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

Reportable

Case No: J 1326/22

In the matter between:

**ELSABE HARMSE N.O.** **First Applicant**

**TRANSNET BARGAINING COUNCIL** **Second Applicant**

and

**EPHRAIM MPHAHLELE** **Respondent**

**Heard**: **8 August 2024**

**Delivered**: **2 December 2024**

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**JUDGMENT**

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**DAVE, AJ**

Introduction

[1] This is an application in terms of section 142(9)(b) of the Labour Relations Act (LRA)[1] for an order to confirm the First Applicant's (Commissioner's) findings against the Respondent in the Commissioner's contempt ruling dated 17

[1] Act 66 of 1995, as amended.

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August 2022 and to suspend the Respondent's right to represent parties in the CCMA, any Bargaining Council and the Labour Court for a period of 6 months.

[2] In her ruling, the Commissioner found the Respondent in contempt of the Second Applicant (the Council) and recommended that the Respondent's right of appearance before the CCMA and Bargaining Councils be suspended.

[3] Although the Commissioner's ruling does not provide for a period of the suspension, the notice of motion proposes a suspension of the Respondent's right of appearance for a period of six months.

[4] In the application before this Court, the Commissioner deposed to the founding affidavit. The Respondent filed an opposing affidavit and the Commissioner filed a reply. Both parties filed heads of argument. At the hearing of this matter, the Respondent appeared in person.

Events leading to the Commissioner's contempt ruling

[5] The Commissioner was appointed by the Council to preside over the arbitration proceedings between Mr Mabatha and his previous employer, Transnet Engineering (Transnet).

[6] SATAWU initially referred the matter on behalf Mr Mabatha and represented Mr Mabatha at the conciliation on 28 June 2022. However, on 10 August 2022, Mr Mabatha was represented by a different Trade Union, namely NTM (National Transport Movement). The Respondent, who appeared on behalf of Mr Mabatha at the arbitration, is employed as NTM's General Secretary.

[7] According to the Commissioner's contempt ruling, during the course of the arbitration, there were various instances of disrespect shown by the Respondent towards her and Transnet's representative as well as towards the witness who testified. The Commissioner's complaint about the Respondent's conduct is the following:

7.1 The Respondent showed "utter disrespect" towards the Commissioner;

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7.2 The Respondent did not allow any person to speak, and he kept on interjecting;

7.3 On more than one occasion the Respondent was busy with a monologue of his own and he constantly educated the Commissioner on the process that she should follow;

7.4 The Commissioner was accused of not following a fair process;

7.5 The Respondent threatened the Commissioner that her process was unfair and flawed and that he would ask for her recusal.

[8] In response to the Respondent's threat of applying for her recusal, the Commissioner afforded the Respondent time to prepare his submissions whereafter the Respondent applied for the Commissioner's recusal. Transnet's representative opposed the recusal application. The Commissioner did not find grounds for her recusal and refused the application.

[9] According to the Commissioner-

9.1 She warned the Respondent that his behaviour and remarks towards her were of a contemptuous nature and that should he continue, she would find him in contempt;

9.2 After her refusal to recuse herself, the Respondent continued with his disrespect;

9.3 As soon as she made a ruling on a point, the Respondent argued and debated the ruling and informed the Commissioner that her ruling was incorrect;

9.4 The Respondent made it impossible for her to perform her duties in the arbitration and had no respect for her or her position of authority during the proceedings;

9.5 The Respondent did not heed to her warnings.

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[10] According to the Commissioner, in behaving as he did, the Respondent prejudiced and improperly influenced the proceedings to such an extent that he *"completely stripped me from my powers as a commissioner as laid out in the LRA".*

[11] In opposition, the Respondent denies that the conducted himself in the manner described by the Commissioner.

Section 142 of the LRA

[12] The LRA recognises that situations may arise where Commissioners conciliating or arbitrating a dispute may be subjected to contemptuous conduct by persons involved or present at the proceedings.

[13] Before considering the Respondent's conduct during the arbitration proceedings, it is necessary to consider the relevant provisions of the LRA in relation to persons who are found to be in contempt by a Commissioner.

[14] The starting point is section 142(8) of the LRA and, considering the facts of this matter, sections 142(8)(f) – (i) are relevant. These sections provide that a person commits contempt of the Commission-

> '(f) if the person willfully hinders a commissioner in performing any function conferred by or in terms of this Act;
>
> (g) if the person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;
>
> (h) by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;
>
> (i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.'

[15] Section 142(9) provides that a Commissioner may make a finding that a party is in contempt of the Commission for any of the above reasons and that the

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Commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).

[16] Section 142(10) provides that before making a decision in terms of subsection (11), the Labour Court-

> ‘(a) must subpoena any person found in contempt to appear before it on a date determined by the Court;
>
> (b) may subpoena any other person to appear before it on a date determined by the Court; and
>
> (c) may make an order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a party in the Commission and the Labour Court to be suspended.’

[17] Section 142(11) provides that the Labour Court may confirm, vary or set aside the finding of a Commissioner.

<u>The Respondent’s conduct during the arbitration proceedings and assessment thereof</u>

[18] The only way to establish whether the conduct of the Respondent falls within the descriptions set out in section 142 (8)(f) – (i) is to carefully consider the record of the proceedings which formed part of the application in this matter. Upon consideration of the record, I set out the various instances where the Respondent’s conduct comes into question.

[19] The first incident related to the Respondent’s refusal to provide his credentials and information regarding Mr Mabatha’s change in Union membership. The record reflects that the Commissioner wanted confirmation that Mr Mabatha changed his representation and that he had become a member of a different Union. The Respondent’s response was *“we are not going to provide that, there is case law that this is there, Madam Commissioner. It’s not something that we should then be engaging at length or elaborate about”.*

[20] What the Commissioner required was for Mr Mabatha to confirm on record that he was changing representatives from SATAWU to another Union and that the

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Respondent would be his representative in the matter. After a debate ensued on this issue (which seemed unnecessary), the Respondent agreed to provide his credentials and that of his Union but refused to provide information relating to Mr Mabatha being a member of NTM. In this regard, the Respondent stated:

> 'No, what I said was that I am not going to address you in relation to the credentials in relation to the Applicant being a member of NTM, I said that I am not going to do. But if you want my credentials or the [A]TN's credentials, those I will attend to.'

[21] In another instance, Transnet's representative (Mr Chubana), during his witnesses' examination in chief, asked a question of his witness which the witness had already testified to. This was in relation to a key that opened doors on the blue train. The witness worked as a Butler on the blue train and in order to carry out her duties she needed a "coach" key to open the doors of the rooms on the train. She had testified during her evidence in chief that the alleged perpetrator of sexual harassment agreed to assist her with a "coach key" provided she gave him a kiss. However, the disciplinary charge against Mr Mabatha referred to the key as a "master key" and not a "coach key". Mr Chubana pointed this out to the witness and asked the witness to explain the difference between a master key and a coach key. When Mr Chubana continued with his questioning, the Respondent objected and accused Mr Chubana of attempting to amend the disciplinary charge and that such is not permissible and that if it were to be allowed, the arbitration would be unfair. The relevant extract from the transcript is pertinent and also demonstrates the disrespect shown by the Respondent towards Mr Chubana and the Commissioner and reads as follows:

> 'Mr Chubana: And charge 3 talks to, whilst working on the blue train you sexually harassed Miss Lebogang Letsoalo by asking her to give you a kiss on the lips when she borrowed the master key from you. You asked her to give a kiss on the lips if she wants to borrow her… if she wants you to borrow her your master key, and this is seen as quid-pro-quo sexual harassment. Am I correct

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that this talks to the incident about you borrowing a coach key?

Ms Letsoalo: That will be true.

Mr Chubana: What's the difference between a master key and a coach key? I see on the charge its written as a master key.

Ms Letsoalo: A master key is an actual key. A coach key is… I don't know how to differentiate them. A master key is like your normal door key, but it opens all doors and then the coach key opens certain units on the train.

Mr Chubana: Okay, so it's a coach key that Mr Mabatha…?

Mr Mphahlele: [interjects] Objection. Madam Commissioner. I think he is now seeking to testify on behalf of the witness for the witness to now just confirm what he said. And he should be knowing that he is not allowed to ask leading questions of his own witnesses, thank you.

Mr Chubana: I'll rephrase, Madam Chair. Which key, in your evidence, were you borrowing from Mr. Mbatha?

Ms Letsoalo: The coach key.

Mr Mphahlele: Madam Commissioner, I think what my learned colleague is doing is irregular, because he seeks to amend the charge sheet in the manner that he is doing. And he brought up no application at the commencement of these proceedings to amend the charge sheet, and he cannot be doing what he is doing. Thus, we will be receiving an unfair hearing. We conducted our own preparations in respect of what is set out in the charge sheet and he cannot be doing what he is doing. Its now in the process of amending the charge sheet and it's our contention that this is not permissible, Commissioner. Thank you.

Commissioner: You may respond, Respondent.

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Mr Chubana: Commissioner, the witness... we rely on what the witness gives us evidence and the witness has been consistent since she started her evidence in chief that it's a coach key. And I just wanted to verify that, that it is a coach key and not what is stated on the charge sheet.

Mr Mphahlele: That's not what you were doing, you... you were then telling her to then say that notwithstanding what is stated in the charge here, it is a coach key and not the master key. And you should be doing what you are doing, because you are doing that in relation to what is set out in the charge sheet. It becomes prejudicial in the extreme to say the least.

Commissioner: Alright. I'm... [cross talk]

Mr Mphahlele: [interjects] You Asked her to then differentiate between the master key and the coach key, she had done that and it should have ended there. Thank you, Madam Commissioner.

Commissioner: All right, so what part are you objecting to, Sir?

Mr Mphahlele: I'm objecting to the fact that he is saying to the witness, in respect of charge number 3. He is asking her, is it correct that what you borrowed from him was a coach key not the master key, and he referred her to charge 3 and we are objecting on the basis of that.

Commissioner: Respondent?

Mr Chubana: Commissioner, and I'm going to repeat what I've said. The witness has been consistent in her evidence in chief, even when she read the e-mail in that she was borrowing a coach key. Now something else is standing on the charges, all I needed to do is to verify that it is the same thing or is it something different.

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Mr Mphahlele: But you asked that question, she differentiated. She said she differentiated the master key from the coach key...

Mr Chubana: [interjects] Can I just finish? Can I just finish, Sir? Now whoever might have made the charges, whoever might have compiled the charges, it's what is there, we can't... We're not running away from that. But the evidence of the witness is that she has borrowed the coach key and that evidence has been consistent throughout her evidence.

Mr Mphahlele: Yeah, but that's a matter of argument. We can deal with that in our heads of arguments. It's not something you then direct the witness to what is set out in the charge and then to have the witness amend in the charge.

Mr Chubana: But I didn't say the witness must amend the charge.

Mr Mphahlele: That's not permissible. If you wanted to amend the charge, you could have brought up an application to have the charge amended at the beginning of the proceedings. And we could have been recorded then an opportunity to object there too on the basis that it becomes a new thing that we then have to go and prepare for, or we could have said that, no it's fine and then we proceed.

Mr Chubana: Commissioner, I…

Mr Mphahlele: [interjects] What you are doing is prejudicial, I am objecting on the basis of the prejudice, it's prejudicial in the extreme to say the least. And in any fair hearing, you cannot be allowed to... a representative cannot be allowed to do what you are doing.

Mr Chubana: Commissioner, my colleague seems to imply that I've asked to amend the charge. [cross talk]

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Mr Mphahlele: [interjects] No, I am your opponent, I am not your colleague.

Mr Chubana: Can I -? Can I just-?

Mr Mphahlele: [interjects] I am your opponent in these proceedings.

Mr Chubana: Yes, and you allow opponents to talk when they want to talk. You can't be the only one that's talking.

Mr Mphahlele: But don't refer to me as your colleague, I'm not your colleague, I'm your opponent and these proceedings.

Mr Chubana: Okay, fine. I'll refer to you as opponent, but you must give me the respect also to speak.

Mr Mphahlele: No, if you prejudice us, you cannot me, you cannot me to then say, no, no, no. In the pre-tense of this so-called respect.

Commissioner: [interjects] Alright, Okay. [cross talk]

Mr Mphahlele: [interjects] Then you should just carry on and prejudice us, I'm entitled to object and if your understanding…

Commissioner: [interjects] Excuse me, Sir. I think I'm going to stand up and leave, because I'm totally redundant in this process we'll stop I've said from the onset when we started these proceedings, we will respect each other, when one speaks, the other one keeps quiet. You've made your point, you've objected, you've given me the reason for your objection. In terms of their process, I need to allow the Respondent to reply to that and then I will make the decision. Not you Sir. You may reply, Sir.

Mr Chubana: Again, Commissioner. For the last time I did not ask for this witness to amend the charge sheet. I asked for this witness to clarify to us, what in her evidence she has been given. She has been saying... she has been referring in her evidence at a coach key and what is on

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the charge is being said as a master key. And I wanted to find out what is the difference between the two, and that's all that I was doing, Commissioner. I did not say to this witness, therefore you are amending the charge? I've never said that. So, as it is, Commissioner, this process relies on what the evidence has been given and I just wanted to clarify from the witness what her evidence was, it is a coach key or a master key? And she says it was a coach key. That's all, Commissioner, that I was doing. Thank you.

Mr Mphahlele: It is not, Madam Commissioner, what he said earlier on. It is on record Sir.

Commissioner: Sorry sir, what is he changing?

Mr Mphahlele: He is now saying that he asked the witness to differentiate between the master key and the coach key. And that particular question, he asked it before he asked a prejudicial question and the witness clarified. And what the witness said in her clarification is that the master key is an actual key that opens all the doors. That is what she presented and that the coach key is the key that opens certain doors to the rooms, that's what the witness had said. And he then went on to refer the witness to charge number 3 and then he then said the charge, what is referred to in the charge as the master key, is it... was it supposed to be the coach key? And then the witness responded and that's where it became prejudicial. On the question of differentiating between the two, I never objected to that. The witness went on to clarify that. I am objecting to the fact that he wants to place evidence that seeks to change the charge sheet into the mouth of the witness for the witness to confirm, that's the only thing that I'm objecting to. And I'm saying it is prejudicial, Madam Commissioner.

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Commissioner: So just jog my memory quickly because I did not hear that part what was the question that was prejudicial question that was put to the witness?

Mr Mphahlele: The prejudicial question was in respect of the fact that what is referred to in charge number 3 as the master key is actually the coach key. That's the map of what the objection...

Commissioner: Was that the question that was posed to the witness?

Mr Mphahlele: Yes, it was put into the mouth of the witness, and he wanted the witness to confirm that, and I objected to that.

Commissioner: Alright, my recollection is not the same, but in any event to address the objection and for the sake of progress, you can reserve this for argument whether it was a master or a coach key and I will decide on the relevance of what type of key it was. I will allow the answer and the question as to the differentiation between the two keys, there's nothing wrong with that.

Mr Mphahlele: [interjects] Ja, but it's already placed, Madam Commissioner, we did not object to that.

Commissioner: [interjects] I'm still speaking, Sir.

Mr Mphahlele: But it's like we are being accused of objecting of what we had not objected to. We have not objected to the differentiation of the master keys in the coach key; I have clarified that.

Commissioner: Are you done?

Mr Mphahlele: Yes, I'm done.

Commissioner: Because I don't interrupt someone else, it's disrespectful. I said and I will repeat myself again, I've listened to your objection, your objection is duly noted. I am saying that whatever key was used whether the

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> charge sheet is not correct, whatever issue with the charge sheet you can reserve for argument. I believe that addresses your objection and I said there's nothing untoward for the witness to explain the difference between the two keys. Can we proceed, please?'

[22] Having regard to the above, the Respondent's objection in itself was ill founded in that Mr Chubana was simply directing his witness to one of the charges (charge 3) and to the fact that the charge made reference to the master key (and not a coach key). The witness had already testified in chief that it was the coach key that she required for her duties. Mr Chubana's comment *"Okay, so it's a coach key that Mr Mbatha ...?* did not constitute an attempt to amend the charge, which in any event is a meaningless proposition. To suggest that a disciplinary charge against an employee can be unilaterally amended *ex-post facto* a discplinary hearing, during a witness's testimony in a subsequent arbitration hearing, is inconceivable. In response to the Respondent's objection Mr Chubana coherently explained what he wanted to achieve. It was obvious that charge 3 referred to a master key whereas the witnesses' evidence referred to the key as a coach key. Despite this, the Respondent pursued a quest to impose his argument that what Mr Chubana had done was irregular and that it would result in an unfair hearing. There was however nothing irregular in Mr Chubana's line of questioning. The record also reflects that when the Commissioner gave her ruling on the objection, the Respondent interrupted her with his dissatisfaction and continued to argue with the Commissioner.

[23] It is also pertinent to consider the Respondent's attitude towards Mr Chubana in the presence of the Commissioner where the Respondent insisted that Mr Chubana not refer to him as his "colleague" but rather as his "opponent" despite him referring to Mr Chubana as "his colleague" later on in the proceedings. This attitude fortified the tone of what was to come and is hardly reflective of any type of respect or collegiality by the Respondent towards Mr Chubana. The Respondent's insistence was not justified and his attitude in this regard reached others present in the room, including the Commissioner.

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[24] In a further instance, during his cross examination of the witness, the Respondent seemed to be educating the Commissioner on how to deal with an objection raised by Mr Chubana. The Commissioner noted the objection and stated that the witness had answered the question. Dissatisfied with the Commissioner's response, the Respondent took issue with the Commissioner followed by a further debate between him and the Commissioner. In this instance, the Respondent referred to the process as being unfair and he threatened to leave the arbitration. The following extract from the record demonstrates the Respondent's conduct:

'Commissioner: Right, thank you sir. Thank you, Respondent, your objection is noted. I believe the question was asked and answered by the witness.

Mr Mphahlele: It has not been answered, Madam Commissioner, and I think for it to be granted a fair hearing, or at least I was still in the process of asking a question, he objected. And in this regard, we are noting the objection, you are not making a ruling on the objection, and you should be making a ruling on the objection. And the witness should there then be allowed to respond to my question or I should then be allowed to repeat the question, so that the question can then be responded to.

Commissioner: Okay, so are you now educating me on how to do my job?

Mr Mphahlele: In so far as you have missed something…

Commissioner: I haven't missed anything.

Mr Mhahlehle: As a… as a representative, I'm entitled to then say, because we are entitled to a fair hearing as a matter of constitutional imperative. It is not an indulgence that the Commissioner should extend to us.

Commissioner: Yes, sir.

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Mr Mphahlele: And for that very same reason…

Commissioner: [interjects] That fairness extends to every person in this process, to the Commissioner as well.

Mr Mphahlele: [interjects] You see you are interrupting me, earlier on you were accusing me of being disrespectful.

Commissioner: I'm not accusing anyone, sir.

Mr Mphahlele: Now you…

Mr Chubana: [interjects] Can I-?..... Can I request something, Commissioner? Can I request the... and I'm not trying to direct you on what to do, but can I request that the witness to wait a little bit outside? So that we can deal with this issue, because it would be a grave injustice, Commissioner, if you were to leave this arbitration, because then the witness must sit in front of another Commissioner and repeat the whole story again, and I would not want us to get to that. It's just a request that I am making, Commissioner.

Mr Mphahele: But we are also entitled to a fair hearing, and if I can… if I am to sit in an unfair process, I will then also excuse myself from the proceedings. Then we will have to go and source another Representative. I can't engage in an unfair process, that I can see, this is unfair and prejudicial. And in this regard, the witness must respond to my question and nothing else, there's nothing that should then prompt the witness to step out for us to discuss anything, what is to be discussed? The witness has got to respond to my question and it ends there, and she will respond in the manner that deems appropriate. And the issue that we are engaging in a debate about, it revolves around the fact that the witness should respond to the question. And I am being directed to move on, notwithstanding the fact that the question is not

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responded to. And I'm saying that would be prejudicial, I would rather than have to take instructions from the Applicant to excuse myself, because it would mean this process would be an extremely unfair in the extreme to say the least.

Commissioner: Are you done, sir?

Mr Mphahlele: Yes, I'm done.

Commissioner: Alright, may I speak?

Mr Mphahlele: You may, Madam Commissioner.

[25] The Commissioner's discontent with the Respondent's behaviour reflected above is illustrated in the following response:

'Commissioner: Thank you, Sir. I do not appreciate being accused of things that's untrue. I do not appreciate being accused of that the process I'm following is unfair. I do not appreciate the fact that when I have to make a ruling that I get interrupted. I do not appreciate the fact that when I did make a ruling, that there is a further debate that ensues after that. I do not appreciate the fact that I'm not being respected as the Commissioner in this process. I do not appreciate the fact that when I give direction to the process, that there's a further debate and that there's threats made that people will leave the process or excuse themselves or take this to another forum. I don't appreciate that. I believe I've been fair towards this process from the start, I would like to finish this process, because I do not think it's a nice process for any person sitting around this table to go through. I don't want to make it more uncomfortable for anyone present. I have said I note your objection, thank you Sir, you've got the right just as the Applicant has the right to object. You've objected and I've noted your objection and I've stated before I was again interrupted to finish what I was

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saying. I said the witness answered the question, the first question with regard to the charge sheet and she said that she was not the drafter of the charges, and that she cannot respond to the time period as mentioned there. Then there was another question and amidst the question, there was an objection. Before I could have been given a chance to say anything, the process was taken over by the Applicant's representative and I was unable to hear the question to make a proper ruling on it. Then, again I was educated on how my process should be conducted and that I am not conducting my process properly, which I also don't appreciate. So, Applicant rep, if you can be so kind as to just ask your question, so that I can hear the question. If there is still an objection, I can rule on it, but as it stands, I didn't hear the question, there was an objection amidst the question, I noted the objection but there's nothing I can rule on yet. So, thank you for that lesson on how to conduct my process, can you please repeat your question. If there is still an objection, Respondent you have the right to object, the Applicant will have a right to apply or to oppose the objection and I will have the right to rule on it. That's how my process is going to be followed. Thank you.'

[26] In all this, the Respondent's behaviour was impudent and insulting. He accuses the hearing (and by inference, the Commissioner) of being unfair and prejudicial and his threat to leave the arbitration due to his dissatisfaction with the Commissioner was outright disrespectful. In particular, the following tone and language demonstrates an egregious attitude on the part of the Respondent:

> 'I can't engage in an unfair process, that I can see, this is unfair and prejudicial. And in this regard, the witness must respond to my question and nothing else, there's nothing that should then prompt the witness to step out for us to discuss anything, what is to be discussed? The witness has got to respond to my

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question and it ends there, and she will respond in the manner that deems appropriate'.

[27] The manner in which the Respondent addresses the forum in the above regard is not acceptable and there is nothing to suggest that the Respondent could not have been unaware of how he was behaving.

[28] A further debate ensued between the Respondent and the Commissioner where the Respondent refused to move on with his cross examination until he received an answer from the witness who had already answered the Respondent's question the first time it was asked and again answered on at least two further occasions. This was in relation to the dates upon which the witness complained about being sexually assaulted. The Respondent asked the witness to provide the "actual" dates of the misconduct. The witness stated that she did not know the dates. Instead of simply moving on to another question, the Respondent persisted with the same question. When the Commissioner pointed out that the question had been asked and answered, the Respondent's impertinence followed. The relevant extract is repeated below:

'Commissioner: … The question was asked three times and the witness answered you three times…

Mr Mphahlele: [interject] Can-? No, I was requesting for help from the Commissioner…

Commissioner: [interjects] I'm still speaking. I'm still speaking. I don't know how are we going to finish this case or conduct this case, if we are not going to pay each other respect. And I believe I have been respectful to every person in this process. Are being brought up to keep quiet when quiet when someone else speaks. So, every time you interject, I'm going to keep quiet. You may speak, Sir.

Mr Mphahele: No, I was then saying, requesting for help from the Commissioner, because you were saying it is

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responded to. I want you to perhaps assist me with the response, so that I am then able to move on and not get stuck on this question. That's the help that I'm requesting from you, Madam Commissioner.

Commissioner: If you did not interrupt me, you would have received the response, but then you interrupted and I kept quiet. I said you've asked this question three times, she answered it three times, she said she cannot remember the exact dates, she can remember the month and the year, that's what she said.

Mr Mphahlele: No, she did not say that, Madam Commissioner. Because what she said earlier on was that she does not know the dates, so she doesn't know the dates and can't remember, there are two different things. It's on record, Madam Commissioner, it's on record. Because she was responding to my question on whether she knew the specific dates.

Commissioner: So are you saying to me now that you did not say she cannot remember the dates, she can only remember the month and the year, not the specific date. Are you saying she did not say that?

Mr Mphahlele: She didn't say that.

Commissioner: OK, then I don't know where I was for the past 20 minutes if she did not say that. I've recorded it here on my notes, she can only... she said, I only know the month and the year, not the specific dates. Now you telling me she never said that. So, then you need to assist me please in telling me what did she say.

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Mr Mphahlele: I think the only appropriate way would be for the witness to respond to the question, and we move on. Because I thought that I could be helped, it's quite clear I'm not going to be helped.

Commissioner: Sir, I don't appreciate the way you are conducting yourself and the way you speaking to me, it's not on, really. [cross talk].'

[29] The above debate was triggered by the Respondent and is what led to the tension which was compounded by the debates that had occurred earlier on in the proceedings. The Respondent's comment *"it's quite clear I'm not going to be helped*", was directed at the Commissioner. This comment was inappropriate in the context of the debate as it served no purpose other than to provoke. The Respondent's provocation was also sourced in his allegation that the witness had not answered his question whereas the witness had clearly answered it. In this regard, the witness did not know certain dates because she could not remember the dates. When the Commissioner asked the Respondent to state what he alleges the witness said about the dates, instead of answering the Commissioner, he decided what the appropriate way to deal with the issue would be. This is where the Commissioner informed the Respondent that she did not appreciate the way in which he was conducting himself and the way in which he was speaking to her.

[30] In a further instance when the Respondent put to the witness that Mr Mabatha denies that he sexually harassed her, the witness answered that *"it did happen"*. In fact earlier on in the proceedings, the Respondent had been asking the witness the same question and she had answered in the same way, i.e. that the sexual harassment did indeed take place. Despite this, the Respondent provoked a further debate resulting in him wanting to "register" a complaint against the Commissioner. The Respondent's complaint was triggered consequent to the following exchange:

'Mr Mphahlele: My instructions are that it did not happen.

Ms Letsoalo: It did happen. And you were never there.

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Mr Mphahlele: Now can you respond to my question.

Commissioner: She did, we can move on. Thank you.

Mr Mphahlele: And what was the answer?

Commissioner: She did, she just answered you, sir.

Mr Mphahlele: Madam Commissioner, you see I…

Commissioner: [interjects] she did answer you. She answered the question.

Mr Mphahelle: Allow me to register a complaint.'

[31] Here, the Respondent was of the view that the witness had not answered his question and once again accused the Commissioner of not giving Mr Mabatha a fair hearing. He accused the Commissioner of being biased towards the Respondent and that the only appropriate way to deal with the matter was for the Commissioner to recuse herself. However, the Commissioner had done nothing wrong. The witness had answered the Respondent's question and the Commissioner confirmed this with the Respondent. His accusation of unfairness and his response to register a complaint was provocative and disruptive as it had no merit whatsoever.

[32] What then followed were submissions by the Respondent to motivate for the Commissioner's recusal. Mr Chubana opposed the application. Once submissions had been made, the Commissioner refused to recuse herself and she went on to state the following:

> 'However, the Applicant's representative's behaviour cannot go unnoticed. His behaviour is contemptuous in nature, is aimed to duly frustrate and prolong this process. The right to human dignity, fairness and fair treatment as enshrined in the constitution of which he has quoted many times is extended to every single person present in this hearing room and not only to him. And the Applicants representative does not have the right to limit or encroach on any of those rights. As stated, the Applicant's representative's conduct is contemptuous in

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> nature and a ruling on contempt will be made in this regard formally and sent to the Labour Court'.

[33] Following the Commissioner's findings of contempt against the Respondent, the Respondent was excused from the arbitration proceedings and the matter was adjourned to allow Mr Mabatha to arrange alternative representation. The Commissioner thereafter issued her contempt ruling which is now the subject of the present application.

[34] The Commissioner, in her ruling, stated that the Respondent, by his conduct, made it impossible for her to properly perform her duties and that the Respondent had absolutely no respect for her or her position and authority during the proceedings.

Evaluation

[35] The question is whether the conduct referred to in the respects set out above were of such a nature to justify the Commissioner's contempt findings. This requires a consideration of the sections of the LRA referred to above.

[36] In *National Bargaining Council for the Road Freight Industry v Myer 25 t/a Oakley Carriers*[2], Wallis AJ, expressed the following view (at 615 A – C):

> 'It is also appropriate to say that the discretion thus vested in the CCMA and bargaining councils is one which is to be exercised with caution and restraint. It was not the intention of the legislature to invest commissioners and designated agents with the status and dignity of courts of law. The legislature intended that commissioners and designated agents would deal daily with the public in relation to matters where strong feelings and impassioned senses of grievance or persecution may arise. They are expected to deal with these and behaviour consequent thereupon robustly, with patience and a measure of stoicism. The purpose of section 142(8) and (9) is to enable them to approach this Court for aid when the conduct in issue, be it failure to respond to a subpoena, a refusal to answer questions or disruptive behaviour, renders it

[2] [2000] 5 BLLR 604 (LC) at para 30.

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impossible for them to perform their statutory function. That is in my view the sole purpose of these provisions.'

[37] In *Bargaining Council for the Clothing Manufacturing Industry and another v Prinsloo*[3], the Court held that-

> 'Such appropriate order as the court may make in respect of contempt in terms of sections 142(8)(g) and (i) of the LRA must leave no doubt in the minds of the public, with whom the commission and bargaining councils are to deal, that these bodies, and their functionary commissioners and designated agents need to be treated with due respect. I believe I cannot otherwise but than state that if the courts find that a person has insulted, disparaged or belittled a commissioner, or if he has prejudiced or improperly influenced the proceedings of a commission, or improperly anticipated a commissioner's award, the kind of appropriate order this Court will make will as effectively as it could impose a sanction which would hopefully deter the perpetrating by other parties of such conduct.'

[38] The power of maintaining order during arbitration proceedings is, for obvious reasons, important, especially with a view of finalizing the case in question. It is indispensable to the administration of justice that Commissioners have control of the proceedings. Whilst different Commissioners would react or deal with the conduct of parties in different ways, the Commissioner in this matter was not, in her view, able to continue with the arbitration pursuant to the Respondent's conduct. This was the result of the manner in which the Commissioner experienced the Respondent's conduct towards her, Transnet's representative (Mr Chubana) and towards the witness who was testifying.

[39] On an objective assessment, the Respondent, on numerous occasions, interrupted Mr Chubana and the Commissioner and was disruptive and disrespectful to both. He refused to accept the Commissioner's authority on certain points or objections and embarked upon debates with the Commissioner that were either wholly unnecessary or without foundation. His manner in dealing with the Commissioner on the points referred to in the extracts above

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[3] [2007] 9 BLLR 825 (LC); (2007) 28 ILJ 1754 (LC) at 831.

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hampered progress and the record reflects the Respondent's impudence when interacting with the Commissioner and Transnet's representative during the proceedings.

[40] Like the CCMA, Bargaining Councils are dispute resolution bodies and are there for the sake of the public. The public must be able to have confidence in them and in the Commissioners who are appointed to preside over matters. Commissioners must be taken seriously in a civilized society and must be respected. They are servants of justice entrusted with ensuring the administration of justice in the forums they serve. Where a participant in an arbitration hearing demonstrates disrespect to the extent that it compromises the integrity of the process, it is an affront to the forum, the Commissioner and to those participating in the proceedings. The public's respect and confidence ultimately pertains to the administration of justice but they do so by having respect and confidence for the presiding Commissioners. If this confidence and respect is not preserved, it will have an unenviable and detrimental impact on the entire system.

[41] The Court in *Prinsloo supra* went on to state that -

> 'I can see no reason why commissioners or designated agents must not enjoy the appropriate level of respect from parties appearing before them or in their tribunals where they sit to determine disputes.
>
> …
>
> There must also be deterrence from transgressions. The gravity of the impact may be reflected in the sentence.'

Conclusion

[42] Section 142(10) provides that before making a decision in terms of subsection (11), the Labour Court "must" subpoena any person found in contempt to appear before it on a date determined by the Court. There was no need to subpoena the Respondent as he appeared in Court in person for the hearing of this matter and represented himself.

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[43] As mentioned, section 142(11) provides that the Labour Court may confirm, vary or set aside the finding of a Commissioner.

[44] In the premises, the following aspects of the Commissioner's contempt ruling are thus confirmed:

46.1 The Respondent was disrespectful, unduly frustrated the process and was obstructive;

46.2 The Respondent insulted and belittled the Commissioner;

46.3 The Respondent improperly influenced the proceedings rendering the Commissioner unable to continue with the arbitration.

[45] In addition, and having regard to sections 142(8)(f) – (i) the Respondent wilfully hindered the Commissioner in the performance of her functions, wilfully interrupted the proceedings, was disruptive, and in doing so prejudiced the proceedings and misbehaved in the manners referred to above.

[46] The Respondent's conduct constitutes misbehaviour as contemplated in section 142(8)(h) of the LRA. It is therefore important that the Respondent is reminded of the seriousness of his behaviour and of the importance of the integrity of bodies such as the Council and the CCMA, as well as the Commissioners who serve these bodies and whose integrity must be preserved through orders such as these.

[47] In *Prinsloo supra*, the Judge had the following to say:

> 'The CCMA and bargaining councils perform an essential service within the employment and labour relations arena. These institutions, the commissioners and the arbitrators fulfil their duties, sometimes under less than ideal circumstances. Their workloads are heavy. That they, at all times, need to perform their duties with the necessary decorum goes without saying. That they are to be respected is equally true. No doubt must be left in any person's mind that if he or she falls foul, particularly of the dictates of section 142(8)(g), (h) and (i) of the LRA by in any way conducting themselves by insulting, disparaging or belittling commissioners, or improperly anticipating a

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commissioner's award, or wilfully interrupting or misbehaving during conciliation or arbitration proceedings, or in any manner acting in contempt of the commission, they will be treated appropriately by being suspended from appearing in these forums, or by imposing fines and, in extreme cases by possibly being imprisoned.

The perception must not be allowed that to be in contempt of the commission or of bargaining councils, its commissioners or arbitrators, will not amount to a serious offence, which, where and when necessary, will be met with serious sanctions, including fines, and as I said, possible imprisonment.'

[48] I have considered an appropriate penalty to address the Respondent's conduct and I am of the view that the Respondent ought to be suspended from representing a party in a Bargaining Council or the CCMA. In the end, the penalty imposed must be commensurate to the misconduct complained of and I have exercised my discretion in this regard. Having considered the matter carefully, as well as the fact that the Respondent, during oral submissions, did not acknowledge any wrongdoing on his part and remained critical of the Commissioner, I believe that a 4 (four) month period of suspension is appropriate, which period shall run from the date of delivery of this judgment. This period of suspension takes into consideration that matters are unlikely to be set down between the latter part of December 2024 and the first week of January 2025.

[49] In so far as costs are concerned, bearing in mind the penalty imposed, I am disinclined to award costs against the Respondent.

[50] The order which I accordingly make is the following:

Order

1. The Respondent is suspended for a period of 4 (four) months from representing any party in the CCMA or at any Bargaining Council;

2. The suspension period in 1 above is to operate from the date of the delivery of this Order;

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3. There is no order as to costs.

L Dave

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate HM Viljoen

Instructed by: Bregman Moodley Inc.

For the Respondent: Mr Ephraim Mphahlele

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