IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case NO: C672/2015

In the matter between:

ANDRÉ WATSON **Applicant**

and

SOUTH AFRICAN RUGBY UNION ('SARU') **First Respondent**

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

JOSEPH WILSON THEE **Third Respondent**

Heard: **17 August 2016 (Cape Town) & 11 October 2016 (Johannesburg)**

Delivered: **30 June 2017**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

"Hockey players only know two languages – English and profanity!"[1]

[1] Whether the above jocular remark can be said to be descriptive of all other professional sports is debatable. It is accepted however that professional sports in general is competitive, emotional, intense, and obviously result

[1] *NHL Hockey Legend, Gordie Howe*

driven. Professional athletes' mantra is *"failure is not an option"*, whilst that of rugby fanatics is; *"Rugby is not just a sport, It's a way of life".* Within that context, it is not uncommon for failures or negative results on the sports field to be met with liberal and gratuitous use of obscenities by players, coaches, technical staff and spectators, as an expression of frustration, anger, or disappointment. Obviously, such a reaction is met disgust by all 'civilised' human beings.

[2] When it comes to the workplace however, the question to be addressed by the facts of this case is whether employees, who are charged with the administration of rugby in whatever capacity, are also at liberty to gratuitously use profanities when engaging with each other? To the extent that it was argued in this case that use of intemperate language was part and parcel of 'rugby culture', can its use by employees nevertheless be deemed to be incompatible with the environment of that 'culture'?

[3] The applicant, André Watson approached this court in terms of the provisions of section 145 of the Labour Relations Act (The LRA)[2] to review and set aside the award of the Third Respondent (Arbitrator), dated 27 June 2015, in terms of which he was dismissed from the employ of the First Respondent ("SARU"). The award was issued pursuant to an Inquiry in terms of the provisions of section 188A of the LRA. SARU opposed the review application.

Background:

[4] Watson was employed by SARU as a General Manager: Executive Head of Referees. He commenced his employment during November 1998 and reported to the CEO of SARU, Mr. Jurie Roux. As at the time of the arbitration proceedings, he was due to retire in five years' time. As per the Notice of Arbitration dated 13 March 2015, the following charges were levelled against him:

> *(1) "Grossly inappropriate and/ or unprofessional and/ or unbecoming behaviour and/ or abusive conduct:*

[2] *Labour Relations Act 66 of 1995*

(a) In the first instance, allegedly towards participants at the High-Performance Referees Camp, including the Referees, in and around November 2014 arising from the manner in which you addressed such participants, the language that you used and the attitude displayed towards them.

(b) In the second instance, when allegedly addressed Coaches and referees prior to the commencement of the Varsity Cup 2015 arising in the manner in which you addressed the Referees and Coaches, the language that you used and the attitude you displayed towards Cwengile Jadezweni.

*(c) In the third instance, when you allegedly uttered words following or similar effect to Mr Rasta Rashivenge- "I'll f**** you up…I will kill you if you turn your back on South Africa…I will destroy you as I am more powerful than you know" – on or about 28 August 2014 during discussions between two of you pertaining to contract negotiations.*

(2) As a consequence of the alleged conduct above and, in general, the manner in which you manage and/ or deal with Referees, a breakdown of your relationship with majority of Referees on the Elite and National Panel has allegedly arisen in that they are unwilling to work with you thereby leading to a situation of possible incompatibility on your part arising from such conduct.

(3) Your conduct as alleged has the potential to bring the name and reputation of SARU into disrepute."

[5] The charges emanate from an investigation initiated by SARU, following upon a grievance letter submitted to it during January 2015 by one of its employee Mr. Mark Lawrence, on behalf of a group of 24 employees within its Referees' Department. The grievance letter was sent to Roux, Mr. Hoskins (SARU President), and SARU's Human Resource Manager, Ms Ingrid Mangcu. A meeting called by management with the aim of resolving the said grievances led to matter being referred for investigations by Mr. Jeremy Chennells, an independent Labour Law and Management Consultant.

[6] The grievances by the members of the Referees' Department arose *inter alia* from Watson's alleged conduct at events hosted SARU. One was at the High-Performance Camp held between 27 and 29 November 2014. The event was attended by referees from the Referees' Department, female referees, and

rugby officials from Botswana, Zimbabwe, Namibia, Kenya and the USA. In this regard, it was alleged that during this open session, Watson spewed obscenities in reference to Selectors upon being asked a question the latter had not attended the event, by saying; "*f**** the Selectors"* and "*f**** their mothers"*.

[7] At another event held on 28 November 2014 (closed session of the Camp), it is alleged that he went on a foul-mouthed tirade when addressing referees, including telling them that; '*You are a bunch of f**** women'; 'you are a bunch of spoilt brats, you f**** women, you really are greedy and egocentric and nothing is good enough unless you f**** sign it'; 'I don't always have something to say to you, so why must I f**** call you?'; 'you f**** up'; 'you can't teach me at the age of 50 to change my f**** communication style and drop my tone of voice and change my 's' and 'I's' and spell 'vok' with an 'f' instead of a 'v'…."*

[8] Another incident complained of occurred at the Varsity Cup Tournament during January 2015. Watson gave a presentation to University Coaches and a number of Varsity Cup referees. It is alleged that Watson had humiliated one of the referees, Mr Cwengile Jadezweni, after a video footage of a previous rugby game officiated by the latter was screened. At the conclusion of the screening, Watson allegedly turned to Jadezweni in the presence of all attendees, and said, "*This is not the way to communicate on the field and we will not communicate like that".* Watson allegedly thereafter turned to Jadezweni and said; *'I hope you have learnt your lesson'*. Jadezweni is alleged to have been humiliated by this incident, especially after the other attendees turned around to look at him.

[9] Further allegations against Watson were that he used abusive and threatening language towards one of the referees, Mr Rasta Rashivenge, at a meeting held in SARU's offices. Rashivenge was one of the up and coming referees under Watson and his offence was to have designs to leave South Africa for Australia. Watson allegedly did not take this news well and had said to Rashivenge; "*I will f*** you up, I will kill you if you turn your back on South Africa, I will destroy you as I am more powerful than you know."*

[10] Chennells was also tasked with investigating further allegations that Watson's management style as the Head of the Referees Department was unprofessional; arrogant; demeaning; unapproachable; autocratic; and that he always used abusive and threatening language; had intimidated and pressured referees; that he was 'bombastic' and had 'lost the change-room'. Some of the referees also questioned his reasoning.

[11] The Chennells' investigation was conducted by interviewing all interested parties including the Watson. The recommendations issued on 22 February 2015 to SARU were *inter alia*:

a) "*a Disciplinary Hearing should be initiated, at which Andre Watson is called to answer the allegations at the High-Performance Referee Camp in November 2014, he was party to conduct which was grossly unprofessional, was abusive and insulting and which impugned the reputation of both management and SARU;*

b) *The Disciplinary Chairperson (as designated in (a) above) should additionally be tasked to assess whether Watson's overall management style and relationship with his subordinates, have accorded with the values of the organisation;*

…if Watson is deemed to have failed in this regard, the Chairperson should be mandated to assess whether in light of the relationship that presently exists in his department, the trust relationship between Watson and his subordinates has been damaged to such an extent that an ongoing employment relationship has been rendered untenable;

c) *An assessment should be made by the designated Chairperson as to whether Watson has the ability to continue to manage the department in the light of the polarization between himself and the other referees. This point of assessment is one of "incapacity" arising from Watson's possible incompatibility with his department going forward;*

d) *The assessment will require analysis whether Watson has both the inclination and capacity to alter his management style and to modify his interactions with his subordinates, in such a way that the trust relationship between himself and his subordinates can be restored;*

…This process might include consideration for the modification of Watson's role to minimise his managerial oversight, a structured intervention to guide and measure fundamental change on his part or termination of his service on grounds of incapacity and incompatibility;

e) *The allegation that Watson threatened to assault Rashivenge is most serious one and requires that it be tested in an appropriate forum;*

…The Disciplinary Hearing cited in (2) above, should additionally be tasked to call Andre Watson to answer the allegation that on 28th August 2014, he directed threatening and abusive and threatening statements to Rasta Rashivenge in flagrant breach of SARU Disciplinary Code.'

The section 188A of the LRA Inquiry:

[12] The parties had agreed to the section 188A of the LRA Inquiry on 16 March 2015, and had concluded a pre-Arbitration Minute on 15 April 2015. The inquiry was held over a period of 8 days commencing 9 April 2015 until 2 June 2015. The parties had also submitted written closing arguments.

[13] At the inquiry, SARU lead the evidence of six witnesses, being, Messrs Chennells, the investigator, and Marius Jonkers, Rashivenge, Jaco Peyper, Craig Joubert and Jadezweni, who were all referees. The evidence of Chennells was largely in regard to his investigation and report. He had confirmed the findings in his report, the remarks made by Watson, and the recordings he had relied upon which were made during the High-Performance Camp during November 2014.

[14] Chennells confirmed that from his investigations, most of the referees he had interviewed viewed the remarks made by Watson at the above-mentioned events as intimidation, and took offence to his use of crude language during camp. Some had even thought of resigning after the incident. Having also interviewed Watson, Chennells testified that the former had accepted the concerns raised by the other referees, and had at some stage, indicated his willingness to change his management style.

[15] Jonkers testified in regards to the incident at the High Performance Camp, and stated that Watson made the remarks attributed to him in the presence of South African referees and international visitors, including female participants. He testified that Watson often used swear words.

[16] Jonkers was not present when the incident between Watson and Rashivenge took place. Rashivenge had however called him after the incident and spoke to him in confidence, and told him that as a result of the incident with Watson, he could not continue his role with South African Rugby and that he was leaving. Jonkers further testified that he regarded Watson as his mentor, and that despite the incidents, their relationship was not affected. He further stated that Watson did not tolerate being challenged, and that his attitude was that it was either *'his way or the highway'.*

[17] Jonker also referred to an incident that took place during 2014 when he was driving from Cape Town to officiate a rugby match in Bloemfontein. He was accompanied by his wife and young children. He had then called Watson on a speaker phone whilst driving to ask him about the AMS System. Watson responded in expletives, including; *'Jy is te f**** groot vir jou skoene…. En as jy nie op die f**** AMS wil gaan dan is jy nie f***** voorbereid'*. When Jonker objected and told him that his family could hear the conversation, his response was*; 'dus jou f*** probleem'.* After that conversation, and whilst driving to the match, Jonker was informed by Lawrence that he had been replaced as a referee in the match he was going to. Jonker had to call Watson to apologise in order not to be removed from the game, and upon doing so, he was put back to officiate the match, and had continued with his trip to Bloemfontein. According to Jonker, the incident impacted on one of his young sons who thereafter refused to call Watson *"Oom Wattie'* as he used the '*f'* word.

[18] Rashivenge serves on both the local and international referees' panels. He gave evidence in regard to his meetings with Watson during August and September 2014 concerning contract renewals. He had raised the issue that he was concerned about Watson's attitude towards him, and wanted to establish whether he disliked him and whether it was racial. It was at that stage that Watson had responded by saying that he would *f**** him up and destroy him, and that he was powerful and destroy him if he turned his back on South Africa*. Rashivenge testified that be felt victimised and questioned whether other referees would be treated in the same manner, and had subsequently left for Australia. He further testified that during the China

Seven's Tournament, Watson apologised twice to him and that he gave him an embrace. He nevertheless did not see a future with Watson and that a relationship was not feasible. He reiterated that he no longer trusted Watson and had no respect for him after the incident.

[19] Peyper's testimony was to the effect that at the Referees' High-Performance Camp, he had led a presentation during the 'Open Session'. Some of the referees inquired about the absence of Selectors in that meeting, as they held the view that Selectors could benefit from the presentations, particularly since they were the ones that judged referees on line-outs and mauls. It was at that point when Watson said; "*f*** the selectors and f**** their mothers"*. One of the participant's (Q Immelman) father was known to be a Selector. Peyper had had taken an empty jar ('swearing jar'), placed it in front of him and said that; *'This is a swearing jar, R5.00 for anyone who swears for use in the bar later'.* Undeterred, Watson had then offered his credit card whenever a swear word was used.

[20] Peyper further stated that Watson continued using foul language for the duration of the meeting. He was of the opinion that Watson would not change and that he could not work with him again. He had confirmed that he had a private conversation with Watson regarding the incident and that the latter had acknowledged that he was wrong. Watson however did not apologise to the group.

[21] Joubert testified that Watson's management style was very threatening. He conceded that Watson was also supportive. He also had a conversation with Rashivenge towards the end of 2014, and the latter had confirmed that he was leaving South Africa for Australia, as he was threatened by Watson. He testified that he always felt that Mr Watson would not change, and that many referees were unhappy with him. He testified that Rashivenge was an honest person, and he had no reason to doubt his version in respect of the incident with Watson.

[22] Jadezweni testified regarding the incident which occurred during January 2015 at the commencement of the Varsity Cape Tournament after the presentation

and the showing of a recorded match he had officiated. He confirmed that remarks attributed to Watson, and testified that he was humiliated as an up and coming referee especially after the other referees in the meeting had turned around to look at him subsequent to Watson's comments. His view was that Watson's comments were not warranted.

[23] Watson testified, and had also called upon other referees, Messrs Oreogopotse Rametsi, and Rodney Boneparte, Ms Aletta Coetzee, an Office Support Adviser, Mr Jurie Roux the Chief Executive Officer, Mr Peirre Oelofse a Direct Line Manager to Mr Watson and Mr Steven Meintjies the Chairperson of South African Referees Association to testify on his behalf.

[24] Rametsi testified that he was present at the High-Performance Camp and that he did not hear Watson say; "*f**** the selectors and f**** their mothers",* and that he would have objected if he had heard him say so. He however confirmed that Watson used inappropriate language at the camp, and contended that the use of foul language was common, as Peyper had also used it before. He confirmed that Watson made the remarks attributed to him towards Jadezweni at the Varsity Cup, but did not believe that Jadezweni was humiliated. Under cross-examination, Rametsi's contention was that the words uttered by Watson did not affect people's dignity, and were not directed specifically at the coaches.

[25] Bonaparte confirmed that foul language was used by Watson and others at the High-Performance Camp. He however did not experience any threatening behaviour by Watson, and did not hear him utter the words "*f**** the selectors and f**** their mothers"*. His contention was also that had he heard those words, he would have objected.

[26] Aletta Coetzee used to report directly to Watson. She testified that she was present at the High-Performance Camp and did not recall hearing the foul language attributed to Watson. Had she done so, she would also have objected to its use. She could however recall that words such as *'up you'* and *'flippant'* were instead used regularly. Her contention was that Watson's management style was hard driven and result oriented, and that if foul

language was used, it must be contextualised and not personalised. Her approach was simply to ignore it.

[27] Watson in his testimony conceded that his conduct at the High-Performance Camp in the presence of external stakeholders could be interpreted as arrogant. He had admitted that he had said *'f**** the selectors'*. He denied however that he had also said *'f**** their mothers'*.

[28] He however did not deny the incident, and during the arbitration proceedings (as recorded by the Arbitrator), he had on various occasions during his testimony, apologised and indicated his willingness to change. He testified that since the initiation of the disciplinary processes he had taken the initiative to change his shortcomings. He testified that prior the process there was no indication of a break down in relationship between him and the other referees. He denied that the relationship between him and SAFU had irretrievably broken down, and that it could be mended if an opportunity was provided. He testified that he was not made aware of the issue of him being incompatible with other employees and that this was never reported to his line manager.

[29] Jurie Roux, is the SARU COO, and Watson reported to him. He testified that the use of foul language was unacceptable and needed to be addressed. He however declined to comment on whether the relationship between Watson and SARU had become incompatible.

[30] Pierre Oelofse was Watson's direct manager. He was also at the High-Performance camp and had heard Watson use the foul language attributed to him. He however denied that Watson had also said '*f**** their mothers'*. He further testified that Rasta Rashivenge was an 'honest and nice person', but was in the habit of fabricating stories.

[31] Steven Meintjies is the chairperson of the SA Referees Association. He confirmed that Watson used foul language including having said; *'we are a bunch of f**** women'*. He however testified that the language was directed towards referees and not at selectors, and that other participants equally used foul language. Despite conceding that Watson had used foul language towards selectors, he had no recollection of him saying '*f**** their mothers'*,

and that had he heard it, he would have intervened. He further blamed himself for allowing foul language to be used over a period of time, and testified that the practice of swearing had been prevalent throughout SARU since 1984 and there was a need for change. According to Mentjies, Watson was of the view that referees were not working as a unit and it was at that stage that he had labelled them spoilt brats. He held Watson in high esteem and as a person who had achieved objectives and had a participative management style, which was direct and open.

Award:

[32] Having considered and analysed the evidence of both parties and further having had regard to the issues he was called upon to determine, and the parties' arguments, the Arbitrator made the following conclusions:

32.1 Watson was guilty of the allegations under 1 (a) on the basis that the evidence presented by his witnesses in regards to the use of foul language at the High-Performance Camp was to be rejected, as it was highly improbable that Bonaparte and Coetzee could not have heard what was said, and that Mentjies' version was convenient as he alleged to have only heard a portion of what Watson had said. He observed that the witnesses wanted to defend an improbable version.

32.2 The version of Peyper was more probable, and Watson had made the remarks referred to at the Varsity Cup Tournament meeting, and he was therefore guilty of charge 1(a) as charged;

32.3 Watson was also guilty under charge 1 (b) as it was common cause that he had uttered the words attributed to him towards Jadezweni at the meeting with Varsity coaches and referees;

32.4 Watson was also guilty under 1 (c), and there was no reason to believe that Rashivenge would have fabricated his version to incriminate him falsely, especially in light of the good relationship they had;

32.5 Watson's conduct constituted incompatibility which warranted action, and in view of his position and high visibility in the public domain, the employment relationship could not be restored. Further having had regard for the institution, it would be difficult for SARU to continue a relationship with an employee who had shown no remorse, and the trust and confidence had broken down.

32.6 SARU had therefore discharged the onus placed on it to prove that Watson was guilty of the allegations and that the trust relationship was damaged and not repairable. He found that the accumulative effect of the allegations against Watson was sufficiently serious to terminate his services.

The review:

[33] The grounds of review on which the award was challenged as captured in the founding affidavit can be condensed as follows;

i. the Arbitrator failed to reach a decision, based on the balance of probabilities;

ii. the Arbitrator committed a gross irregularity and/or reached an unreasonable and/or unfair conclusion in that he failed to apply the accepted approach in order to determine factual disputes;

iii. the Arbitrator exceeded his powers in that he misconceived the nature of the inquiry before him and failed to appreciate that the case to have decided was whether the relationship between Watson and SARU had become incompatible and if so, what was the appropriate sanction thereto;

iv. the Arbitrator failed to appreciate that the question as to whether Watson's employment was rendered incompatible resorted under the

heading incapacity, and was to be dealt with in terms of the principles established in that regards.

v. the conclusion arrived at by the Arbitrator that the relationship between Watson and SARU could not be restored was not reasonable in that:

a. The management of SARU at no point in time testified that the trust relationship had broken down;

b. The management of SARU never testified that Watson's management style was incompatible with it;

c. No evidence was presented that, but for the intervention of Chennells and the formal disciplinary process, the grievances raised by relevant individuals would not have and could not be addressed;

d. The aforesaid evidence together with the evidence of Chennells to the effect that Watson had expressed a clear understanding for the difficulties experienced in relation to his management style ought to have led to a reasonable conclusion that at all relevant times during the grievance process, he had demonstrated the ability to appreciate the complaints of the relevant referees, but in addition thereto, demonstrated his willingness to address same;

e. The Commissioner ought to have considered the fact that Watson had a long service record with SARU and in addition thereto, he had a clean record;

[34] Watson's further contention was that the issue for determination was therefore whether the conduct detailed in the Notice of Arbitration and his conduct in general rendered him incompatible with the culture of environment at SARU[3]. It was further submitted that in order to dismiss him fairly on grounds of

[3] In reliance on *Jabari vs Telkom SA (PTY) LTD (2006) ILJ 184 LC;* and *National Union of Mineworkers & Another v Libanon Gold Mining Co Ltd (1994) 15 ILJ 585 LAC:*

incompatibility, SARU not only had to demonstrate the actual alleged incompatibility but also that the incompatibility persisted notwithstanding a fair process to address it, and that the allegations *per se* did not justify a conclusion that his employment with SARU was rendered incompatible without compliance with general principles for dismissal based on fair reason. He further supported this contention based on the fact that of the five referees called to testify against him at the arbitration proceedings, and only two indicated the unwillingness to work with him.

[35] It was further submitted on Watson's behalf that in the event the court found that the Arbitrator did not misconceive the nature of the inquiry and/ or did not misconceive the nature thereof to the extent to constitute a gross irregularity, his application of the principles pertaining to incapacity/incompatibility in the context of prevailing authorities nonetheless constituted a gross irregularity and rendered the award reviewable.

SARU's response and submissions:

[36] In opposing the review, SARU moved from the premise that the allegations of misconduct preferred against Watson were those listed in the Notice of Arbitration, being charges 1(a), 1(b), 1(c) and 3, and that it could not therefore be correct that the central issue for determination or material issue related to the allegation of incompatibility to the exclusion of other forms of misconduct alleged. In this regard, it was further submitted that;

i. The allegations of misconduct were not dependent on any finding that Watson was incompatible and such allegations were correctly dealt with in terms of the law applicable to misconduct cases.

ii. The allegation of a breakdown in the relationship between Watson and the Referees and the consequent incompatibility was only dependent on an adverse finding that Watson was guilty of misconduct, but was also dependent on adverse finding regarding the manner in which he had managed and/ or dealt with Referees on his Department and whether they were unwilling to work with him.

iii. The dismissal for incompatibility was classified as a form of incapacity if the employee concerned is not to blame for the misconduct that rendered him incompatible. In this case the evidence showed that Watson was to blame for the conduct that rendered him incompatible and such incompatibility was rightly and reasonably treated as a misconduct by both SARU and the Arbitrator.

iv. Watson's conduct was grossly unacceptable and had destroyed the working relationship. His conduct did not arise from incapacity but from misconduct.

[37] SARU relied on the Code of Good Practise: Dismissal to demonstrate that the Arbitrator followed the correct approach in terminating the employment relationship. It argued that the Arbitrator was alive to the nature of incompatibility which he had classified as misconduct, and that the rationale for dismissing an employee who is unable to work in harmony with his colleagues was the employer's right to expect its employees to conduct themselves in a manner that is acceptable to their colleagues. It was submitted that the contract of employment contained an implied term which stated that Watson would not act in a manner calculated to cause disharmony and a breakdown in the employment relationship.

Evaluation:

[38] The applicable test in review proceedings is that of a reasonable decision maker, which the Labour Appeal Court in *Fidelity Guard Cash Management Services v CCMA and Others*[4] reiterated in the following terms:

> 'If it is an award or decision that a reasonable decision-maker could not reach, then the decision or the award of the CCMA is unreasonable and, therefore reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or the award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration or decision of the commissioner is one that a reasonable decision would not reach but one that a reasonable decision maker could not reach.'

[4] *[2008] 3 BLLR 197 (LAC)* at para 97.

[39] In *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others)*[5], it was held that a review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at. In assessing whether the result of an award is unreasonable, the reviewing court should not adopt a piecemeal approach, and must further enquire whether;

> "…….. (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[6]

[40] In this case, I did not understand it to be Watson's case that the Arbitrator did not afford him an opportunity to have his full say in respect of the dispute. Having had regard to the award, I am also satisfied, contrary to Watson's contentions, that the Arbitrator correctly identified the dispute he was required to arbitrate, i.e., that the issue to be decided was whether he was guilty of the allegations levelled against him and if so, what would be the appropriate sanction.

[41] To the extent that it was argued that the Arbitrator had acted outside of his powers and thus committed a gross irregularity, it is not clear on what basis this allegation was made as there is nothing in the Arbitrator's analysis that indicates that he had exceeded his powers outside of his terms of reference as stipulated in the parties' pre-arbitration minute. The only issue is whether given the background of the issues, his terms of reference and the allegations made, he came to a reasonable conclusion.

[5] *[2014] 1 BLLR 20 (LAC)* at para 16
[6] At para 20

[42] The question of whether the Arbitrator went about the wrong way in considering the issues he was supposed to determine is different from whether he had considered those issues. Furthermore, to the extent that Watson insisted that the Arbitrator misconceived the nature of the enquiry, this can only be in relation to how the Arbitrator dealt with the issue of incompatibility arising from the misconduct as alleged. I will address the issue of incompatibility at some stage in this judgment.

[43] The Notice of Arbitration contains three main charges against Watson, viz, 1. 'Grossly inappropriate and/or unprofessional and/or unbecoming behaviour and/or abusive conduct' in respect of further allegations under (a); (b) and (c). Charge 2 flowed from the allegations made in charge 1 and its sub-charges, and pertains to whether the alleged conduct (if proven), led to a breakdown in his relationship with a majority of the referees, which lead to 'a situation of incompatibility on his part arising from his conduct'. Charge 3 also emanate from the other charges, and where proven, the issue was whether the alleged conduct had the potential to bring the name and reputation of SARU into disrepute.

[44] Aligned to the above were the Arbitrator's terms of reference as contained in the pre-arbitration minute, which required of him to decide;

24. Insofar as the Applicant admits to using "untoward" language in the context of the entire address to the Referees at the particular session in relations to allegation 1(a), what action, if any, should be taken against the employee?

25. Insofar as the Applicant does not admit the remainder of the allegations in 1(a) and the allegations 1(b), 1(c), 2 and 3:

25.1 Whether SARU has discharged the burden of proving such allegations or whether they should be dismissed?

25.2 Only in the event that SARU discharge the burden of proving all or any one of such allegations, what action, if any, should be taken against the Employee?

[45] The Arbitrator's starting point was to identify and acknowledge that he was faced with conflicting versions, which required the application of the principles

set out in *Stellenbosch Farmers Winery Group Ltd and Another v Martell & Kie SA and Others*[7]. He further took account of Schedule 8 of the Code of Good Practice and the guidelines set out therein, and the SARU's disciplinary Code and procedure, which governed the standard required of its employees in the workplace.

[46] In respect of the charge under 1 (a), the Arbitrator took account that Watson had conceded that he had said '*f**** the selectors'* during the open session. Watson had however denied having said *'f**** their mothers'*. A reading of the award indicates that the Arbitrator was alive to the principles applicable to the resolution of disputed facts and conflicting versions before him. In my view, and upon a proper consideration of the probabilities in respect of the conflicting versions proffered by Watson, Rametsi, Bonaparte and Coetzee as opposed to that of Peyper, the Arbitrator appropriately assessed the credibility and reliability of the witnesses, and made a finding that the version of the three ought to be rejected.

[47] In the light of the above, I fail to appreciate how the Arbitrator could have come to a different conclusion as to whether Watson had said *'f**** their mothers'* within the context of everything else he had said. It is equally improbable that Rametsi, Bonaparte and Coetzee could have heard anything else that Watson uttered but for '*f**** their mothers'*. Coetzee's version that people merely said *'flippant'* amongst other things within the context of Watson's concession was clearly even more improbable, and a lame attempt at sugar coating uncouth language. As the saying goes; *"You can put perfume on a pig but it's still a pig".* It is improbable that she could not have heard the profanities used by Watson when her other attitude was simply to ignore it.

[48] The Arbitrator's conclusions therefore that Peyper's version was more probable are unassailable, particularly within the context of the Watson's penchant and others to use foul language, and there is no merit in the contention that the yardstick applied by the Arbitrator in determining whether Watson's witnesses' evidence was probable or not was not equally applied to the evidence of Peyper.

[7] *2003 (1) SA 11 (SCA)*

[49] The submissions made on behalf of Watson that the foul language, and in reference to *'f**** the selectors'* was used within the context of indicating to the referees that they should referee what they see and not to impress the Selectors is clearly without merit and again, a lame attempt at justifying the use of foul language. The fact that Watson had conceded that he had said *'f**** the selectors'* speaks volumes of his and witnesses' denials. Even if there was any iota of truth in his contentions, the fact that he did not say *'f*** their mothers*' does not make his other part of the foul language less profound given the context within which it was said and the audience it was directed at.

[50] Charge 1 (b) pertained to whether Watson had humiliated Jadezweni following the screening of a previous match he had officiated in. The Arbitrator accepted it as being common cause that Watson had said the words attributed to him, and the only issue was whether these were offensive and harmful. Watson takes issue with the Arbitrator's conclusions in this regard, and contended that the incident was not specifically meant to humiliate Jadezweni; that the evidence led did not indicate that the utterances were abusive or factually wrong, and that any embarrassment felt by Jadezweni was as a result of his own subjective response.

[51] Having had regard to the Arbitrator's conclusions in this regard, the only basis the Arbitrator came to the finding that Watson was guilty under charge 1 (b), was that it was common cause that he had uttered the words attributed to him in respect of Jadezwane. The Arbitrator had merely stated that he would deal with this issue as part of his overall conclusion, but there is nothing in those conclusions that indicate that he did so. As to how much weight the Arbitrator was supposed to attach to the context in which the remarks were made and the effect thereof is neither here nor there, as Jadezweni's subjective reaction to those remarks prevailed in the absence of any evidence to suggest that the reaction was unwarranted or exaggerated.

[52] In respect of charge 1(c), the Arbitrator appreciated that he was confronted with two conflicting versions in regard to what Watson had said to Rashivenga. It was argued on behalf of Watson that he had persistently denied having uttered threatening and abusive comments to Rashivenge in their meeting on

28 August 2014, and that the latter's reaction was initially that he had viewed those comments as 'racial' as he was of the view that his other colleagues would not be treated in that manner. It was further submitted that the Arbitrator failed to and/or unreasonably failed to resolve the factual dispute in that regard, as it was apparent that Rashivenge had other reasons for leaving South Africa, and had already made plans to leave prior to the alleged incident due to his belief that the 'system' had failed him in view of issues surrounding his contract. It was further argued that in any event, the complaint by Rashivenge never formed part of the Chennells' investigations, and other than these issues, subsequent e-mails between Rashivenge and Watson indicated that the two had made peace, inclusive of the two having embraced and made peace at the China Tournament.

[53] It was correctly pointed out on behalf of SARU that the fact that Watson had initially denied the allegation and had thereafter stated that he could have said the words attributed to him but in a jocular fashion made his version improbable and unreliable, and further cast aspersions on his credibility. The Arbitrator had followed this reasoning, and found that to the extent that Watson had conceded that he might have uttered the words in question to Rashivenge but in a jocular fashion, it was more than probable that Watson had uttered the words in question.

[54] The Arbitrator based his reasoning on the fact that Watson may have been displeased with Rashivenge's intentions to leave for Australia, in that as a person of colour, he was deemed to be a referee with great potential. The Arbitrator concluded that Watson had made the remarks without realising its consequences, and there was no reason to believe that Rashivenge could fabricate his version and incriminate Watson falsely since the two had a good relationship. In the light of Watson's previous instances of making inappropriate remarks, the Arbitrator's conclusions that he was guilty of having uttered the words in in question my view cannot be faulted. It was common cause that Rashivenge had confided in Jonker and Joubert after the incident, and notwithstanding Oelofse's contention that Rashivenge was in the habit of fabricating stories, there was no basis for the Arbitrator to have come to that

conclusion. As to whether the remarks made towards Rashivenge were threatening was an issue the Arbitrator failed to deal with. On the whole however, in respect of the Arbitrator's findings in this regard, there is no basis to conclude that these were not reasonable.

[55] In the light of the above, I am satisfied that the Arbitrator in finding Watson guilty of the charges levelled against him by SARU had dealt with the enquiry set out in the pre-arbitration minute, which was to establish whether SARU had discharged the burden of proving the allegations. Furthermore, there can be no doubt that the conduct complained of, especially in regard to the events at both the open and closed sessions of the High Performance Camp should be viewed as grossly inappropriate, unprofessional and unbecoming. Even if the spewing of obscenities was part of 'rugby culture' as alleged by Watson, the nature of the crude language used by him in the presence of foreign quests was inexcusable, and the consequences thereof, without the need for any other evidence, was to bring SARU's name into disrepute, bearing in mind that the event was hosted by it.

[56] Charge 2 pertained to whether the conduct complained of led to a breakdown of Watson's relationship with the referees to the extent that they were no longer willing to work with him. The second leg of the charge was whether the conduct complained of had led to a possible incompatibility on Watson's part. As correctly pointed out on behalf of SARU, the issue of the breakdown of the relationship with the referees and resultant alleged incompatibility cannot be viewed in isolation from the allegations of misconduct as already dealt with. As shall further be illustrated below, there is a fine line between incompatibility and misconduct.

[57] It was submitted on behalf of Watson that the Arbitrator's conclusions in this regard were not reasonable, and that he had committed a gross irregularity specifically since he had misconceived the nature of the enquiry. To the extent that it was argued on behalf of Watson that the award was reviewable on account of the alleged gross irregularity, it is trite that gross irregularity should

concern the conduct of the proceedings rather than the merits of the decision[8], and further that a gross irregularity is also committed when a decision-maker misconceives his/her mandate or his/her duties in conducting the enquiry[9].

[58] As already stated, I did not understand it to be Watson's case that he did not get a fair hearing, and any allegation of irregularity on the part of the Arbitrator is not about the conduct of the proceedings but rather the manner with which he had undertaken the enquiry in respect of the issue he was required to determine, and more particularly, the issue surrounding incompatibility as opposed to ordinary misconduct.

[59] In dealing with the questions surrounding the alleged breakdown of relationships and incompatibility, the Arbitrator did so within the context of considering the appropriate sanction. In my view, this approach cannot be faulted in that if it were to be found that there was indeed a breakdown in relationships between Watson and the referees, and which had led to

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[8] *Herholdt v Nedbank Limited (COSATU as Amicus Curiae) 2013 (6) SA 224 (SCA)* at para 10.

[9] See *Head of the Department of Education v Mofokeng and Others [2015] 1 BLLR 50 (LAC)* at paragraphs 30 – 33 where Murphy AJA held that;

> "[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in Herholdt v Nedbank Ltd and this court in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

And,

> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

incompatibility, it would then have been within that context that the Arbitrator had to determine the appropriate action to be taken in accordance with paragraph 25.2 of the pre-arbitration minute.

[60] As per the Notice of Arbitration, the allegation of a breakdown of relationship was in reference to the Elite and National Panel referees, and not between Watson and SARU. It is accepted that where it is found that fellow employees can no longer have a trust relationship with each other, this can also impact on the employment relationship between the concerned employee and the employer. However, for the purposes of the enquiry before the Arbitrator, and from the notice of arbitration itself, the focus of the trust relationship was between Watson and the referees. In this regard, the Arbitrator in arriving at his conclusions took account of the following factors;

i. the allegations made in the grievance by the *'twenty-three people who allegedly attested to Watson's alleged dictatorial and bombastic management style'*.;

ii. Watson's communication style which was described as arrogant, demeaning; threatening and abusive, and which had alienated him from the referees;

iii. The fact that Rashivenge was not prepared to come back to South Africa whilst Watson was still in charge;

iv. the allegation that Watson had lost the changing room

v. Some of the referees wanted to resign after the Rugby World Cup if Watson was still in charge

[61] It was submitted on behalf of Watson that of the five referees called upon by SARU to testify, only Jonker and Rashivenge indicated that they were not willing to work with him, and even then, Rashivenge's motivation for his expressions was subject to scrutiny. It was however submitted on behalf of Watson that the Arbitrator acted unreasonably by simply relying too much on the Chennells' report in respect of the other allegations against Watson.

[62] The Chennells' report or recommendations formed part of the documentary evidence before the Arbitrator. It is accepted that not all 24 referees would have been expected to testify in the proceedings, and the issue therefore is what weight was the Arbitrator to attach to the allegations made before Chennells and the findings made, to the extent that it was alleged that most referees did not want to work with Watson.

[63] In *Impala Platinum Limited v Zirk Bernardus Jansen & Others*[10], it was confirmed that it is not correct that an employer must always lead evidence to establish a breakdown in the trust relationship in order for a sanction of dismissal to be appropriate. It was held that it must be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal is the appropriate sanction[11]. Furthermore, it has been held that the breakdown of the trust relationship is not solely dependent on what the employer says, and that irrespective of the employers' testimony in this regard, the Commissioner is still enjoined to enquire whether that is indeed so[12].

[64] In my view, and to the extent that the allegations of misconduct/incompatibility in this case were made by other employees, I can see no reason why the above principle should not be applicable as between employees. Thus, the issue therefore is whether to the extent that the complaints as consolidated in the grievance letter, and as further established by the Arbitrator to have merit, were of such a nature that it could be implied that the relationship between Watson and the Elite and Panel Referees had broken down, leading to incompatibility.

[65] The overall evidence, or more specifically as led by Peyper, Joubert, Jonker and Rashivenge points Watson as having a propensity to gratuitously use obscenities whenever dealing with the referees whether in formal gatherings or as individuals. The events at the open and closed sessions in November 2014 at the High-Performance Camp points in that direction. Jonker's

[10] *(JA100/14)*
[11] at para 15
[12] *Barloworld Logistics v Ledwaba NO (JA119/14) [2016] ZALAC 17 (11 May 2016)* at para 20

experience in that regard especially as it happened in the presence of his family further bears testimony to Watson's disregard for anything civil whenever talking to the referees. Furthermore, the fact as attested to by Jonker that Watson could remove referees from matches at a whim is indicative of his management style, which it can safely be said confirms allegations of a dictatorship and abuse of authority. Rashivenge was in any event reminded by Watson of how powerful he was. I am therefore prepared to accept that overall, and without the necessity of testimony of all the referees, Watson's management style can be said to not only result driven and robust as alleged by Coetzee, but also vulgar, autocratic, demeaning, unprofessional and to some extent abusive.

[66] As to whether the above conclusions can be said to point to an environment of incompatibility (the second leg of the enquiry under charge 2) and whether a dismissal was appropriate in the circumstances must be examined within the context of principles applicable where incompatibility is alleged.

[67] It was argued on behalf of SARU that a dismissal for incompatibility is classified as a form of incapacity if the employee concerned is not to blame for the conduct that renders him incompatible. It was further argued that a dismissal for the same issue will be classified as a form of dismissal for misconduct, if the employee concerned is to blame for the conduct that renders him incompatible. In this regard, it was argued that this should be the case where the conduct is grossly unacceptable and it destroys the working relationship[13]. To this end, it was further argued that since Watson was to blame for the conduct that rendered him incompatible, such incompatibility was correctly dealt both by SARU and the Arbitrator as a form of misconduct deserving a dismissal.

[68] Watson's main contention was that the Arbitrator failed to appreciate that the material issue that had to be determined was whether the question his employment was rendered incompatible resorted under the heading of 'incapacity,' and that it was to be dealt with in terms of the principles established in that regard.

[13] In reference to Grogan, Dismissal, Second Edition, 2014 at Page 533

[69] Incompatibility arises from a particular set of facts and cannot be viewed in isolation. As pointed out on behalf of SARU, it cannot be correct that the issue for determination or the material issue, related to the allegations of incompatibility to the exclusion of misconduct proven. In my view, whether incompatibility is to be treated as a form of misconduct or incapacity or both needs to be determined within the framework of what that concept entails.

[70] In terms of section 188 of the LRA, the dismissal of an employee is unfair unless the employer can show that the reason for such a dismissal was related to the employee's conduct, incapacity or the employer's operational considerations. Each of these requires a particular procedure to be followed before a dismissal can be deemed to be justified.

[71] The LRA does not make provision for the concept of incompatibility, nor does it define incapacity. It is thus left to the Courts and dispute resolution fora upon a consideration of the facts of each case, to determine where this species of conduct falls in, to the extent that it has been recognised as a valid ground for dismissal. The danger however is that incompatibility is invariably about human behavioural traits, and it is always going to be impossible to pigeonhole any specific conduct as either incompatibility, misconduct or incapacity without a proper consideration of the facts of each case.

[72] Various meanings have been ascribed to incompatibility within the context of the workplace. It can refer to an employee's inability to maintain a harmonious relationship with his / her colleagues, or when the employee is unable to adapt to the company's 'corporate culture', which in my understanding refers to norms and standards as shall be set and implemented by the employer.

[73] The essence of incompatibility has been seen to be an irremediable breakdown in the working relationship caused through personality differences, an inability to work together in harmony, friction between employees, a discordance in approaches and the like[14]. This obviously must be

[14] *Jabari vs Telkom SA (Pty) Ltd 2006 10 BLLR 924*; *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 *ILJ* 422 (IC)); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others (JR1894/2011) [2014] ZALCJHB 414 (27 October 2014)* at para 70; *Jardine vs Tongaat Hulett Sugar Limited (2002, 23 ILJ 547)*

distinguished from innocuous, mild or harmless eccentricity or exhibitionism, which might cause irritation, annoyance, unease or minor discomfort to other employees or management[15].

[74] The rationale for the dismissal of employees accused of causing disharmony is the right of an employer to expect its employees to adapt and adhere to a certain set of norms and standards, and to conduct themselves in a manner harmonious and acceptable to everyone in the workplace. Thus, a dismissal would be considered fair if the ultimate results of that incompatibility is to irretrievably break down relationships in the workplace[16].

[75] The onus is on the employer alleging incompatibility to demonstrate that the employee in question was responsible substantially for the disharmony or breakdown of relationships at the workplace, and that incompatibility as proven constituted a fair reason for the dismissal in the circumstances of a given case. The fairness of the dismissal in incompatibility cases, turns on a variety of factors including but not limited to:

i. the nature and the seriousness of the conduct of the employee in causing disharmony with the others;

ii. the assistance given to the employee to address his or her problem. This may include counselling and facilitating a relationship building by objective exercise.

iii. placing the employee in another alternative position if the remedial action has failed.[17]

[76] I subscribe to the view that incompatibility should be deemed as a species of incapacity[18], as it signifies a situation where co-workers find it unbearable to tolerate another employee's behaviour, demeanour and general personality, thus negatively affecting work performance of both the employee concerned and that of his co-workers.

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[15] *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd (1993) 14 ILJ 227 (IC) At par E-J:*
[16] *Wright v St Mary's Hospital (1992) 13 ILJ 987 (IC)*
[17] *Mgijima* at para 71
[18] See *Le Roux and van Niekerk in The South African Law of Unfair Dismissal* (1994) at 285-6; *Jabari v Telkom SA (PTY) LTD (2006) 27 ILJ 1854 LC*

[77] However, the mere fact that an employee's behaviour or conduct has been deemed incompatible does not necessarily imply that such an employee should immediately be dismissed, as the employer is required to seek ways and means of reversing the incompatibility complained of. If the employee is believed to be the cause of the problem, he/she has the right to be advised that there is a problem, and be given a chance to resolve it, as a dismissal is always considered a measure of last resort. Thus prior to reaching a decision to dismiss, the employer must make some sensible, practical and genuine efforts to effect an improvement in interpersonal relationships with a view of correcting the incompatibility complained of[19]. This is in line with the constitutional right to fair labour practice, as further finding expression under the provisions of sections 185 and 188 of the LRA, and further in line with Item 10 of Schedule 8, Code of Good Practice: Dismissal.

[78] It further follows from the above principles that the employer's own strong feelings about incompatibility or the feelings of the fellow employees, are on their own not sufficient. This is so in that Courts should guard against instances where both employers and employees make allegations of incompatibility against another employee for spurious if not malicious reasons. A workplace brings together people with different personalities, cultures, characteristics and the like. It is a powder keg waiting to explode because of personality clashes and other differences amongst employees that have nothing to do with work. It is therefore not uncommon for co-employees to dislike each other for a variety of reasons other than those based on work performance, and to use an excuse of incompatibility as a way of getting rid of that employee.

[79] To the extent that it was argued on behalf of SARU that the circumstances of this case should be treated as a form of misconduct since Watson was to blame for the conduct that rendered him incompatible, it is again emphasised that there is a fine line between instances of incompatibility and ordinary misconduct. In my view, and further in line with the principles set out above, the starting point is to treat any allegation of incompatibility as a case of

[19] *Lubke v Protective Packaging (Pty) Ltd (1994) 15 ILJ 422 (IC)* at 429D-E; *Hapwood v Spanjaard Ltd [1996] 2 BLLR 187 (IC)* at 196-7.

incapacity. It is only once measures put in place to address and reverse the incompatibility complained of have failed that it can be treated as misconduct. Thus, once those measures, accompanied by set norms and standards have failed to yield results, and the employee continues with his or her errant ways, nothing prevents an employer from dealing with that employees' subsequent behaviour as misconduct. In this case therefore, the onus was on SARU to demonstrate that it had taken every possible means to address the conduct of Watson, and that these measures had not yielded any result.

[80] The above conclusions in regard to conduct classified as incompatibility should however be distinguished from conduct that would ordinarily be classified as misconduct, even if such conduct takes place within the overall context of incompatibility. In this regard, it is acknowledged that there can be a single incident which signifies an overlap between incompatibility and ordinary misconduct, that would require a different approach, or in the alternative, some conduct even if viewed as eccentric might be downright misconduct rather than incompatibility. The facts of each case will obviously be determinative.

[81] In this case for instance, and particularly in respect of charge 1 (c), the allegation was that Watson had said to Rashivenge; *"I will f**** you up… I will kill you if you turn your back on South Africa…… I will destroy you…."*. The profanities, as argued on behalf of Watson may form part of incompatibility, and are distinguishable from the threats of violence made within the same context, which would ordinarily be construed as misconduct. I however hold the view that the threats of violence made with the profanities is indicative of the gross nature of the misconduct, and it would nonsensical to distinguish incompatibility from misconduct in that context. I will revert to this point at a later stage in this judgment.

[82] For the purposes of a determination of the issue surrounding incompatibility however, I accept without reservation that Watson's general demeanour in dealing with the referees was unprofessional, uncouth and bordered on the despicable as demonstrated by the events at the High-Performance Camp and as further attested to by Jonker. There can therefore be no doubt as

demonstrated through the grievance submitted by the referees that Watson's conduct had clearly led to a point of incompatibility, where it had become untenable for other referees to work with him.

[83] There are however concerns with the manner with which the Arbitrator dealt with the issue of incompatibility in this case. In arriving at the conclusion that a dismissal was the appropriate, the Arbitrator took account of the guidelines stipulated in *Sidumo & others v Rustenberg Platinum Mines Ltd & Others*[20] and the fact that SARU had a Disciplinary Code and Procedure which provided for progressive disciplinary measures in cases related to misconduct. The arbitrator further considered the fact Watson had long service with no disciplinary record, and the fact that he had made immense contribution to referees' department as also attested to by witnesses who had testified against him. The Arbitrator was not persuaded by these factors, and held that even if other individuals were guilty of the same conduct, this was immaterial as Watson was a senior employee and the 'buck stopped with him'. The Arbitrator's view was further that Watson was incapable of changing, and that he had not shown any genuine remorse nor had he apologised to those he had offended.

[84] Significant with the Arbitrator' conclusion was that he had regard to the essence of the concept of incompatibility, and acknowledged that an employer must make sensible and practical means to improve interpersonal relations. Inexplicably however, the Arbitrator concluded that; *'In the above circumstances with the challenges faced by SA Rugby I am not convinced that the latter is achievable. I have particularly considered the position that Watson held and his high visibility in public domain'.* It is not apparent from these conclusions as to what *'circumstances'* the Arbitrator was referring to. Furthermore, Watson's *public profile*, could not for all intents and purposes, have trumped his right to a due process to the extent that the conduct in question was viewed as incompatibility. As correctly pointed out on his behalf, it was at that point that Arbitrator misconceived the nature of the enquiry or undertook the enquiry in the wrong manner. It is trite that once this happens,

[20] *(2007) 28 ILJ 2405 (CC)* at para 75-79 and 179 -183

the conclusions reached by the Arbitrator cannot by all accounts be reasonable.

[85] The Arbitrator, despite acknowledging the fact that prior to dismissing on account of incompatibility, SARU was obliged to put measures in place to rectify the incompatibility complained of, nevertheless failed to consider that this was not done. His conclusions that any measures in that regard would not have yielded any results in view of *'the challenges faced by SARU'* are not in my view reasonable.

[86] It was common cause that until at a point when the referees lodged a grievance, SARU had not been made aware, at least officially, that there was a problem with Watson's conduct. A second factor which the Arbitrator overlooked was that the Chennells' investigation merely resulted with a report and recommendations. Significant with these recommendations were the following;

> *'An assessment should be made by the designated Chairperson as to whether Watson has the ability to continue to manage the department in the light of the polarization between himself and the other referees. This point of assessment is one of "incapacity" arising from Watson's possible incompatibility with his department going forward;*
>
> *The assessment will require analysis whether Watson has both the inclination and capacity to alter his management style and to modify his interactions with his subordinates, in such a way that the trust relationship between himself and his subordinates can be restored;*
>
> *…This process might include consideration for the modification of Watson's role to minimise his managerial oversight, a structured intervention to guide and measure fundamental change on his part or termination of his service on grounds of incapacity and incompatibility;'*

[87] In the light of the above, it follows that the sanction of dismissal was not the only option available to the Arbitrator. To the extent that it was recommended that any measures were to be taken, it was for the Arbitrator to first determine whether, in the light of SARU's own disciplinary code and procedure, measures had been taken to correct the behaviour complained of, and whether Watson had responded positively to those measures or not. It was therefore not reasonable for the Arbitrator to conclude that Watson was

incapable of changing when he had not been afforded an opportunity to do so. This view is further fortified by the following considerations;

i. There can be no doubt that given Watson's personality and conduct over the years, SARU had condoned it, whether wittingly or inadvertently;

ii. Until the arbitration proceedings, SARU had not expressed its discontentment with Watson's conduct, and had not at all raised any trust issues with him.

iii. SARU's CEO, Roux, had declined to commit himself when asked whether the relationship with Watson had become incompatible. Oelofse, the Head of Performance Review, equally failed to give evidence as to whether the relationship between with Watson had broken down. For SARU therefore to suddenly allege that a trust relationship between it and Watson was broken as a consequence of the grievance lodged was disingenuous and opportunistic, even moreso since the grievance was lodged in January 2015 when the main incidents complained of took place in November 2014;

iv. Uncontroverted evidence indicated that the use of uncouth language was not uncommon within SARU circles, including by senior officials. For SARU to contend otherwise is equally disingenuous.

v. The submission made on behalf of Watson however that rugby is a *'brutal, confrontational, competitive and macho*' sport, hence its environment permitted the use of such language is devoid of any truth. The gratuitous use profanities cannot by any stretch of imagination be part of any corporate or sports culture. It is accepted that sportspeople are not saints who have been cocooned from the vulgarities of the game. They are entitled to express their frustrations and disappointments when things do not go their way on or off the sports field. However, in doing so, there is no justification for them to behave like veritable barbarians and be uncivilized and obnoxious at any given opportunity. There is indeed a limit to how much obscenities the ear can take, irrespective of any context or environment. Professional sportspeople in general are

ordinarily regarded as role models, especially to young people. I do not think being vulgar and obscene makes one a better role model. I am therefore in agreement with the Arbitrator's observation that Watson as a leader should have set a better example, irrespective of whether foul language was liberally used within SARU circles or not. He did not have to be uncouth to be a good manager.

vi. The Chennells' report indicated that Watson had acknowledged, *albeit* grudgingly, that he needed to change his ways. This however was not a basis upon which to reject any prospects of him changing his ways, as he needed to be afforded that opportunity in any event. This is so in that the report and the arbitration proceedings was the first opportunity for SARU to appreciate the magnitude of the problem the referees had with Watson. Significant with the Chennells' investigations and the arbitration proceedings was that Watson had consistently, or at least repeatedly, shown contrition and a willingness to atone for his behaviour. The Arbitrator acknowledged this fact, but however concluded that the show of contrition was belated on the basis that he *'got the impression that he did not realise the seriousness of the allegations against him*'. In coming to that conclusion, the Arbitrator had regard to the statement made by Watson outside of the arbitration proceedings to the effect that; *'you can't teach me at the age of 50 to change my communication style'*. The reliance on this statement in my view was misplaced and amount to nick-picking. That statement arose from part of the grievances lodged against Watson, and was part of the overall allegation of incompatibility before Chennells. It could therefore not have been indicative of his alleged unwillingness to change subsequent to the investigations or the arbitration proceedings. Thus, there was no basis for the Arbitrator to conclude that any remedial action would not have had any effect, when no such action had not been taken.

vii. The Arbitrator in coming to his conclusions was further to be guided by paragraph 25.2 of the parties' pre-arbitration minutes, which provided that; *'Only in the event that SARU had discharged the burden of proving*

all or any one of such allegation, what action, if any, should be taken against the Employee?' Thus, to the extent that it was established that Watson was guilty of conduct under charges 1 (a); 1 (b) and 1 (c), the Arbitrator was therefore required to first assess whether there was a breakdown in the relationship between Watson and the referees, and thereafter to assess whether there was incompatibility. Having found that there was indeed a breakdown in the relationship which had led to incompatibility, various options were then available to the Arbitrator in view of the nature of the proceedings. Thus, in line with the principles and views set out above in respect of the issue of incompatibility, and the Arbitrator's powers under both section 138 (9) of the LRA, the terms of reference, and the Chennells' recommendations, it was open to him to rule as to what action, if any may be taken against the employee. Those powers in my view were not however limited to a sanction of a dismissal, and the finding of the Arbitrator in the light of the above considerations cannot be deemed to be reasonable.

[88] It has already been stated that the issue of incompatibility ought to be distinguished from that of ordinary misconduct, and to a large extent, the Arbitrator failed to deal with that distinction in concluding that the dismissal was appropriate, and essentially conflated these issues. In my view, and in accordance with the Chennells' recommendations, the remarks made to Rashivenge within the context of the threats were indeed serious, and the Arbitrator had found Watson guilty of the conduct in question.

[89] The issue however is whether the Arbitrator should have decided on a dismissal in that regard. I hold the view that a dismissal for this offence was not the appropriate sanction, moreso since the Arbitrator had conflated the issues for determination. The only issue emanating from his reasoning pertaining to the incident with Rashivenge was that he was no longer prepared to come back to South Africa because of that incident. At the same time however, I am prepared to accept that the incident arose out of Rashivenge's anxieties about his contract, and at the time, the evidence as gathered by Chennells was that Rashivenge had in any event, made an

informed decision to leave for Australia. Other than that issue, not much is stated by the Arbitrator as to the reason that incident on its own was deserving of the ultimate penalty, other than that it was taken into account in the overall consideration of the allegations. In my view, a lesser penalty would have sufficed, given other factors to be taken into account when considering such a sanction.

Conclusions:

[90] Having considered this matter and the conclusions reached throughout this judgment, I am of the view that the award of the Arbitrator ought to be set aside on the basis that the conclusions reached therein do not fall within a band of reasonableness, particularly in regards to the issue surrounding incompatibility. I am further satisfied that even if Watson was properly found guilty on the charge pertaining to the incident with Rashivenge, the Arbitrator's decision to impose a sanction was not one that a reasonable decision maker could have made in the light of the entire evidence before him.

[91] This then brings me to the question of relief. Watson seeks an order substituting the award of the Arbitrator with an order retrospectively reinstating him with back-pay. Since I hold the view that the circumstances of this case permit an order of reinstatement, I am however not convinced that such an order should be with full back-pay for a variety of reasons. These are that Watson had not approached the arbitration proceedings with clean hands. This is gleaned from the correct findings made by the Arbitrator on the question of guilt in respect of the charges, and my conclusions in respect of charge 3 that indeed Watson's conduct at the open session at the High-Performance Centre camp in November 2014 brought the name and reputation of SARU into disrepute. It is further considered that during the arbitration proceedings, Watson, as duly and ably assisted by his witnesses, had sought to deny the obvious, thus necessitating a protracted inquiry. In the light of these and other considerations as already dealt with in this judgment, it is deemed appropriate to order Watson's reinstatement but with limited back-pay, coupled with a sanction in respect of the Rashivenge's incident.

[92] I have further had regard to considerations of law and fairness regarding the issue of costs, and I am satisfied that in the light of the conclusions reached on the merits, each party must carry its own costs.

Order:

[93] Accordingly, the following order is made;

1. The Arbitration award dated 27 June 2015 issued by the Third Respondent under case number WECT 4145-15 is reviewed, set-aside and substituted with the following order;

   (a) 'Andrew Watson is found guilty under charges 1 (a), 1 (b) and 1 (c); and 3 as stipulated in the Notice of Arbitration

   (b) Andrew Watson is to be issued with a Final Written Warning in respect of the guilt finding under charges 1(c) and 3'

2. The First Respondent is ordered to reinstate Watson in its employ, on the same terms and conditions as applicable to his employment prior to his dismissal.

3. The reinstatement order as above shall operate with retrospective effect.

4. Back-pay due and payable to Watson as a result of the order of retrospective reinstatement as above shall be limited to six months' salary, at the rate of his pay as applicable as at 27 June 2015.

5. Each party is to pay its own costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. C. Goosen
Instructed by:	Van Velden – Duffey Inc
For the First Respondent:	Mr. I Gwauza of Edward Nathan Sonnenbergs