



IN THE LABOUR APPEAL OF COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: CA05/21

In the matter between:

MASSCASH (PTY) LTD T/A JUMBO CASH

AND CARRY

Appellant

and

THOZAMA G MTSOTSOYI

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER MADELEINE LOYSON

N. O

Third Respondent

Heard: 1 September 2022

Delivered: 31 October 2022

Coram: Sutherland and Coppin JJA et Kathee-Setiloane AJA

Summary: arbitrator's decision, that failure by employee to carry out a repeated instruction over a period spanning 6 weeks constituted gross insubordination and warranted dismissal, was reasonable on the evidence. Appeal against Labour Court's decision setting aside arbitrator's award upheld.

JUDGMENT

KATHREE-SETILOANE AJA:

- [1] The appellant, Masscash (Pty) Ltd t/a Jumbo Cash and Carry (employer) appeals against the judgment and order of the Labour Court (Rabkin-Naicker J) in which it reviewed and set aside the arbitration award of the third respondent made under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) and substituted it with an order that the second respondent, Mr T Mtsotsoyi (Mr Mtsotsoyi) be retrospectively reinstated.

Background

- [2] The Mr Mtsotsoyi was employed by Masscash as a sales representative on 10 October 2016. Just a little over two years later, on 29 October 2018, he was dismissed for gross insubordination after repeatedly failing to follow an instruction over a period of approximately six weeks.
- [3] Masscash provides company vehicles (vehicles) to its employees who are required to travel for work purposes. These vehicles are fitted with tracking devices. Masscash allows its employees to use the vehicles for private trips, provided the mileage of these trips did not exceed 30% of the total mileage on the vehicle. Masscash did not have a regular practice of monitoring its employees' use of the vehicles. However, on discovering the abuse of a vehicle by one of its employees, Masscash decided to, more regularly, analyze the reports produced by the tracking device (tracker report) for all the company vehicles. The tracker report contains addresses of the starting point and stopping point of the vehicle, as well as the date and time when it was started and stopped.
- [4] On 28 June 2018, Masscash's Logistics Department requested a tracker report for the vehicle which Mr Mtsotsoyi drove. Numerous irregularities

were identified in the usage of the vehicle. On the face of it, it appeared that Mr Mtsotsoyi's private use of the vehicle exceeded his business use.

- [5] On 25 July 2018, Masscash's Regional Manager, Mr Charles MacDonald (Mr MacDonald) and Store Manager, Mr Mohammed Fakier Samaai (Mr Samaai) met with Mr Mtsotsoyi to discuss the purported irregularity in relation to his use of the vehicle. At that meeting, they effectively instructed Mr Mtsotsoyi to submit a report identifying his business and private trips on the tracker report for the preceding three months, and if a particular trip was identified as business, Mr Mtsotsoyi was instructed to indicate in the report which customers/clients he had visited. There were also numerous trips that were made outside of Mr Mtsotsoyi's working hours, which he was required to explain.
- [6] Although he was only required to provide a report for the preceding three months, Mr Mtsotsoyi chose to carry out the exercise from the time he received the vehicle (November 2017 to June 2018). He advised Mr MacDonald and Mr Samaai that he was unable to submit the report immediately, as gathering the details of the trips listed on the tracker report would take time. He therefore requested two to three weeks to submit the report. Mr MacDonald afforded Mr Mtsotsoyi two weeks, and a paid day off, to gather the required information and instructed him to submit the report by 14 August 2018.
- [7] Although Mr Mtsotsoyi confirmed, at the meeting with Mr MacDonald and Mr Samaai, that he understood what was required of him, he failed to submit the report on the agreed date. When Mr Samaai approached him about the outstanding report on 14 August 2018, Mr Mtsotsoyi informed him that he did not understand the instruction. At no point before the due date, did Mr Mtsotsoyi inform Mr Samaai or Mr MacDonald that he did not understand their instruction. Mr MacDonald, nevertheless, met with him and again explained the instruction to him.

- [8] Mr MacDonald also attempted to understand from Mr Mtsotsoyi why he had not followed the initial instruction and extended the due date for the submission of the report by a further two weeks to 27 August 2018. Mr Mtsotsoyi again confirmed at this meeting that he understood what was required of him.
- [9] On 27 August 2018, Mr Mtsotsoyi sent the tracker report to Mr MacDonald. Although he fully understood what was required of him, he merely inserted on the print-out of the tracker report he was given, a "B" for the business trips he made and a "P" for the private trips made with the vehicle. He failed to provide the details of the customers/clients he had visited on his business trips and, the details of the persons he had visited on the private trips, he identified on the tracker report, as instructed to do.
- [10] On 4 September 2018, Masscash sent a formal letter to Mr Mtsotsoyi reducing the instruction to writing, and requiring him to follow it by no later than 10 September 2018. This was the third extension of the due date for the submission of Mr Mtsotsoyi's report.
- [11] On 7 September 2018, Mr Mtsotsoyi sent an email to Mr MacDonald stating that he had misunderstood the instruction prior to it being reduced to writing in the letter of 4 September 2018. According to him, he understood the instruction to have been that he must only identify on the report whether it was a business trip or a private trip. Mr MacDonald responded by informing Mr Mtsotsoyi that no further extensions would be granted and should he not submit the report on 10 September 2018, disciplinary action would be instituted against him. This notwithstanding, Mr Mtsotsoyi requested a further extension to submit his report. MassCash refused to grant him any further extensions.
- [12] Mr Mtsotsoyi failed to submit the report on 10 September 2018. On 28 September 2018, Mr Samaai issued him with a notice to attend a disciplinary hearing. He was charged with the following misconduct:

‘Gross insubordination, in that you failed to follow a reasonable instruction on numerous occasions (i.e. on or about 26/07/2018, 27/08/2018/ 4/09/2018, 10/09/2018) by the Regional Operations Manager to provide additional information regarding the tracker report furnished to you on the 26 July 2018; this behaviour signifies a willful intent not to comply with an instruction from a senior manager.’

[13] The Chairperson of the disciplinary inquiry found Mr Mtsotsoyi guilty of gross insubordination and recommended his dismissal. Masscash dismissed him on 29 October 2018.

[14] On 15 November 2018, Mr Mtsotsoyi referred an unfair dismissal dispute to the CCMA alleging that his dismissal was substantively unfair and he sought to be reinstated.

Arbitration Award

[15] The arbitrator found that Mr Mtsotsoyi's dismissal was fair. She accepted Mr MacDonald's testimony and that of Mr Samaai's over the testimony of Mr Mtsotsoyi on the following bases:

‘MacDonald was an excellent witness who clearly stated the facts of each meeting with the [Mr Mtsotsoyi]. His attempt to assist [Mr Mtsotsoyi] in completion of the report, including giving him an additional fully paid day to assist him, as well as having asked him how much time he needed as opposed to being prescriptive, indicated that he was certainly not out to “get” [Mr Mtsotsoyi] or be vindictive. His demeanor throughout also reflected no animosity and only an inability to understand while [Mr Mtsotsoyi] could not comply with the request despite [Masscash] having done its best to allow him to do so.’

[16] The arbitrator also found that the six-week time frame within which Mr Mtsotsoyi was required to produce the report was reasonable, that the instruction was a simple one requiring him to simply account for his whereabouts, and that he required no training to complete the report. In

relation to his inability to provide the required information, the arbitrator stated that:

‘It is inconceivable that a person who has access to a company vehicle to perform his tasks would not have a logbook recording all trips or no record of which clients he visits on a daily basis, or if given an address, that he would have no idea where it is or what he did there. Most if not all sales representatives have to report at some stage or another about which clients they visited. There would also be records of business deals concluded or quoted for or about which enquiries were made, which would have assisted [Mr Mtsotsoyi] in identifying the locations.’

- [17] Concerning Mr Mtsotsoyi’s version that, for the period in question he had no memory of anything at all, and could, therefore, not complete the report, the arbitrator observed as follows:

‘That alone would be deeply concerning, but, [MassCash] did not dismiss [Mr Mtsotsoyi] for that – he was only dismissed for not submitting the report in the form and in the time frame requested. As was the case with Mr Samaai, I have no hesitation in accepting the evidence of Mr MacDonald as true and correct. He had tried to assist [Mr Mtsotsoyi] and only when it was clear that he could not or would not comply, disciplinary action was initiated.’

- [18] In relation to Mr Mtsotsoyi’s evidence that he was unable to identify any customer/clients on the tracker as he was not given adequate time to comply, the arbitrator observed as follows:

‘[Mr Mtsotsoyi] did not do himself any favours. He was clearly attempting to clutch at straws. It is unacceptable that a person in his position would be entirely unable to identify any customers/clients on the tracker list or what his business there was; it is unacceptable to say that the period of time he had to complete the task was too short; it is unacceptable to say that training would be required to do such an analysis. It is unacceptable to say that it was not his job to analyse his tracker report – he is the only one who could say where he was at those times and no one else; it is unacceptable for him to have not asked for assistance or further

explanations had he really not understood the simple request. All in all, [Mr Mtsotsoyi] was a poor witness who even tried to make as if he had been accused of irregularities and that that informed the need for the report. No one had accused him of anything but simply asked him to do the analysis after which, clearly if there were indeed irregularities evident, he would in all likelihood have been charged. I suspect that that was possibly the reason for his “inability” to recall anything or to conclude the analysis – but no evidence before me was led in that regard at all.’

[19] The arbitrator concluded that Mr Mtsotsoyi was grossly insubordinate in not carrying out the instruction he was given and that his dismissal was substantively fair. He accordingly dismissed Mr Mtsotsoyi’s unfair dismissal claim.

Labour Court judgment

[20] Mr Mtsotsoyi applied to the Labour Court to review the arbitration award. The key findings of the Labour Court are as follows:

20.1 The instruction given to Mr Mtsotsoyi by Mr Samaai was not clear as Mr Samaai’s “*explanation does not support the notion that the verbal instruction given was clear. The written instruction did not mention anything regarding information only being needed outside of office hours which appeared to be the recollection of the verbal instruction as testified to by [Mr MacDonald]*”.

20.2 The arbitrator’s decision that Mr Mtsotsoyi had committed gross misconduct and that dismissal was a fair sanction is not one that a reasonable decision maker could reach on the evidence. In this regard, the Labour Court held that:

‘The issue of remorse is only one of the factors that an arbitrator will take into account in determining sanction. But that decision needs to be taken in relation to all the relevant circumstances. [Mr Mtsotsoyi] was not charged with dishonesty. He had a clean disciplinary record. He did comply with the instruction he was

given, albeit not on time and in a way the employer found to be sub-standard.'

[21] The Labour Court made an order reviewing and setting aside the award of the arbitrator, and substituted it with an award: (1) declaring that Mr Mtsotsoyi's dismissal was substantively unfair; and (2) reinstating Mr Mtsotsoyi retrospectively to the date of his dismissal.

[22] The appeal lies against the order of the Labour Court with its leave.

The Appeal

[23] The core contention advanced, on behalf of Masscash, in the appeal was that, viewed in light of all the evidence that was led at the arbitration hearing, the arbitrator's determination fell within a band of reasonable decisions and was not liable to interference on review. Masscash accordingly contended that the Labour Court erred in overturning the arbitrator's finding that Mr Mtsotsoyi was guilty of gross insubordination and that the sanction of dismissal was appropriate.

[24] To the contrary, Mr Mtsotsoyi, who represented himself at the appeal, argued in support of the Labour Court's finding that reinstatement was an appropriate sanction because he had partially complied with the instructions, was not charged with dishonesty or any irregularities and had a clean record. He contended that the arbitrator erred in not taking these factors into consideration in determining the sanction.

[25] He conceded, during argument, that he understood the instruction given to him to provide the details of the business and private trips he had made with the company vehicle over the period in question and was willing to provide that information, but Masscash had given him insufficient time to do so. In this regard, he argued that some of the areas identified on the tracker report were areas that he no longer serviced and needed time to return to them in

order to provide the required details. He did not say how much time would have been appropriate.

[26] It is a trite principle of law that the review test is result based. This means that in deciding whether an arbitration award is reviewable, the Labour Court must consider the reasonableness of the outcome of the award in relation to all the evidence that was presented to the arbitrator during the arbitration hearing.

[27] The offence of insubordination was described by this Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*¹ as “a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer’s authority”. In *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,² this Court held that it is not necessary for the instruction to be issued on numerous occasions for an act of insubordination to occur. A single act of defiance by an employee will be sufficient for insubordination to occur.

[28] In this case, Mr Mtsotsoyi repeatedly and willfully defied the instructions of his employer to provide it with the details of the business and private trips which he identified on the tracker report. The Labour Court, however, found that he complied with the instruction that was given to him, “*albeit in a substandard form*”. What is clear from the record of evidence is that the instruction to Mr Mtsotsoyi was that if he identified a particular trip on the tracker report as a business one, then he was required to indicate the name of the customer/client he visited. And if it was a personal trip to a friend or his home, then he was required to advise on the nature of the visit to that location.

[29] Both Mr MacDonald and Mr Samaai testified that the instruction went beyond the mere submission of a report indicating which trips identified on

¹ (2015) 36 ILJ 1511 (LAC) at para 19.

² (2019) 40 ILJ 150 (LAC).

the tracker report were for private or business purposes. Despite them explaining the instruction to Mr Mtsotsoyi on at least three occasions (which he fully understood as conceded), reducing it to writing, and giving him a fully paid day off to gather the information as well as three extensions between 14 August and 4 September 2018 to comply, he failed to do so.

[30] Yet surprisingly, after the deadline of 14 August 2018 had passed, and the report was requested from him by Mr Samaai, his excuse was that he misunderstood the instructions. To the extent that he did not understand the instructions, the onus was on Mr Mtsotsoyi to seek clarity, but at no stage during the preceding two weeks did he take steps to approach either Mr MacDonald or Mr Samaai to clarify them.

[31] This notwithstanding, on 14 August 2018, Mr MacDonald had another meeting with Mr Mtsotsoyi at which he again explained the instruction to Mtsotsoyi, and extended the deadline by a further two weeks to 27 August 2018. Having confirmed, once again, that he understood the instruction, he submitted the report on 27 August 2018, lacking in the detail that he was instructed to provide. Mr Mtsotsoyi merely indicated which trips were for private use and which ones were for business use. He simply failed to provide the information that was requested from him.

[32] Three days after receiving the letter of 4 September 2018 containing the instructions in writing and the third extension to 10 September 2018, Mr Mtsotsoyi responded, in writing, "*that he had misunderstood the instruction prior to it being reduced to writing*", and requested a further extension. To make matters worse, even though he was specifically informed that no further extension would be granted and that should he not submit the report on 10 September 2018, disciplinary action would be instituted against him, Mr Mtsotsoyi persisted in his failure to comply with the instruction.

[33] Mr Mtsotsoyi testified that he had no memory of the trips he made in the preceding 8 months and therefore needed time to visit those locations in order to provide the required information. It is inexplicable how Mr Mtsotsoyi

could state, with relative ease, which of the 417 trips made, over an eight-month period, were either for business or private purposes, and yet have no memory at all of any details of those trips. In particular, since the tracker report contained the addresses of the starting and stopping point of the vehicle in relation to each trip made and the date and time.

[34] Having been the only driver of that particular company vehicle, only Mr Mtsotsoyi would have had knowledge of whether the trips made were for business or private purposes, and which customers/potential customers/friends/family he visited at the addresses specified in the tracker report. Surely, as a sales representative he would have made entries in a logbook and kept records of his trips, customers visited, sales finalized, quotations provided etc. That he could have utilized his logbook as an aide to providing the required information was confirmed by Mr Mtsotsoyi's own witness, Mr Kole, an ex-employee of Masscash. Notably, only Mr Mtsotsoyi could provide details of the private trips made with the vehicle.

[35] Mr Mtsotsoyi testified, at the arbitration hearing, that because he had loaded the details of businesses that had become customers into the company system, the company had that information on file and had no good reason to have requested it from him. That the company may have had some of these addresses on file, did not absolve Mr Mtsotsoyi of the responsibility to comply with the instructions given to him. Surely, all he had to do was either call up the information himself or request it as an aide to providing the company with the information that he was instructed to provide.

[36] At best for him, even if he only understood the instruction when it was reduced to writing on 4 September 2018, he made no attempt to even partially complete the report in accordance with the instructions. It is inconceivable on the probabilities that he would have no memory of the details of any of the addresses he went to with the company vehicle, or that he needed a period in excess of six full weeks to establish and gather those details. There were surely addresses (both private and business) on the tracker report that he would have visited regularly, and should have had no

difficulty providing. On the evidence, other employees, who were provided with company vehicles, were instructed to complete a similar analysis of the tracker reports for their respective vehicles, and did so with no difficulty.

[37] Mr Mtsotsoyi contended that he understood the instruction and was willing to provide the requisite information to Masscash, but was given inadequate time to do. As I see it, if Mr Mtsotsoyi was sincere about not having adequate time to complete the report, then he had every opportunity to submit it to Masscash between the 10 September 2018 deadline and 28 September 2018, when he was notified of the disciplinary hearing. There was a lapse of 18 days between these two events in which he could have still submitted the report. He could have even produced the report at the disciplinary hearing but took no steps to do so.

[38] The Labour Court found that Mr Samaai's explanation of the verbal instruction to Mr Mtsotsoyi that he "*must state on the tracker report who the customer is ... or who or where it relates to, so we wanted to identify the business...*", did not support the notion that the verbal instructions given were clear as the "*written instruction did not mention anything regarding information only being needed outside of office hours which appeared to be the recollection of the verbal instruction as testified to by MacDonald*".

[39] The Labour Court erred in its assessment of the facts on the record. On a proper analysis of the testimonies of both Mr MacDonald and Mr Samaai, it is clear that the instructions related to all the trips, identified by Mr Mtsotsoyi as private and business, whether during working hours or after. As specifically testified to by Mr MacDonald, this included a number of private trips made outside of Mr Mtsotsoyi's working hours which he was required to explain. Thus, the required information was not only needed for "*trips made outside of business hours*" as erroneously concluded by the Labour Court.

[40] Notwithstanding Mr Mtsotsoyi's earlier version that he was only instructed to identify his business and private trips on the tracker report, his version in

the founding affidavit in the review application is that the company asked him to explain both his personal and business trips. This was consistent with his concession at the appeal hearing that he understood the instruction. It was never his case that in terms of the verbal instruction, he was only required to explain after-hours trips or that the instruction was unclear.

[41] In the context of the established facts that Mr Mtsotsoyi willfully and persistently defied a reasonable instruction of his employer over a period spanning some six weeks, the Labour Court's conclusion that Mr Mtsotsoyi complied with the instruction and was not grossly insubordinate is clearly wrong.

[42] The Labour Court furthermore held that in concluding that the dismissal was an appropriate sanction, the arbitrator only had regard to the fact that Mr Mtsotsoyi did not accept his wrongdoing and show any remorse, and ignored other relevant factors such as that Mr Mtsotsoyi had a clean record. While the arbitrator does not mention this fact in the award, it is not clear from the Labour Court's reasoning how this omission would have changed the outcome of the arbitration award, having regard to the totality of the evidence that served before the arbitrator.

[43] The arbitrator's finding that dismissal was an appropriate sanction is reasonable on the evidence. She carefully considered the evidence and had regard to the employer's disciplinary code which lists dismissal as the appropriate sanction for a first offence of gross insubordination. She furthermore correctly found that since Mr Mtsotsoyi did not accept his wrongdoing or show remorse for his conduct, progressive discipline was inappropriate as a disciplinary measure. Moreover, she took into consideration the uncontested testimony of both Mr Samaai and Mr MacDonald that the company lost complete confidence and trust in Mr Mtsotsoyi due to his willful and sustained failure to follow the instruction given to him.

[44] Mr Mtsofsoyi was found guilty of gross insubordination for defying the instruction to provide an account of the business and private trips he made with the company vehicle. Although irregularities were detected (from the tracker report) in his use of the vehicle, he was given the benefit of the doubt and afforded an opportunity by Masscash to set the record straight. That he was never charged or found guilty of any irregularities or dishonesty does not detract from the fact that his refusal to obey the employer's instruction was willful, serious and warranted dismissal.

[45] The seriousness of Mr Mtsofsoyi's misconduct was central to the arbitrator's finding that dismissal was an appropriate sanction. In particular, because the same instructions were repeatedly explained to him and he was afforded ample time to comply, yet he willfully defied the instruction. The Labour Court accordingly erred in concluding that the sanction of dismissal was inappropriate.

[46] For all these reasons, the appeal must succeed.

Costs

[47] I consider it fair and just not to make a costs order in the appeal.

Order

[48] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside and replaced with the following order:

“1. The review application is dismissed with costs.”

F Kathree-Setiloane AJA

Sutherland JA and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:

A. Myburgh SC

Heads of argument drafted by R. Itzkin

Instructed by Edward Nathan Sonnenbergs Inc

FOR THE RESPONDENT:

TG Mtsotsoyi