an attendee at the meeting gave a very similar version of the events to that given by Mmboneni. He differed to some extent on the nature of Ramolobela's intervention, stating that he had asked Mmboneni to forgive Buthelezi and

asked her to forgive him. He also said other workers in the meeting objected to Buthelezi's language and stopped him talking.

- [8] Buthelezi agreed he raised the issue of the G room being used as a mess room and for emergencies. He denied being angry or raising his voice but agreed Mmboneni was not responding to the questions being raised. He wanted to say the showers were *"fuckin dirty"* but decided not to finish what he was going to say because he realised he might have been perceived as rude when he used the swear word *"fuck"*. He disputed that anyone had tried to close his mouth or that Ramolobela had apologised on his behalf.
- [9] Mr M Ngcana ("Ngcana"), a shop steward also attended the meeting on 20 October 2017. He claimed that the issues raised about the G room were safety matters because it was not up to standard. He admitted Buthelezi swore but he said the showers were fuckin then stopped talking. He also denied anyone closed Buthelezi's mouth and did not hear Ramolobela apologising on Buthelezi's behalf. He agreed Mmboneni had said Buthelezi must continue and say what he wanted to say.
- [10] Ramolobela's version was that Buthelezi had raised the issue of the showers and said *"the showers were fucken.."*. He also confirmed Mmboneni said he must carry on talking. According to him nobody was angry, and the meeting was not heated. He insisted that Buthelezi stopped talking after he said the word *"fucken"*, then Mmboneni said *"...no, just allow him to go on."*
- [11] Ramolobela denied apologising on Buthelezi's behalf. He also laid a grievance against Mmboneni after he heard that in a statement she made on 30 November 2017, she had made the allegation about his intervention. He was asked why he only lodged that grievance after Buthelezi's referred his unfair dismissal dispute to arbitration. It was suggested he only did this to make his testimony at the arbitration hearing easier. He simply said he realised he had been used at the time he lodged it. The grievance was unresolved at the time of the hearing and Ramolobela said he had cancelled a scheduled grievance meeting because he had to attend to something more important.

- [12] The arbitrator found that the plant issues must have been raised out of frustration because the forum was not intended to deal with those issues.
- [13] The arbitrator concluded that the applicant had used vulgar language whether he had uttered the words “*fuckin*” or “*fuckin shit*”, and that Buthelezi acknowledged such language was unacceptable in the workplace. She found it was improbable that the applicant intended to refer to the “*fuckin showers*”, because there was no reason from him not to have uttered the inoffensive word “*showers*” after he had already said “*fuckin*”.
- [14] On the question whether he had directed his language at Mmboneni, the arbitrator found that AEL’s witnesses corroborated each other that he said the words while he was directly looking at her. Moreover, if Buthelezi had not intended to make Mmboneni the target of his attack, he ought to have assured her that the words exchanged were not directed towards her and that no harm was intended.
- [15] The arbitrator accepted the evidence of the respondents’ witnesses that a shop steward, who was present at the meeting had tried to intervene and had apologised on Buthelezi’s behalf, asking that he be forgiven, even though the shop steward denied having tendered such an apology on the applicant’s behalf.
- [16] On the question of procedural fairness, the arbitrator found that Buthelezi should have been permitted to have the shop steward of his choice represent him at the disciplinary enquiry, which the employer had disallowed. For this reason, the arbitrator concluded that the dismissal was procedurally unfair.

Ground of review

- [17] Buthelezi raises the following grounds of review:

17.1 The arbitrator failed to explain why she preferred the AEL’s witnesses’ versions when the applicants’ witnesses versions also corroborated each other.

17.2 The fact that the offensive words were uttered while the applicant was looking at Mmboneni, did not mean that the words were directed at her because the applicant was simply raising the issue of the showers with her.

17.3 There was no basis for the commissioner to find that the plant issues were raised out of frustration.

17.4 There was no basis for the arbitrator's finding that the shop steward probably asked Buthelezi to be forgiven because he knew that if Buthelezi apologised it would mitigate the seriousness of his misconduct.

17.5 The arbitrator ought to have appreciated that there was no evidence of statements from other attendees at the meeting only because the company did not conduct a proper investigation into what transpired.

17.6 The arbitrator failed to appreciate that no evidence of the code of conduct was presented to prove that the use of vulgar language in the workplace amounted to misconduct or what recommended sanction was provided for it.

17.7 The arbitrator failed to determine the precise nature of the vulgar language used, whereas she was required to determine the most probable version.

17.8 The arbitrator could not have found that progressive disciplinary action would not have been appropriate because no remorse was shown by the applicant given that the applicant testified that he stopped talking when he uttered the word 'fuck' because he realised he may have appeared to be rude whereas it was just a slip of the tongue and he admitted that such behaviour was not acceptable in the workplace. Accordingly, he acknowledged his wrongdoing and was remorseful.

17.9 The arbitrator failed to consider mitigating factors and no evidence was led on the effect of the misconduct on the trust relationship.

[18] Paragraphs 17.1, 17.2, 17.3 and 17.5 essentially concern the arbitrator's assessment of the evidence in concluding that he was guilty of the charge.

Paragraph 17.7 relates to the same issue. The other grounds concern whether the arbitrator's decision that the sanction of dismissal was fair is sustainable. What the relevance the arbitrator's finding that the plant issues were raised out of frustration is, is not apparent.

Evaluation

Arbitrator's evaluation of the evidence of misconduct

- [19] The main issue in relation to the alleged misconduct is whether there was sufficient evidence for a reasonable arbitrator to have concluded that it was more probable the applicant had said Mmboneni was *"talking shit"*, than uttering an unfinished allegation about the *"fuckin ..."* showers.
- [20] To succeed, Buthelezi must demonstrate that the arbitrator could not have plausibly arrived at the findings given the evidence before him. If the arbitrator's interpretation and weighing of the evidence was not untenable then the award must stand.
- [21] Buthelezi complains that the arbitrator did not explain why the evidence of Masela and M was preferred. It is correct the arbitrator did not expressly state why she rejected the evidence of Buthelezi's witnesses, and this is a flaw in award. She ought to have at least provided brief reasons why she did so. Nonetheless, the question is whether her assessment of the evidence was plausible or, to put it differently, whether no reasonable assessment of the evidence could ever result in a conclusion that the firm's version is more plausible.
- [22] The applicant admits using the word *'fucken'* and that he was talking to Mmboneni when he said it but claims he did not complete what he was going to say, namely that the showers were *'fucken dirty'*. He claimed he did not complete what he was going to say *'because someone else may take it that I am swearing'*. On the employer's version, Buthelezi paused in his address because he was interrupted by others, including Ramabolela, owing to the language he was using.
- [23] It was common cause that Mmboneni had said Buthelezi should finish what he was going to say, but he never did. Ramolobela himself stated

that she said Buthelezi should be allowed to finish. Accordingly, it is a legitimate inference to draw that Buthelezi did not stop speaking as an act of self-correction but stopped owing to the objections raised by others in the meeting to what he said. Equally, it is not untenable to conclude that Ramolobela probably did try and rectify matters by tendering an apology on Buthelezi's behalf, given that it is plausible Buthelezi was interrupted by the reaction of the meeting.

- [24] Further, Buthelezi's own version for not completing what he wanted to say is difficult to understand because it is not inherently plausible. If he had already uttered the offensive word, but had not completed the point he wanted to make, why stop speaking completely? I do not think it was an impermissible inference for the arbitrator to conclude that the employer's witnesses' account of the sequence of events which led to Mmboneni saying he should finish what he was going to say was more likely because it is more natural that Buthelezi would have continued with what he was saying unless he had been stopped by the actions of others. Moreover, even Ramolobela's evidence supported the version that Mmboneni had reacted to other attendees trying to prevent Buthelezi from speaking further, which also tends to support an inference that Buthelezi did not stop speaking because he was checking himself after a 'slip of the tongue'.
- [25] There was also no evidence tendered of any discussion having taken place about the condition of the showers preceding Buthelezi's objectionable language, and it was never suggested to the employer's witnesses that a discussion of the showers was already underway. Similarly, there was no material challenge to Mmboneni's account of how she and Buthelezi were engaged in a back-and-forth interaction about whether there was a need for a separate G room, at the time he swore.
- [26] It is common cause that Buthelezi was engaged in debate with Mmboneni about why the company did not build another gathering room and that the SHEQ meeting was not the forum for discussing that issue. There was no account offered by Buthelezi how he made the transition from this interaction with Mmboneni about why the company did not find the money

to build a separate gathering room, in which he made it clear he did not accept that the company could not do that, to vehemently protesting about the state of the showers. In passing, Mr M Ngcana ('Ngcana'), contrary to Buthelezi's version, claimed that Buthelezi had said something to the effect that *"the showers are fuckin..."*, a version which is materially at odds with Buthelezi's own narrative and the version put to EAL's witnesses.

- [27] EAL's narrative arising from the evidence was of a safety training meeting being disrupted by employees from the bagging department raising issues relating to their department. Following that a relatively heated exchange between Buthelezi and Mmboneni took place over the need to build a separate gathering room. During that exchange, Mmboneni's attempt to argue that the room could serve a dual purpose was dismissively rejected by Buthelezi, who stated that the company could afford to build another room, and disparaged Mmboneni using vulgar language when persisted in saying it was a matter that should be discussed in another meeting. His use of vulgar language was not only objectionable to Mmboneni but also to other attendees who interrupted him. This led to calls being made for him not to use such language and a request that he should apologise. It is a version which is more consistent with him accusing Mmboneni of 'talking shit' in response to what she said, than with a version that he suddenly diverted from the exchange they were having into a complaint about the showers. It also provides a more credible explanation why he abruptly stopped speaking, given that it was not a matter of dispute that Mmboneni had appealed for him to be allowed to finish speaking.
- [28] Consequently, I am satisfied that had the arbitrator failed to assess the credibility of the versions, Buthelezi has not made out a case that, she would have been compelled to favour his version if she did. It is quite feasible for a reasonable arbitrator to conclude he was guilty as charged and that he had told Mmboneni in front of the attendees present, that she was *"talking shit"*.

Fairness of the sanction

[29] It was not disputed that on either version, Buthelezi's use of vulgar language was unacceptable. He contends he should have been subjected to progressive discipline and the employer failed to prove whether it was misconduct that normally attracts the sanction of dismissal. He also argues that the arbitrator failed to appreciate that he acknowledged that the language used was not appropriate and this showed he was contrite and remorseful.

[30] What needs to be demonstrated is that no reasonable arbitrator could have accepted that dismissal was a fair sanction.

[31] Without stating that she found Buthelezi had told Mmboneni she was talking 'fucken shit', the arbitrator did find that he directed his foul language at her. This took place in front of a number of other employees from other departments and sub-contractors. Buthelezi never actually apologised even for his own version of what he said. Acknowledging that the use of such language in the workplace is unacceptable is not the same as apologising to Mmboneni for what he said. I am not satisfied a reasonable arbitrator could find an expression of real remorse in Buthelezi's conduct after the event.

[32] In *Woolworths (Pty) Ltd v Mabija & others*¹ the Labour Appeal Court held:

"The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such breakdown. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed

¹ (2016) 37 ILJ 1380 (LAC)

with others in order to determine whether the sanction of dismissal was fair.”²

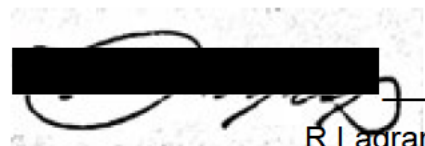
[33] This was not an instance of a worker using foul language while bantering with colleagues. It was uttered in a context where Buthelezi was arguing with the person running a meeting attended by other employees and it was directed at her and was plainly disrespectful towards her. The immediate reaction of other attendees was indicative of how unacceptable it was. In the circumstances, it would not be an unjustifiable conclusion to draw that it was a particularly serious instance of the use of vulgar language aggravated by the context in which it was uttered. As such, it cannot be said that no reasonable arbitrator could agree with the arbitrator’s conclusion that dismissal was a fair sanction.

Conclusion

[34] It follows from the discussion above that Buthelezi has failed to show that the findings of the arbitrator are ones no reasonable arbitrator could have reached on the evidence.

Order

1. The review application is dismissed.
2. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

² At paragraph 21, reaffirmed in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2017) 38 ILJ 860 (LAC) at paragraph 34

LABOUR COURT

Representatives:

For the Applicant:

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For the Third Respondent:

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