THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PA 05/2023

In the matter between:

ALGOA BUS COMPANY (PTY) LTD	**Appellant**
and	
TASWU obo XOLISWA MZAWI	**First Respondent**
BOTHA DU PLESSIS *N.O.*	**Second Respondent**
SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL	**Third Respondent**

Heard: **05 September 2024**
Delivered: **10 September 2024**
Coram: **Van Niekerk JA, Nkutha-Nkontwana JA & Jolwana AJA**

JUDGMENT

LABOUR APPEAL COURT

VAN NIEKERK, JA

Introduction

[1] This first respondent (employee) was employed by the appellant as a bus driver until her dismissal on 17 March 2021, after she was found guilty of reckless and negligent driving and causing an accident. The employee's challenge to the fairness of her dismissal was dismissed by the second respondent (arbitrator), but upheld by the Labour Court (per Nzuzo AJ), which reviewed and set aside the arbitrator's award and reinstated the employee with retrospective effect. With the leave of this Court, the appellant appeals against that order.

The arbitration

[2] At the time of the incident that gave rise to her dismissal, the employee had been employed for some six years. The events that gave rise to her dismissal and the arbitration hearing occurred on 26 February 2021, when at 17h38, the employee was involved in a serious collision with a minibus taxi. The accident occurred in Kariega, an area familiar to the employee and on a route that she frequently travelled.

[3] The charge against the employee was that she had driven through the intersection against a red traffic light, thus causing the accident. The employee denied the charges brought against her – her defence was that she had driven through the intersection on an amber light. The arbitrator had regard to video footage of the incident, recorded by a camera mounted in the bus driven by the employee, which showed clearly that the traffic light had turned red before the employee entered the intersection. The employee's own witness conceded as much. In so far as the employee had testified that the actions of the taxi had caused the accident in that it drove through a red traffic light to her left, the arbitrator found that the footage showed that it was the employee who drove through a red traffic light and collided with the taxi, "*which also happened to go through a red traffic light on his side"*. The arbitrator concluded that the fact that the taxi went through a red traffic light did not

LABOUR APPEAL COURT

exonerate the employee – she ought to have slowed down when the light turned amber. Had she had done so, the accident would not have occurred. As the arbitrator put it:

> 'This dispute is not about what the taxi did, it centres on the actions of the bus driver who hit another vehicle. In fact, one can conclude that both drivers acted irresponsibly. But it is the conduct of the applicant that I am dealing with and not the conduct of the taxi.'

The arbitrator noted further that according to the video footage, there was ample distance to the intersection from the moment the traffic light turned amber for the employee to bring the bus to a stop. The footage revealed that far from attempting to do so, the employee accelerated from that distance to where the accident occurred. To the extent that the employee contended that the accident was not serious since no one was injured, the arbitrator stated:

> 'That reasoning does not hold water – [the] fact of the matter remains that she contravened the Road Traffic Rules. There might have been no accident if she had followed the Traffic Rules. She argued that she had approached the intersection with caution, however, she increased her speed according to the footage which displayed the speed.'

[4] In so far as the employee challenged the consistency of the appellant's application of discipline, the arbitrator noted that the appellant's disciplinary code provided for a final written warning for the offence of driving through a red traffic light, unless there were consequences, in which case the prescribed penalty was dismissal. The comparator employees to whom the employee referred had received final written warnings for driving through red traffic lights, but none had caused an accident. The employee's reliance on the inconsistency that she alleged was thus dismissed.

[5] The arbitrator came to the following conclusion:

> '31. Drivers were independently responsible for the business of the respondent on the road. The applicant was a professional driver and ought to have known that her conduct was not correct. The evidence led at this

LABOUR APPEAL COURT

arbitration suitably persuaded me that the applicant was correctly found guilty at her hearing.

32. The applicant was not remorseful about her behavior but continued to conjure up elaborate reasons for her actions. Her insistence that she did not do anything wrong despite overwhelming evidence to the contrary gives an impression that she would most likely repeat this behavior.

35. My inescapable conclusion is that the employee was involved in gross misconduct and that a sanction of dismissal is appropriate for the above offences and in line with company policies and the code – I agree with the evidence that the employee's actions have undermined the trust on which the employment relationship was built, and thus justifies her dismissal. In doing so, I have considered all factors and the arguments.

36. The respondent's implementation of a sanction of dismissal was fair under the circumstances. The employee provided me with no credible or reputable evidence as to why I should not uphold her dismissal. The version from the respondent was more credible.'

The Labour Court proceedings

[6] The employee filed an application to review and set aside the arbitrator's award. In the application, the deponent to the founding affidavit, a union official, asserts, among other things, that the arbitrator had a duty to consider the surrounding circumstances to determine whether the sanction of dismissal was fair. In particular, it was contended that the minibus taxi was ultimately responsible for the collision, and that had the minibus taxi "*not been solely to blame for jumping a red light, the [employee's] position would have been exactly the same as all of the other employees who jumped red lights and she would just have received a final written warning*". The latter reference is to the evidence given by the appellant's manager that other employees found guilty of driving through a red traffic light had previously been issued with final written warnings, but only in circumstances where the driver concerned had not caused an accident. Of some significance in the present proceedings is the following submission:

LABOUR APPEAL COURT

> 'The [arbitrator's] finding in relation to the aspect of the seriousness and that the argument does not hold water was incorrect and unreasonable (sic). The [arbitrator] had a duty to determine whether the accident was serious as the [employee] was charged with that. The [arbitrator] also had a duty to consider the surrounding circumstances as per the policy to enable the [arbitrator] to determine whether the sanction was fair.'

The deponent asserted that the arbitrator had thus arrived at conclusions and made findings that no reasonable commissioner in the position of the arbitrator could have made, thus rendering the award 'grossly irregular and reviewable'. The employee did not file a supplementary affidavit. In essence, the review was sought on the basis of a challenge to factual conclusions reached by the arbitrator relating to the employee's conduct, and on what was contended to be a failure by the arbitrator to determine whether the accident was serious and to consider the surrounding circumstances, as he was required to do by the appellant's disciplinary code and procedure.

[7] The Labour Court accepted the arbitrator's factual findings in relation to the existence of the misconduct alleged by the appellant. Specifically, the Court found that the employee had approached the intersection at 40 km/h when the traffic light was amber, that she made no attempt to slow down, on the contrary, she accelerated, and that the traffic lights had turned red before she entered the intersection. The Court accepted too that on the evidence, the employee had been correctly found guilty of the misconduct for which she was dismissed.

[8] The Court then turned to the second leg of the fairness enquiry (i.e. the appropriateness of the sanction of dismissal), and found that the appellant had been obliged at the arbitration hearing to adduce evidence to sustain its contention that dismissal was an appropriate sanction and that its failure to do so was fatal to its opposition to the employee's claim of unfair dismissal. In particular, the Court held:

> '[13] In order to establish fairness of the sanction of dismissal, the [employer] must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This requires evidence, for example, that the trust relationship between the employer and employee had broken down.

LABOUR APPEAL COURT

Put differently, an employer can dismiss fairly if it can prove that there was a transgression, the nature as well as the effect or impact of which was such as to make the sanction of dismissal appropriate…'

And further:

'[15] The employer has the burden of proof in the sense of a persuasive burden – it must place enough material and facts before the decision-maker to persuade such person that the sanction of dismissal was fair. …

[16] I am not persuaded by the argument proffered on behalf of the [employer] suggesting that the effect of the employee's misconduct to the employment relationship is no longer an issue that needs to be considered in determining whether dismissal was warranted or not. I hold a view that this remains one of the crucial requirements of a fair dismissal for misconduct, and enquiry which the commissioner is enjoined to make in the determination of dismissal as a fair sanction. In such an instance, the employer is enjoined to establish that the contravention of the rule by the employee was sufficiently serious to warrant dismissal. The test frequently used when assessing the appropriateness of dismissal is the effect that the employee's misconduct have (sic) on the employment relationship.

[17] It is difficult to fathom how a dismissal is substantively fair in a matter where no evidence, showing that the employment relationship has been rendered intolerable, was led. While I accept that there are certain acts of misconduct which are of a more serious nature that not even the absence of evidence as to the effect as to the effect of misconduct to the employment relationship can save an employee who is guilty of them from dismissal. Such acts of misconduct are those that antithetical to any employment (i.e. Gross dishonesty and assault).

[18] I am not satisfied that the act of misconduct for which the [employee] was charged and dismissed falls within that category, the commissioner has

LABOUR APPEAL COURT

not concluded otherwise, with the result that evidence as to the suitability of dismissal ought to have been led for the determination of fairness of the applicant's dismissal. I have perused the transcribed record of the impugned proceedings and I found no such evidence. My inescapable conclusion therefore is that the commissioner's conclusion that the dismissal was fair in the circumstances of the case was not based on the material before him but on speculation on his part. In my view, the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The arbitrator's conduct in this regard constitute (sic) misconduct, one which renders his award reviewable by this court.'

[9] The Labour Court went on to find that in terms of the appellant's disciplinary code and procedure, the decision-maker had to exercise a discretion in the determination of a suitable sanction. The appellant's disciplinary code recognises degrees of recklessness and negligence, dependent on prevailing conditions, the nature of the misconduct and actual and potential consequences. The guidelines on penalty range from a final written warning to unpaid suspension and dismissal. the Labour Court found that there was no evidence as to the suitability of the sanction of dismissal –

'That evidence would have shown that why dismissal, which is harsher than other punitive measures for misconduct, was preferred over others. This evidence would have enabled the commissioner to make his own assessment that the dismissal was not imposed capriciously. Without evidence as to the suitability of the sanction of dismissal, there was no basis on which the commissioner could have come to the conclusion that the dismissal was substantively fair. The commissioner was not in a position to speculate on what evidence might have been placed before him showing that dismissal was warranted in the circumstance.'

[10] The Labour Court concluded:

'[21] I must ascertain whether the commissioner considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable… In my view, the commissioner's findings on the fairness of the

LABOUR APPEAL COURT

> [employee's] dismissal fall outside the bounds of reasonableness based on the evidence that was placed before him.'

[11] In the result, the employee was reinstated into the appellant's employ, with effect from the date of her dismissal.

Analysis

[12] In my view, the Labour Court erred in upholding the review. The Labour Court misconceived the nature of the enquiry to be made in the determination of the appropriateness of dismissal as a sanction and incorrectly decided that the award should be set aside on account of the appellant's failure to adduce evidence at the arbitration hearing concerning the suitability of dismissal as a sanction.

[13] First, while the appellant's disciplinary code and procedure provide that the degree of seriousness of the misconduct, the nature of the misconduct and the actual or potential consequences are relevant factors in the determination of an appropriate penalty, it is hardly the case that there was no evidence before the arbitrator in respect of these issues, nor is the case that his conclusion was 'speculative'. Ms Mpengesi, who testified for the appellant, stated that the incident was serious, and that the prevailing conditions were such that the road was clear with nothing obstructing the driver. Further, the employee had accelerated rather than applied her brakes to bring the bus to a stop, as she was obliged to do. The potential consequences of the driver's conduct are also serious, if not fatal. The arbitrator concluded, after a review of the totality of the evidence and the factual conclusions that he had drawn, that the sanction of dismissal was both appropriate and in line with the appellant's disciplinary code and procedure. To the extent that Mr Higgs submitted that the arbitrator had misdirected himself because the appellant had led no evidence at the arbitration hearing regarding the seriousness of the accident, or whether it constituted a major or minor incident, the fact that these factors receive specific mention in the code, does not require evidence to be led in a mechanistic fashion, in some isolated sense, regarding each of these factors – they are better considered in the context of the evidence as a whole. This is precisely

LABOUR APPEAL COURT

what the arbitrator did. The arbitrator considered the facts before him in a holistic fashion (as he was obliged to do), and came to the conclusion that, having regard to all the relevant factors, dismissal was an appropriate sanction. In the course of his consideration of an appropriate sanction, he clearly had regard to the seriousness of the employee's misconduct, the actual and potential consequences and importantly, the employee's mendacious denial of any misconduct. As this Court has previously stated, the acknowledgement of wrongdoing is the first step towards rehabilitation.[1] In the present instance, the employee refused to take even that first step. In short: the arbitrator's assessment of the evidence regarding the appropriateness of dismissal as a sanction cannot be faulted.

[14] Secondly, and more fundamentally, the Labour Court erred to the extent that it considered that the arbitrator had committed a reviewable irregularity by deciding to uphold the employee's dismissal, in the absence of specific and discrete evidence concerning a breakdown of trust or deterioration in the employment relationship. The determination of the fairness or otherwise of a dismissal involves a moral or value judgment, to be made by the presiding arbitrator, after considering all of the relevant factors and circumstances. *Sidumo & another v Rustenburg Platinum Mines & others*[2] (*Sidumo*) specifically enjoins arbitrators to "*consider <u>all</u> relevant circumstances*" (own emphasis added).[3] The absence of any specific evidence adduced in an arbitration hearing regarding a breakdown or deterioration in the employment relationship is thus not a basis to set aside an arbitrator's decision to uphold a decision to dismiss. As this Court has observed,[4] the existence of serious misconduct can in itself lead to a finding that a dismissal should be upheld, without evidence of any breakdown in trust. Indeed, the CCMA Guidelines on Misconduct Arbitration[5] (Guidelines) repeat the injunction to make a value judgment as to the fairness of the employer's decision to dismiss, taking into account all of the relevant circumstances. To the extent that the Labour Court held that it was necessary for the appellant to lead such evidence as a necessary condition for a finding of unfair

[1] *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration & others* [2000] ZALAC 10; (2000) 21 *ILJ* 1051 at para 25.
[2] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).
[3] Ibid at para 79.
[4] *Woolworths (Pty) Ltd v Mabija & others* [2016] ZALAC 5; (2016) 37 *ILJ* 1380 (LAC).
[5] GN R224 in GG 38573 of 17 March 2015, at item 93.

LABOUR APPEAL COURT

dismissal, that is not the law. In *National Union of Metal Workers of South Africa v Commission for Conciliation, Mediation and Arbitration and others*[6], the Labour Court provides a useful summary of developments post-*Edcon Ltd v Pillemer NO and others*.[7] Both this Court and the Labour Court have consistently held that there is no general obligation on an employer to lead evidence as to the appropriateness of dismissal as a sanction or any breakdown in the trust relationship, nor is there some limited category, as the Labour Court appears to suggest, in which an employer may be relieved of such an obligation (the Labour Court gave the examples of assault and dishonesty). Any deterioration in the trust relationship between employer and employee may be a relevant or even significant factor in the determination of the fairness or otherwise of a dismissal, but it is not a determinative factor. More often than not, the evidence of the nature and extent of the employee's misconduct will be sufficient for an arbitrator to exercise the required value judgment on the fairness of dismissal as a sanction. The Labour Court's finding that absent any evidence as to the suitability of dismissal as a sanction for the employee's misconduct, her dismissal was axiomatically unfair, constitutes a misconception of the applicable legal principles. The arbitrator did precisely what he was required to do – he made a moral or value judgment based on the totality of the evidence before him. It is difficult in these circumstances to appreciate how it can be said, as the Labour Court found, that he committed any gross irregularity. Specifically, there is no basis for the Labour Court's conclusion that the arbitrator's conclusion was based on 'speculation'. All of the evidence that served before the arbitrator spoke to the magnitude of the employee's misconduct – she breached a workplace rule, and the rules of the road, with calamitous consequences.

[15] Thirdly, the absence of any reviewable irregularity would ordinarily result in the award under review being upheld. But even if the present matter were to proceed to the second leg of the review enquiry (i.e. whether the outcome met the reasonableness threshold, regardless of any irregularity committed by the arbitrator) when the totality of the evidence is considered. At this stage, in order to succeed on

[6] [2023] ZALCPE 6; (2023) 44 *ILJ* 1575 (LC). See also: *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC); *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and others* [2016] ZALAC 55; (2017) 38 *ILJ* 881 (LAC).
[7] [2009] ZASCA 135; (2009) 30 *ILJ* 2642 (SCA).

LABOUR APPEAL COURT

review, the applicant "*must demonstrate that no reasonable commissioner could have opted for the sanction (or lack thereof) in question*".[8] The threshold for review when an arbitrator's decision on sanction is sought to be set aside is deliberately set high – whether the arbitrator considered the sanction of dismissal to be too harsh (as in *Sidumo*),[9] or as in the present case, where the arbitrator considered the penalty of dismissal to be fair. Either way, a review court cannot intervene simply because it thinks that the arbitrator was wrong, or because it would have rendered a different decision on the same evidence.

[16] In the present instance, there can be no question that the arbitrator's decision is one to which a reasonable decision-maker could come. On the evidence placed before the arbitrator, there is no basis to conclude that his decision to uphold the employee's dismissal fails to meet the reasonableness threshold. The evidence discloses the appellant's reasons for imposing the sanction of dismissal. These include a concern at the gravity of the employee's misconduct and its potentially fatal consequences. The facts that served before the arbitrator (and confirmed by the Labour Court) include a deliberate decision by the employee to accelerate prior to reaching the intersection, even though the traffic light had turned amber, in circumstances where she ought to have braked to bring the bus to a timeous halt. Instead, the employee failed to have regard to the amber traffic light and bring the bus to a timeous halt. Instead, she took a deliberate decision to drive the bus into the intersection, against the red traffic light. The employee's conduct caused a collision with a minibus taxi, laden with passengers. The employee was employed on a basis in which she was entrusted with the lives of passengers. There was also evidence of the employee's conduct in the arbitration hearing – she showed no remorse for her conduct. Instead, she dishonestly persisted with the false version that she had crossed the intersection on an amber traffic light. There was nothing in the record of the arbitration proceedings to indicate that the employee took cognisance of the scale and seriousness of her misconduct – on the contrary, she did not seem to regard the incident as particularly deserving of censure. It is self-evident from the evidence that the employee, who showed no remorse or capacity for reform, that the

[8] A Myburgh, C Bosch, '*Reviews in the Labour Court',* LexisNexis, at p301.
[9] Ibid.

LABOUR APPEAL COURT

employment relationship was irretrievably compromised. The employee's intransigence suggests that corrective discipline was unlikely to cure her behaviour. As the arbitrator put it: "*Her insistence that she did not do anything wrong despite overwhelming evidence to the contrary gives an impression that she would most likely repeat this behaviour*". It is difficult to imagine evidence more damning of the employee's conduct and its damaging effect on the employment relationship between her and the appellant. Indeed, Mr Higgs conceded as much when he submitted that any shortcomings in the Labour Court's judgment could be remedied by confining the remedy to one of compensation.

[17] In sum: contrary to what the Labour Court held, there is no obligation in law on an employer to adduce evidence on the appropriateness or suitability of dismissal as a sanction for misconduct, as a necessary condition for any finding of unfair dismissal. An arbitrator making a decision on the appropriateness of dismissal as a sanction for misconduct must make a value judgment, taking into account all relevant facts and circumstances. A breakdown in trust or deterioration in the employment relationship may be inferred from the evidence regarding these facts and circumstances. Finally, there is nothing in the record to indicate that the arbitrator's decision to uphold the employee's dismissal is a decision to which a reasonable decision-maker could not come. That being so, it was not open to the Labour Court to interfere with the award. The appeal thus stands to be upheld.

Costs

[18] Neither party pursued an order for costs, and none will be granted.

[19] I make the following order:

Order

1. The appeal is upheld with no order as to costs.
2. The Labour Court's order is set aside and substituted by the following: 'The application is dismissed'.

LABOUR APPEAL COURT

A van Niekerk JA

Nkutha-Nkontwana JA *et* Jolwana AJA concur.

APPEARANCES:

FOR THE APPLICANT: Adv F le Roux

Instructed by Joubert Galpin Searle

FOR THE FIRST RESPONDENT: Mr C Higgs, Higgs Attorneys Inc.

LABOUR APPEAL COURT