IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C848/17(2)

In the matter between:

NEIL FRASENBURG Applicant

and

TRANSNET FREIGHT RAIL 1st Respondent

URSULA BULBRING (ARBITRATOR) 2nd Respondent

TRANSNET BARGAINING COUNCIL 3rd Respondent

Date heard: 18 November 2020

Delivered: 15 February 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This opposed review application has a long history which includes a Rule 30 application made by the first respondent (the company) when the applicant (Frasenburg) filed his supplementary affidavit, without first filing a copy of the record. I dealt with that application in a judgment dated 2 August 2018. The parties were ordered to reconstruct the record of the arbitration but the applicant tried to no avail to get a response from the first respondent. Many directives from

this Court followed and eventually the first respondent's legal representatives made an appearance, and informed the Court that the first respondent had discovered it had the recording of the hearing. Eventually this was transcribed, papers delivered and the review application was heard on the 20 November 20111 by means of video conference.

[2] Frasenburg has consistently worked to obtain a hearing and rightfully complained about the tardiness of his former employer in dealing properly with the matter. He continued to do so in his submissions before me. In the interests of justice and the speedy resolution of disputes, I intend to deal with the merits of the review itself in this Judgment and I grant condonation to both parties for any delay in prosecuting the review.

[3] In a Jurisdictional Ruling under case number: BC.SATAWU/TFR (INFRA) WCP/ 13087, dated the 8 February 2016, the second respondent (the Commissioner) set out the background to the dispute as follows:

"3. Frasenburg is employed by the company and has been so employed for approximately 34 years. During the past five years Fransenburg served as a South African Transport and Allied Workers Union ("the union") shop steward (full time). The company is a state owned corporation; it supplies freight rail services and employs approximately 20000 employees

4. On 4 November 2015 the company received notification from the union that it had taken a decision to "recall" Frasenburg as a full time trade union representative. He was replaced by Lucky Siwani. Other shop stewards were removed at the same time. Thereafter the company received several complaints from the union's members to the effect that the removals were unconstitutional and in breach of the constitution. Regarding it as important to respond to employee enquiries the company addressed a letter to the union seeking clarity. The union clarified the issues in a letter from the Deputy General Secretary, Nicholus Maziya dated 17 November 2015. It set out that the union's Central Executive Committee had adopted a policy authorizing the General Secretary, Deputy General Secretary and Provincial Secretary to remove and replace full time union representatives. The letter sets out:

"We further want to state that the position of full time shop steward given the SATAWU (the union), and it is therefore the duty of this organization to appoint an individual who will represent the union in executing its functions. Under no circumstances can this position now be reduced to be that which can only be occupied by one person. In the event that a FTSS is not operating in a manner which is positive for the union, SATAWU (guided by policies) has every right to have the individual removed. Additionally, for as long as members and shop stewards will continue to attack SATAWU in the media, writing letters to management undermining the union, its structures and the leadership, action will continue to be taken against the perpetrators. The role of Transnet should not be that of questioning SATAWU's decisions (as has been the case), but to support and implement the resolutions taken instead of supporting individual groupings within our union."

5. On 30 November 2015 the company notified Frasenburg that it had received notification that he had been released of his duties as a full time shop steward and that as per the conditions of the recognition agreement he would be placed in his former position of Senior Administrative Official (Grade Level 12X), effective 1 December 2015. Fransenberg took it up with the company alleging that the company's actions are in breach of the collective recognition agreement between the company and the unions SATAWU, UASA, United Transport and Allied Workers' Union (7 November 2007). On 11 January 2016 Frasenburg lodged a dispute at the council alleging that the company is in breach of the collective agreement. The nature of the dispute reads: "Non-compliance of Recognition Agreement about Term and Assignment of Full Time Shop Stewards". The relief sought is reinstatement to his full time shop steward position."

[4] At the conciliation of the matter, the company raised a point *in limine* and argued that the recognition agreement (the Agreement) gives the union the authority to appoint or remove shop stewards. Frasenburg's "beef" was with the union, it submitted. The company argued that the Agreement provides in Clause 15 that the union is entitled to replace a FTSS, subject to its constitution, and to elect or nominate a substitute (15.1). It also provides that when a FFST is withdrawn by

the union that elected or nominated him the assignment of the FTSS end automatically. (Clause 15.3 read with Clause 15.3.6). The dispute was between the trade union and Frasenburg and the company submitted that the company is "the wrong respondent".

[5] Frasenburg argued that the union was in breach of its constitution in removing him and that the company was obliged to ensure that the union complied with its constitution. The company should be seen to be acting in accordance with the recognition agreement. He also submitted that Clauses 11.6 and 11.8 were applicable to him and that the company should have discussed various options with him. Clauses 11.6 of the Agreement and 11.8 are provisions dealing with shop stewards who were displaced by the coming into existence of the Agreement in June of 2007, and given a four month grace period before returning to their former jobs during which they would receive guidance and counselling inter alia. Frasenburg was removed as a FFSH in 2015.

[6] In her analysis of the evidence and argument before her, the Commissioner found as follows:

"10. To my mind Frasenburg's quarrel is with the union. His matter emanates from internal union issues. If the union is in breach of its constitution (which it has denied in correspondence to the company) then an order against the company would be baseless. The company does not have the power to dictate to the union on its constitution in terms of the recognition agreement. It is the union who removed Frasenburg. This was communicated to the company in terms of the recognition agreement. Frasenburgs dispute lies with the union. The company is not correctly cited as the respondent in this matter.

11. Also I agree with the company that 11.6. to 11.8 does not apply to Frasenburg That portion of the recognition agreement is headed "FFTSs displaced by this agreement. It referred to full time shop stewards being entitled to certain benefits within four months of the signing of the agreement in 2007 (a four month grace period). It relates to shop stewards displaced in terms of the recognition agreement, not to Frasenburg.

12. In conclusion the issues raised by Frasenburg concern internal union issues and the alleged non-compliance with the union's constitution These issues must be taken up with the union's structures It is not for the company to be disputing and enforcing the union's constitution. It is also not the job of council. The dispute has been incorrectly brought against the company. The Labour Court case does not take the matter further. It simply confirms that a union should act in accordance with its constitution. It does not place any responsibility on the company to enforce that constitution. The council does not have jurisdiction to conciliate the dispute. Accordingly no certificate is issued."

[7] The phrase that: "The company does not have the power to dictate to the union on its constitution in terms of the recognition agreement" deserves scrutiny. The Agreement specifically qualifies the right of a sufficiently representative union to withdraw or replace a shop steward to be subject to its constitution (Clause 9.1.). The election of shop stewards is obliged to take place in accordance with the unions respective constitutions in terms of Clause 6.3 of the Agreement. In addition, the election or nomination of FTSS for second or successive terms of assignment by the unions is subject to their constitutions. In terms of Clause 1.6 of the Agreement, the "unions acknowledge that they have provided Transnet with their constitutions, and undertake to notify Transnet of any amendments within one (1) month."

[8] It seems to me that if regard is had to the inclusion of the above clauses, the company, as party to the Agreement, would have the right to raise a breach of the obligations contained in them, should one of the union parties to the agreement disregard the obligation to act subject to its constitution in relation to the appointment of FFSSs. Enforcement of such a clause in the agreement does not amount to enforcement of a union's constitution, as the Commissioner's Ruling suggests. This is most probably why the company did raise the issue of the removal of certain FTSSs with SATAWU. It then decided to accept the union's position as to their removals, and at the hearing claimed it was powerless to deal with such issues.

[9] A further problem with the Ruling in the Court's view is the characterization of the point *in limine* raised by the company which was accepted by the Commissioner. The transcript of the hearing contains the following interaction:

> "**COMMISSIONER:** Why are you saying we have got no jurisdiction?
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> **RESPONDENT REPRESENTATIVE:** Because the Recognition Agreement give SATAWU the authority, as you will see in Section 15, to appoint or remove. So our argument is his beef, his complaint lies with his union. The union said to us very clearly look we have complied with our constitution, you must do as we tell you in terms of the Recognition Agreement and I submit that is the correct thing to do. We do not have any jurisdiction to appoint anybody, be it as a normal shop steward, be it as a full time shop steward. That is why I said to you when we were off the record, Commissioner, we are of the view that we should not be here, Transnet should not be here. And…(intervenes)
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> **COMMISSIONER:** Okay. "

[10] In the Court's view, the Company was in essence raising the legal point of misjoinder or non-joinder, when it claimed that the Frasenburg's quarrel was with SATAWU. This was the point *in limine* that should have been interrogated by the Commissioner. The third respondent (the Council) did have jurisdiction to consider the interpretation and application of the Agreement in question between a member of SATAWU and the employer, both bound by the terms of the collective agreement[1]. What was raised before the Commissioner was the issue of which parties needed to be before her. The result of accepting that a jurisdictional point had been raised was the non-suiting of Frasenburg, rather than a determination of whether SATAWU should be joined to the dispute.

[11] The issue for the Court to decide is whether the Commissioner objectively had jurisdiction in law and fact[2]. I find that she did, for the reasons set out above.

[12] In these circumstances, I am of the view that the Ruling stands to be set aside. The dispute stands to be sent back to the Council for conciliation. Frasenburg has now retired and seeks financial compensation on the basis that his earnings

[1] Section 23(1) of the LRA
[2] Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others (2018) 39 ILJ 903 (LC) at para 63.

were affected by his removal as a FFSS. Given the long period that this matter has stood unresolved, it is to be hoped that the parties make every effort to find a path to settle their dispute in the process of conciliation.

[13] In the above circumstances, I make the following order:

Order

1. The Ruling under Case Number BC.SATAWU/TFR (INFRA) WCP/ 13087 is reviewed and set aside.
2. The dispute is remitted back to the third respondent for a conciliation hearing before a Commissioner other than second respondent.
3. There is no order as to costs.

H. Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court

Representation

For the Applicant: In Person

For the First Respondent: K Naidoo instructed by Kapditwala Inc t/a Dentons