Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 370/2015

In the matter between:

STEPHEN FIRE MNGOMEZULU **First Applicant**

and

VODACOM SA (PTY) LTD **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER D.I.K WILSON (*N.O.*) **Third Respondent**

Date of Set Down: 20 October 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 28 November 2022.

Summary: (Review – Grounds of review – Proceedings conducted without interpretation – in the circumstances of the case arbitrator justified in concluding that employee and representative acquiesced thereto - no evidence provided of what material testimony was not captured on the few occasions when the employee spoke in Zulu –issue in dispute concerning interpretation of email – employee's own version that it reflected exactly what he had formulated originally in Zulu – no suggestion the English version did not reflect what he intended – Despite employee's claim to be poor in English his use of English to express biting sarcasm belies his claim he is not proficient in the language – Arbitrator's findings on other charges plausible based on the evidence – dismissal appropriate given serious prior warning for similar misconduct – review application dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award issued on 29 March 2015, in which the third respondent ('the arbitrator') found that the applicant's dismissal for misconduct was substantively and procedurally fair.

[2] The review application was launched on 20 May 2015. The matter was first enrolled on 10 June 2020. It appears that a major reason for the long delay was that the applicant ('Mngomezulu') attempted to reopen another review application pertaining to an unfair labour practice ruling concerning a previous warning issued to him which had a bearing on his ultimate dismissal. His efforts to revive that application took him all the way to the Constitutional Court but he was unsuccessful. It appears that in 2018 the Constitutional Court refused him leave to appeal against decisions of the Labour Courts. However, by the time this review application should have been heard, the first respondent ('Vodacom') had launched an application to dismiss the review application for want of compliance with the Labour Court Practice Manual and the applicant ('Mngomezulu') had filed an

application to reinstate the review application the day before the dismissal application was due to be heard.

[3] At the hearing of the matter, Vodacom advised that it was no longer going to pursue the dismissal application, in view of the application to reinstate the review application, and was willing to deal with the substance of the review application on the merits. Accordingly, neither of the interlocutory applications proceeded. The presiding judge obviously had not anticipated that the merits of the review application would be dealt with and the hearing, which took place virtually, was adjourned so the judge could consider the record and the merits. On 22 September 2020, judgment was handed down but, in error, the court upheld Rule 11 application to dismiss the review application. An application for leave to appeal was then brought. The court, on realising the error, rescinded the judgement of 22 September 2020 and directed that the review application be enrolled for hearing before another judge. It was re-enrolled on 20 October 2021.

[4] The review application was also conducted virtually, in view of the prevailing Covid-19 pandemic.

The award

Summary narrative

[5] Mngomezulu was employed by Vodacom since January 1998 and was a Senior Technical Officer at the time of his dismissal on 2 January 2014.

[6] During the year prior to Mngomezulu's dismissal there had been informal discussions between him, Ms T Radebe ('Radebe') and Vodacom's senior management. Radebe was his supervising manager. On 21 and 23 May 2013, Mngomezulu was subjected to a disciplinary enquiry in which allegations of gross insubordination and insolent attitude were brought against him. Mngomezulu was found guilty of the allegations and accepted a final written warning valid for twelve months and an unpaid suspension of five days, as an alternative sanction to dismissal. He accepted the warning under protest and pursued an unfair labour practice claim with the CCMA in

respect of the warning. It was the progress of this dispute, which delayed his pursuit of this review application.

[7] In December 2013, Mngomezulu was summonsed to another disciplinary enquiry in which he was charged with insubordination and insolence. The allegations read:

> "Misconduct consisting of insubordination and/or insolence and/or failure to follow a reasonable instruction in that:
>
> On or about 4 December 2013, you responded to an e-mail of your line manager, Thokozile Radebe, in a rude and/or disrespectful manner, showing disregard for your manager's authority; and/or ("Allegation 1")
>
> On or about 5 December 2013, you sent an e-mail to your line manager, Thokozile Radebe, as well as various of your colleagues which mail was disrespectful and/or sarcastic and/or resulted in your line manager's authority being undermined. ("Allegation 2")
>
> On or about 13 December 2013, you were rude and/or disrespectful and/or aggressive towards your line manager, Thokozile Radebe, during a telephone call where you failed and/or refused to adhere to her instruction to return to the office after attending the BEE Scheme road shows. ("Allegation 3")
>
> Insubordination and/or unauthorised absence in that on 14 and 15 Dec 2013, you were absent from work without permission from your line manager and/or despite a direct instruction from your manager to report for duty on 15 Dec 2013 ("Allegation 4")".

[8] In the internal enquiry he was found guilty on the first three complaints, but not the fourth, and was dismissed. The chairperson took account of the final written warning Mngomezulu had unwillingly accepted in deciding that he should be dismissed.

[9] The unfair dismissal dispute which ensued was heard in arbitration proceedings over three days during which Mngomezulu was represented by an attorney. The arbitrator found his dismissal was procedurally and substantively fair.

The award

[10] The arbitrator's findings on the various charges are dealt with in abbreviated form below in the sequence in which the alleged misconduct occurred and with reference to most salient parts of the evidence.

First Allegation: Alleged disrespectful email of 4 December 2013

[11] On 14 November 2013, Radebe received a call that Mngomezulu and Mr Zaid Abrahams ('Abrahams') were absent from their workstations for one and a half hours. They work in Vodacom's Fault Management Department, that monitors the Vodacom network for twenty-four hours a day.[12]

[12] Mngomezulu and Abrahams could only be absent from their workstations if they had obtained consent from Radebe or a Tier 3 specialist. This is so, as each of them oversee a different section of Vodacom's network and are required to respond to network failures within fifteen minutes.[13] Without obtaining the necessary permission, they were both attending a meeting with Mr Craig Clarke ("Clarke") for one and a half hours. Clarke was the Executive Head of Department for Fault Management and Radebe's manager.

[13] Radebe learnt from one of the other employees in the department where Mngomezulu and Abrahams were. Nonetheless, on 15 November she sent them each an email enquiring about their whereabouts the previous day. Abrahams responded that he had been meeting with Clark from 12:00 to 13:30 and forgot to inform her or a T3 specialist. In a replying email, she reminded himy that he had to clear such absences beforehand so that there was adequate monitoring of the network. Mngomezulu, by contrast, did not respond to her email, until she sent him a reminder on 4 December to the effect that she did not recall getting his response and asked him to provide feedback. He responded peevishly as follows:

> ""Hi Thokozile. I don't know what you want, because Zaid informed you that we had a meeting with our BOSS Craig Clarke in his office. This is my first timer (sic) I am being ask (sic) such a question. I mean How on earth will I leave my work station without having someone to watch the network for me. Hope this will put this question to bed".

(emphasis added)

[14] Radebe responded the same day to this email stating that Abrahams had been answering on his own behalf and she still wanted Mngomezulu's own feedback on the issue. His further response, was some 11 days later at 15:15 on Friday 13 December, and read:

> "Hi Thokozile. On the said date, I was representing my colleague Zaid and Nico right in our office with Craig. I left my station with Don and Russell for them to check for me while I am in Craig's office. I did call Fergusen[1] and Denver answered the call, he informed me that Fergusen is not on duty and that Craig Delport was busy. Craig is still new in this position. Hence I then informed Don and Russell. If there was anything major I could be called as they knew that I was in Craig's office. Sorry for this late however I was of the opinion that Zaid's explanation would have shed some light".

[15] Significantly, he only sent this belated but courteous and civil response after Radebe had been told him on the same day that he must come to the office and collect a notice of a disciplinary enquiry. However, Mngomezulu would not concede there was a difference in the tone of the two letters and said it was not his intention to be disrespectful. He also claimed that his last email should in fact already have been received by Radebe before 13 December, but that he only realised that it had not transmitted when he logged into his emails at the BEE roadshow on 13 December. He blamed the allegedly poor transmission signal where he lives in Strandfontein for the late sending of the email. Later still, he claimed that on 13 December he ahd reflected on his earlier email of 4 December and Radebe's response, which led him to decide that perhaps she had misread his earlier response and that he should clarify things. No part of this explanation was put to Radebe when she testified, and. his evidence about when he sent the email was not consistent.

[16] Radebe testified that if she had received this response to her initial email she would simply have sent him a message in reply similar to the one she sent Abrahams. However, she found the tone of his initial response on 4

[1] Mr F Louw

December, to a perfectly legitimate enquiry why he had not followed proper procedures, was disrespectful and offensive. She admitted that she was unaware that Abrahams had told Mngomezulu that he had replied to her and he need not respond himself. She acknowledged that on 15 November he had sent an email advising her that he was with the HR office for 30 minutes and asked someone to keep an eye on his region in his absence. It was put to Radebe that the fact he mentioned nothing about what happened on 14 November in this email showed that he thought Abrahams had dealt with the issue. Radebe commented that it did not explain why he had to be so rude at the time he did respond on 4 December. Further, in addressing the claim that Mngomezulu was in a state of shock when he sent his email on 4 December, she observed that he did not say that he thought Abrahams had dealt with the issue nor did he apologise.

[17] The arbitrator concluded that the 4 December email and the email of 5 December relating to the second allegation (discussed below) were in fact disrespectful towards Radebe and challenged her authority. In relation to the email of 4 December he had failed to respond to a reasonable request to explain his absence from his workstation without asking for permission and when she followed up he responded in "the most intemperate way" without properly addressing the question he was asked. The disciplinary action did not relate to his absence from work as such but concerned his response when asked to explain it. His colleague, who had responded reasonably, was cautioned but not disciplined.

[18] One might add that Abrahams had also responded timeously to Radebe. In passing, it must be noted there was no evidence that Mngomezulu claimed he was having difficulty expressing himself in English when he sent this email, or that it came out the way he did because he was translating directly into English from Zulu.

Second allegation: Allegedly rude or disrespectful response on 4 December in an email to Radebe

[19] On 3 December 2013, Mngomezulu requested a Tier 2 (T2) specialist, Mr C Olifant, to resolve an issue that pertained to Vodacom's Netcool system.

This e-mail was copied to Radebe, Mngomezulu's own team, and two of the T2 specialists. Radebe replied on the same email thread stating: "Netcool not generating refs needs to be logged with Netcool support and not T2." Mngomezulu responded in turn, thus: "Hi Thokozile. It was Craig's suggestion that Adnaan and Caiphus should investigate this problem. However I am of the opinion that our specialist should run with such issue while we are monitoring live network." Radebe referred this email to Clarke and he responded "I asked Ferguson to ensure it was investigated further (meant via incident process …). Having received this clarification from Clarke, Radebe resumed the email thread and advised Mngomezulu:

> "Stephen you must have misunderstood him, not every issue goes to T2. If you have a complex issue that requires investigation by the specialists then you must send to T2. You should be able to differentiate, and solve some of your issues yourself. Normal Tools related issues you log it yourself and report them to the relevant support people, and inform T3 so they can add it on their report and escalate further when needed."

[20] Departing from the brief and business like communications up to that point, Mngomezulu sent another email, using the same thread, which contained the following introductory passage:

> "Hi Thokozile. Thank you for highlighting my disability of not understanding, I will come and sit with you so I can put this on my PD, I will then apply for the bursary to go and study a course next year in the heuristic model of sentence construction the one similar to the one I was thought (sic) by my standard 5 English teacher, So that I can be able to understand how to summarize speech and comprehension next time, however I am of the adamant that Craig didn't speak American English to me...".

(emphasis added)

Mngomezulu then resumed a business-like tone in the remainder of his response, viz:

> "Coming back to the matter at hand, Adnaan and Caiphus have done a wonderful job since they took over the job that they are doing. You can measure that by the improvement so far. We do not wait for long any more.

> Hence I decided they could help as well, and that we do not have a standard or a policy on what to escalate to them. …"

[21] Mngomezulu denied that there was anything sarcastic, disrespectful or aggressive in his response and argued that no witnesses were brought to confirm Radebe's claim that he undermined her authority. When asked about his use of the term 'heuristic' he said he recalled this model of learning when he googled English lessons. He mentioned his standard five teacher because Radebe would sometimes tell him he did not understand English, which was an allegation not put to Radebe under cross-examination.

[22] In support of his version of what Clarke said to him, Mngomezulu called Mr F. Louw ('Louw') to testify if Clarke had given him an instruction to investigate it further via the incident procedure. Louw testified that they did not have an incident procedure, only an escalation procedure. He would simply have logged the Netcool issue in his shift report. He believed that Mngomezulu was rightfully upset about being taken to task over conflicting statements by Radebe, but in his view that the appropriateness of Mngomezulu's response depended on his relationship with his manager. After he concluded his testimony, Radebe was called to deal with this new evidence of the shift reports, which the company obtained after Louw testitified. Radebe testified there was no evidence of the Netcool problem appearing in the shift reports for 2,3 or 4 December and she disputed that the problem was a recurring one. At the instance of Mngomezulu's attorney, Louw was contacted telephonically. He testified on speakerphone about the shift reports. He could not understand why the Netcool issue did not appear on the reports obtained by the company. However, he undertook to go through the reports and forward them. However, the arbitrator said he never received any from him. This episode gave rise to one of Mngomezulu's grounds of review.

[23] The arbitrator found this email was even more disrespectful than the one of 4 December, and stated:

> "87…. Applicant appears to have taken umbrage at Ms Radebe stating that he must have misunderstood Mr Clarke. He tried to convince me that his response was not sarcastic and was a genuine undertaking to improve his

> understanding of English, but the tone of the response belies this. Applicant also claimed that the nature of the email was affected because he translated from Zulu to English, but it appeared both from the wording of his e-mails and his use of English in the arbitration hearing that his command of the language is reasonably good. I am satisfied that Mngomezulu intended his response to Ms Radebe to be sarcastic and in doing so he challenged the authority of his manager. The fact that the email was copied to numerous other people is an aggravating factor. Applicant claimed that he merely followed the "email trial" started by Ms Radebe; however he had the option of replying to her alone. Instead he chose to reply to all the others copied on earlier emails."

[24] The arbitrator went on to consider Mngomezulu's claim that his response was dictated by an onerous workload and that Radebe was persecuting him, but noted that he had not been charged for not performing his duties or being absent from his own workstation. Radebe's own communications to him were the normal correspondence one would expect between a superior and subordinate at work, and were not rude or disrespectful, nor did they warrant the response they received.

Third allegation: Alleged rudeness and failing to follow an instruction to return to work

[25] The circumstances giving rise to this allegation are largely common cause. On Friday 13 December, with Radebe's permission Mngomezulu was to attend a so-called 'BEE roadshow', which was being held at a venue in Century City, about a ten minute drive from the Vodacom office in Bellville, where he worked. Originally, the roadshow sessions were intended to continue until 16:00, but around 09:30 that morning an internal communication was sent out cancelling a couple of the sessions. The result was that the roadshow was due to end at 12:15, more than three hours earlier than scheduled. Mr S Adams ('Adams') a senior representative on the company's Consultative Committee ('CC') had asked Radebe to release Mngomezulu for the purposes of the roadshow, which she did. She did not agree to release him to perform other CC functions. Mngomezulu was also a member of the CC.

[26] When Radebe heard that the program had been curtailed she tried phoning Mngomezulu, but he did not answer as he was still in the meeting, so she sent him a text message asking him to call her back. He responded with another text message to the effect that he was still in a meeting but phoned her at approximately 12:00. She asked him to meet with her that day and they agreed to meet at 15:00. However, later he was told by Radebe that he needed to come to the office so that she could issue him with a notice to attend a disciplinary hearing in the presence of a member of the HR team. It was Adams' evidence that by 13:00 he knew that Radebe had instructed Mngomezulu to return to the office.

[27] Sometime around 14:00, Mngomezulu phoned Radebe and told her that he would not be coming in because he was still busy with CC work. She insisted that it was still a working day and she required him to come to the office. She phoned him back in the presence of an HR representative and reiterated her instruction, but he insisted that he was not coming back. The conversation took place while he was driving together with Adams. Adams wanted to intervene in the conversation and Mngomezulu put his phone in speakerphone mode so Adams could also participate.

[28] Radebe clearly regarded her discussion with Mngomezulu as of no concern to Adams, but Adams and Mngomezulu were claiming that Mngomezulu still had CC work to do even though the roadshow had been drastically curtailed. Adams felt that he had a claim on Mngomezulu's time because Radebe had released Mngomezulu that Friday at Adams' request. As far as Radebe was concerned, she had only released Mngomezulu to attend the BEE roadshow, which had already finished. In any event, the upshot was that Mngomezulu said he was not coming in as he still had CC work to do. Radebe claimed she waited at the office until 17:00 for him to arrive.

[29] Mngomezulu's primary defence to the complaint was that Radebe had effectively seconded him to work under Adams that day and accordingly Adams was in charge of him during that time, not Radebe. Mngomezulu was referred to a clause in the CC constitution, which provides that time off to perform CC functions is allocated by the CC representative's line manager, to whom the CC was responsible for making the necessary arrangements.

[30] In Mngomezulu's case his line manager was Radebe. When it was put to him that this meant that Radebe had the final say in determining when he was permitted to perform CC work, he answered that he had been released for the day to do CC work. In fact, Adams' request to Radebe to release Mngomezulu that Friday was specifically for the purpose of participating in the roadshow. Mngomezulu's attitude was that Radebe had released him for the day. He was reluctant to concede that Radebe had the final say on the time he could spend on CC activities that day, which he contended continued beyond the time of the roadshow. As for as he was concerned, Adams was his 'boss' when he was performing CC functions.

[31] The arbitrator considered this was the most serious of the charges facing Mngomezulu because it incorporated an element of insubordination. Mngomezulu had agreed to return to work initially but then did not do so. Mngomezulu did not dispute that Radebe instructed him to return to work but claimed that Adams required him to continue working for him on CC duties. Adams denied that he had. The arbitrator found that the time Mngomezulu was permitted to perform CC functions was determined by Radebe in terms of the Constitution of the CC and she remained his manager despite him working with Adams on the day in question. In any event, the arbitrator found that Mngomezulu could have gone to the office to receive the notice, if that was all that was required of him, and then continued with any CC activities.

The Grounds of review

[32] In his founding and supplementary affidavits, Mngomezulu raised a compendium of complaints about the arbitrator's reasoning and conduct of the hearing, as well as issues which were not canvassed in evidence during the arbitration. Many of these related to the conduct of the original disciplinary enquiry, none of which were raised during the arbitration. It appears that he may have drafted some, or all, of the affidavits in support of his application himself. Nonetheless, he was again legally represented at the arbitration by counsel.

[33] Mngomezulu's counsel, *Mr G Khoza,* presented argument on the three grounds of review which were fundamental to Mngomezulu's application.

[34] Firstly, Mngomezulu attacks the reasonableness of the arbitrator's findings on the charges in relation to all the charges he was found guilty of. Secondly, he claims in effect that he was denied a fair hearing because no competent Zulu interpreter was present, in circumstances in which he had requested interpretation. A further ground of review was the arbitrator committed a reviewable irregularity when deciding to admit new documentary evidence from Vodacom at a late stage in the proceedings in the form of the shift reports and, or alternatively, hearing Louw's evidence in surrebuttal of Radebe's own rebuttal testimony, on the phone without him having the documents before him, whereas he should have postponed the hearing to allow him to attend the hearing and give his evidence.

The right to an interpreter

[35] Mngomezulu had requested an interpreter in his request for arbitration and one was present, but she confirmed that her Zulu was 'not good'. Mngomezulu contends that the arbitrator ought to have postponed the hearing until a competent interpreter could be appointed.

[36] At the start of the arbitration hearing, Mngomezulu's attorney had indicated that interpretation would not be required until Mngomezulu testified. When the hearing reached that point and an interpreter had to be called, Mngomezulu's attorney indicated that Mngomezulu had instructed him that some of the questions he would answer in Zulu. The arbitrator confirmed that Mngomezulu would proceed in English but the interpreter was there to assist him and he was entitled to testify in Zulu if he preferred. When Mngomezulu commenced his testimony he asked to testify in Zulu. It was at this point that the interpreter indicated she was not able to perform the role adequately, and the arbitrator adjourned the hearing to see if another interpreter could be obtained.

[37] On his return, the arbitrator announced that no better Zulu interpreter was available and that the current one would do her best and would be corrected by Mngomezulu if he felt she was not translating correctly. Mngomezulu's

attorney then advised him to speak Zulu. In argument it was contended that Mngomezulu and his attorney "were clearly overpowered by the unfair and irregular conduct of the Commissioner which forced him to testify in a language which he struggles to speak, English."

[38] Further, when Mngomezulu was testifying in chief about the email he sent in response to Radebe's query about him not obtaining her permission to meet with Clarke, he claimed that he really could not understand what she wanted and his email was simply a direct translation of what he would say in Zulu and he could not understand what was offensive about any of the language. During this explanation the record shows that he spoke Zulu at certain times which the interpreter could not translate. He continued with his explanation.

> "Mngomezulu: Yes, I responded to [Radebe] because I said to myself but I have already responded to my manager. I do not know, Zaid responded, what else must I say, but you must understand that English is a challenge for me. In English I will translate Zulu to English. In isiZulu if you have asked me a couple of times and I tell you, I do not really know what you want.; And I forgot to take the dictionary was me, because I wanted to see in the dictionary if there is any swearword in any of the sentence, because I was worried that maybe I did swear at [Radebe] or maybe I used a word that is in here that is not actually a word that I must use. So (speaking Zulu).
>
> Interpreter: no, I do not understand.
>
> Mngomezulu: This (speaking in Zulu) [Radebe] took the email and he (*sic*) put the feelings in this email. That means in this email when I look at it she must have said like she was explaining to you Mr Commissioner that I do not know what you want. I did not say that. If [Radebe] called me, remember we did not even meet was [Radebe]. She did not call me and say come here so that she could see even the tone and that of me, because that was not my tone. This is like simple English. I do not have an [a]pposite word of this, because it is translated straight from the way I know how to speak and if she could show me in the sentence where is the swearword that I have used here."

[39] After reading the last passage of his email into the record, he stated:

> "This explains that for my entire 16 years at *Vodacom*, I have never even on a single day been called to account to my work, because I am professional and the reason why I put the statement like that is because I am not cross with my boss. I do not have any grudges with [Radebe]. I cannot understand why boss did not call me and say okay come to the bench to see to hear it from me that okay this man is rude. I am not even rude there. I mean if you listen to the politicians even speaking outside sometimes you ask yourself this person is rude, but this person is not rude. I mean you look at issues that people debate sometimes. It is like somebody is putting maybe putting his things across."

After expanding on his view that Radebe should have rather come and spoken to him about things he also explained that he respected her and that in the email he was simply responding to the question that he had already answered. He continued:

> "So I put it now that everything this is addressed in this email so that at least that I have left here then maybe [Radebe] will call me as well and say to me okay come, come just explain to me where were you, but now you must realise that I did not even get an opportunity to be called, not even Management 1.1 says an employee, you have to call an employee and sit with an employee and then discuss these issues, but as soon as you did not discuss these issues then you put your feelings in the statement. Then Mr Commissioner this was not my intention. What she is saying there is not what I am saying here. I am lucky today because I got an opportunity to explain the statement that I did not, I am not disrespectful. This is the email that I could have sent even from taking from Zulu to English because there is a challenge in English sometimes to put across and therefore I write I was thinking Zulu okay this is how (speaking in Zulu) then I will take it back and write it in English."

[40] Under cross-examination when he has asked why he did not just say he was sorry and he was with Clarke his response was:

> "Maybe next time I will put it that way, because I told you already that to me English as a challenge. For me to put what you are saying it is, I do not even think I will think something like that for me.
>
> Mr Bagatsu: Oh okay, polite language is a challenge.
>
> Mngomezulu: No.
>
> …

Mngomezulu proceeded to say that he could not express himself as well as Abrahams in English. He would have expressed himself better in Afrikaans was that was an easier language for him. The cross-examination proceeded thus:

> "Ms Bagatsu: You know what Stephen, I hope you realise what you are doing. This lost in translation argument of yours. You basically telling us that it is okay, because your email is just downright rude? So in Zulu if you want to say this in Zulu it will just be outright rude. Is it not?
>
> Mngomezulu: let me translate this in Zulu. You will hear it is going to be the same thing. I translated this directly from Zulu to English, straight from Zulu."

[41] By way of explanation, Mngomezulu gave the following analogy:

> "Commissioner someone sent me to the shop to go and buy milk. I arrived at the shop then I buy milk. Then I realised it is so and then when I arrive the person says to me why did you bring sour milk, I said milk. Then I go back and by the sour milk again. Then when I come back the person says to me no, I wanted milk why did you buy Salama. Now I will ask what is it that you want."

Mngomezulu was then asked why he sent the second email on 13 December in elaboration on his first response to her request to explain his absence from his workstation. His response was that he realised and decided that perhaps Radebe misread what he had previously sent to her. He sent the second email to see if she would understand better. He denied that the tone was any different. When it was put to him that the second email was even more polite than the one sent by Abrahams, he claimed the cross

examiner was being selective in her reading as it was the same as what he had said before.

[42] It is trite law that witness is entitled to interpretation so they can understand the proceedings and express themselves in their home language or the language they feel most comfortable with [2].

[43] It was clear at the outset that the interpreter was inadequate and not up to the task. The arbitrator tried to obtain a more competent interpreter but was unsuccessful. He decided they should proceed but if Mngomezulu was not satisfied with the interpretation he should raise it. With some reluctance, and to "avoid wasting time", Mngomezulu testified in English. Neither Mngomezulu nor his attorney, either then, or at any stage thereafter, requested the arbitrator to postpone the hearing until a competent interpreter could be obtained. The arbitrator's understanding, according to his answering affidavit was that Mngomezulu and his attorney had agreed to proceed in English.

[44] On the record, the contention that their failure to object to the arbitration continuing without a competent interpreter because they were 'overpowered' by the arbitrator 'forcing' Mngomezulu to testify in English is difficult to accept. It is clear the arbitrator tried to obtain a better interpreter. When that effort failed he decided to proceed with Mngomezulu testifying in Zulu while raising any difficulties he had with the interpretation. Given Mngomezulu's demonstrable facility with English, that was not such an outlandish suggestion as Mngomezulu contends. Had his level of English been such that he obviously had little idea whether his words were being accurately reflected, then it might justifiably be said the arbitrator would have acted irregularly in adopting this approach. It is noticeable that, in the approximately 250 pages of his recorded testimony at the arbitration, there is no evidence of him faltering in his testimony, struggling to express himself, or requesting clarification. Similarly, he never indicated that he did

[2] See e.g. *Mabitsela v Department of Local Government & Housing & others* (2012) 33 *ILJ* 1869 (LC) at paras [16]-[21] concerning the failure to provide interpretation in arbitration proceedings and *Mmola v Commission for Conciliation, Mediation & Arbitration & others* (2018) 39 *ILJ* 1793 (LC) at paras [12] –[14] dealing with a failure to provide interpretation in a disciplinary hearing.

not know how to answer a question because he did not know how to express his answer in English. I note also from the 200 odd pages of minutes of the internal disciplinary enquiry that those proceedings were conducted in English without any interpretation and without Mngomezulu raising any objection thereto. Of course that does not mean he could not insist on interpretation in the arbitration, even if it was not strictly necessary for him to present his case fully, but it is another indication that it is unlikely he was actually prejudiced in the conduct of his case.

[45] Mngomezulu contends that when he spoke in Zulu at the arbitration, and it was not translated, the 'information got lost'. However, nowhere in the transcript nor in his affidavits does Mngomezulu attempt to explain what was the crucial information he was trying to convey in Zulu and, in particular, what further or different explanation he might have given for the English text of his email of 4 December if his utterances in Zulu had been translated or if he had testified completely in Zulu. In argument it was submitted that 'material facts' he testified to in Zulu were not translated or transcribed, but not one of these was specifically described or identified. The explanation he repeatedly gave was that what he had written was simply a direct translation into English of what he was thinking in Zulu. In other words, it meant the same in English as it did in Zulu. He also never attempted to identify in the arbitration hearing, or in his very lengthy review papers, a single instance of information or nuance of meaning that was lost when he wrote that email in English, or as a result of testifying in English.

[46] On the record, I am not satisfied that Mngomezulu and his attorney were cowed or bullied to accede to proceeding in English. Rather, the probabilities favour an interpretation of the transcript that they acquiesced to proceeding in English despite the earlier objections and despite being aware they were entitled not to proceed without a competent interpreter. Neither Mngomezulu nor his attorney displayed any inability to question the way the arbitrator was conducting matters, if they were unhappy about anything. As such I am not persuaded the arbitrator committed a reviewable irregularity in allowing the matter to continue in English without adjourning the hearing to obtain an interpreter. It might have been prudent, as a matter

of sound practice, to confirm expressly on the record that the matter could proceed on that basis, but there was no reason for the arbitrator to have believed that Mngomezulu was not prepared to proceed without interpretation.

[47] It must be understood that the general principle that a refusal or failure to postpone a hearing if proper interpretation is unavailable will ordinarily amount to a reviewable irregularity, unless it is apparent there was an express agreement to waive the right to interpretation, or conduct that can reasonably be construed as acquiescence on the part of a party who is fully aware of their right to interpretation.

Findings on the first charge

[48] Mngomezulu argued that the real issue between him and Radebe was incompatibility and if the arbitrator had been reasonable he would have found that dismissing him without making a real effort to improve their interpersonal relations was premature. As Mngomezulu testified, Radebe ought to have taken steps to clarify the undertones of disrespect she was picking up from his email. The arbitrator failed to understand the email of 4 December in the context in which it was sent. The fact that he responded to that the same day shows he acted in good faith and bona fide believed Adams had answered for them both.

[49] The issue of incompatibility being the problem was not raised in the arbitration as a defence to the alleged misconduct. The arbitrator was not required to consider it. It might be so that he believed Adams had answered for them both because that is what he alleged Adams told him. The question that remains is why he replied in the peevish tone he did and why he followed up with a far more conciliatory response the day he realised he was facing disciplinary action. He repeatedly denied any change of tone in his emails between the first and second, but from the language it is obvious that the first is not respectful in tone and implied that Radebe's query indicated a degree of confusion on her own part. The second email, when he knew that disciplinary action of some sort was pending, was more in keeping with a neutral factual response lacking any emotive language. The

only plausible explanation for him sending the second email was that he knew the first one was unacceptable and wanted to make amends for it given the knowledge of pending disciplinary action.

[50] The grounds advanced why the arbitrator could not have found him guilty on this charge do not reveal any flaw in the arbitrator's reasoning of the kind that is fatal to his conclusion which is required to set it aside on grounds of reasonableness.[3]

The second charge

[51] Mngomezulu contended that the implication of Radebe's email correcting him on what Clarke supposedly had said or meant, implied that he did not understand English and was intended to embarrass or belittle him. The arbitrator failed to appreciate that his response was an honest response in which he acknowledged his failings and indicated his willingness to undergo training. It is interesting to note that he interpreted Radebe's email as belittling but maintains his own response was not emotive but a neutral one.

[52] Mngomezulu's self-deprecating tone in the email and suggestion that he must undergo training in sentence construction and comprehension, even though he thought Clarke was speaking English simply oozes sarcasm. Oscar Wilde, the renowned Irish literary figure reputedly said "Sarcasm is lowest form of wit but the highest form of intelligence." Any admirer of sarcasm would appreciate Mngomezulu's feigned admission of his inability to understand what Clarke said. The unmistakable thrust of his email was that what Clarke said to him was perfectly clear and straightforward so if he did misunderstand him, he must be suffering from a serious inability to comprehend even the most simple statement, and his deficiency of understanding is so bad that he requires basic training in grammar and comprehension. The self-mocking tone is disingenuous and the sting of the passage lies in the indirect implication that it is actually Radebe who is wrong about what Clarke said. The change in tone in the second half of the

[3] See *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) at para [33].

email contains the only response that was required and was perfectly appropriate. He might have taken some offense to being informed he had misunderstood Clarke's instruction, but Radebe's understanding was based on what she was told by Clarke and even if Mngomezulu took some offence because it was circulated in the same email thread, his response was grossly exaggerated and intended to make fun of her. If he had not wanted to create this impression, he would simply have left this part of his email out, or merely stated he had understood Clarke differently, and then continued with the rest of the email.

[53] The arbitrator's findings in respect of this charge are plainly plausible ones to have reached on what was before him.

The third charge

[54] Mngomezulu argues that the arbitrator's finding on this charge was unsustainable. On the evidence he could only have found, objectively speaking, that his conduct did not constitute a persistent and wilful refusal to follow an instruction,[4] nor was Ms Radebe's instruction reasonable.

[55] The essence of this argument is founded on the contention that Radebe had effectively permitted Mngomezulu to be off the whole day to perform CC functions under the instruction of Adams, to whom she had ceded managerial authority over Mngomezulu for the day. Consequently, there was nothing untoward about Adams becoming involved in the debate about whether Mngomezulu could go back to the office on Radebe's instruction. Radebe was unreasonable in insisting he collect the notice of the enquiry when there was no inherent urgency in that task.

[56] The arbitrator found that Mngomezulu was assigned to work with Adams purely for the duration of the BEE roadshow, which was drastically curtailed and accordingly the rationale for releasing him from work ceased to exist once the roadshow ended around 12h15. Vodacom argues that it was

[4] *Commercial Catering & Allied Workers Union of South Africa & another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ (IC at 314 H-J.

reasonable of Radebe to have insisted on issuing the notice that day, to avoid short notice of the disciplinary enquiry.

[57] Whichever version of the evidence of the events that day is preferred, Mngomezulu did flatly refuse to return to the office and asserted his CC responsibilities as his priority for the day, relying on the argument that he was under Adams direction, a stance which was supported by Adams. Significantly though, Adams would not go so far in his testimony to say that he refused to permit Mngomezulu to return to the office. He also he conceded that Radebe was entitled to give Mngomezulu the instruction. It was also apparent that Mngomezulu was evasive in answering when it was put to him that the CC constitution ultimately gave Radebe the authority to determine when he could perform CC functions. It is also noteworthy that Mngomezulu also contended that Radebe was not asking him to work as a reason why he decided not to return, so his decision did not depend only on his argument of being seconded to Adams for the day.

[58] On the evidence, the arbitrator's assessment that Mngomezulu's decision not to return to the office when instructed to do so by Radebe was a perfectly plausible interpretation of the events, and his conclusion was one a reasonable arbitrator could have come to.

Telephonic evidence of Louw

[59] In relation to the alleged impropriety of this part of the proceedings, it is important to note that there was no objection raised at the hearing to the rebuttal evidence of Radebe and the introduction of the shift reports to contradict Louw's evidence that the Netcool incidents would be recorded there. Likewise it was at Mngomezulu's attorney's instance that Louw was asked to give evidence telephonically in surrebuttal of Radebe's testimony. All of this took place without any party demurring. I fail to see how Mngomezulu can now argue that the arbitrator acted irregularly in allowing the hearing to proceed in this manner. Nowhere does he claim his legal representative acted without his authority in relation to the way further evidence was admitted or how Louw was questioned.

[60] The only remaining aspect of this ground is that Mngomezulu claims Louw did send reports to the CCMA but the arbitrator ignored them. There is no evidence, if they were sent that the arbitrator received them. In any event, the relevance of Louw's evidence ought not have had any decisive impact on the issues the arbitrator had to decide. The key issue was the way that Mngomezulu responded to Radebe's claim that he must have misunderstood Clarke, not on who was right about what Clarke said. In so far as Louw's testimony was relevant, it was relevant to the latter issue only and therefore of little import to the key issues in dispute.

[61] Consequently, the verification or corroboration of Louw's evidence would not have had any material impact on the arbitrator's reasoning and does not have a bearing on the reviewability of the award.

Appropriateness of the sanction of dismissal

[62] Had the misconduct in question been the first time that Mngomezulu had been disciplined for this type of disrespectful behaviour, it might plausibly be argued that dismissal was an unreasonably harsh sanction. However, he had been issued with a final warning for similar behaviour, which was still current and which had nearly resulted in his dismissal then, but had been scaled down to a period of suspension without pay.

[63] A theme running through Mngomezulu's evidence was his obvious reluctance to accept he worked under Radebe's authority. It was apparent under cross-examination that he was happy to accept Clarke as a superior, but was reluctant to accord authority to Radebe, his direct line manager. Similarly, in the dispute about who had authority over him on the day of the roadshow, he would not expressly concede Radebe's ultimate authority to determine when he could perform CC functions. He was unapologetic about any of the conduct complained of. As such it is perfectly reasonable to suppose if he returned to work, his attitude would not have changed towards Radebe. It is very regrettable that Mngomezulu persisted in his disrespectful attitude and lost his long standing job as a result, but he cannot blame the employer or the arbitrator for the consequences of him not heeding the seriousness of his previous warning.

Conclusion

[64] In summary, Mngomezulu has not advanced sufficient grounds of review to set the award aside.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives

For Mngomezulu	GSS Khosa instructed by MRT Law Inc.
For the First Respondent	A Redding SC, instructed by Edward Nathan Sonnenberg Inc.