

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.:JA16/99

In the matter between:

**TRANSVAAL MATTRESS & FURNISHING
COMPANY LIMITED**

Appellant

And

**COMMISSION FOR CONCILIATION, MEDIATION
& ARBITRATION**

1st Respondent

VAN DER MERWE N.O.

2nd Respondent

**PAPER PRINTING WOOD & ALLIED
WORKERS' UNION**

3rd Respondent

MDLALOSE, A

4th Respondent

JUDGMENT

CONRADIE JA

[1] This is an appeal from a decision of Revelas J. She declined to interfere with the award of a CCMA commissioner who imposed on the fourth respondent what amounted to a four month suspension without pay.

[2] The fourth respondent, who was a driver employed by the appellant, had

been dismissed for having made unauthorised use of a delivery vehicle belonging to the appellant. He was at a disciplinary enquiry charged with and found guilty of having privately used the vehicle and having kept it at his home overnight. The second component of the offence was common cause. The first was not admitted. However, when the dismissal came to be considered by a commissioner of the CCMA, it was not suggested in evidence by Mr Dube, the respondent's assistant who accompanied him on the day in question, how the eighty-eight kilometres, which were on the respondent's delivery schedule unaccounted for, might have been recorded. The commissioner found on the evidence before him that the vehicle had probably travelled this distance when the driver's assistant was taken from Soweto to his home in Daveyton near Benoni. He nevertheless concluded that the fourth respondent had to be given 'the benefit of the doubt.' It was contended by Mr Franklin for the appellant that in so doing the commissioner applied the wrong standard of proof. The submission is obviously correct but I do not think that it is of any consequence. The commissioner decided that he could not say for certain that the eighty-eight kilometres had been travelled in taking Dube to his home in Daveyton. He did not, on a careful reading of his judgment, mean to say that the fourth respondent had not at some stage of his journey driven eighty-eight kilometres which he should not have. I can therefore not agree with Mr Franklin that the commissioner proceeded to determine

the propriety of the fourth respondent's sanction on the footing that he had been guilty only of keeping the vehicle at his home.

- [3] The driver's erstwhile immediate supervisor testified that all drivers were well aware that a contravention of the rule against the unauthorised use of a vehicle – whether in the form of using the vehicle for private purposes or keeping it at home overnight - was a serious disciplinary offence which could result in dismissal. He nevertheless found that 'it could not have been expected of him to have been alert to all the possible consequences of non-compliance.' The reason for this finding is articulated as follows –

'There is no indication on the part of the company that non-compliance would be regarded as a dismissable offence at the first instance. There was no agreement with the employees or with their union in regard to appropriate sanctions in the event of non-compliance. In short, the rules were not plainly and clearly set out in writing and publicised so that every driver knew about them without any doubt. Possible or definite consequences of the unauthorised use of company vehicles were not brought unequivocally to the attention of employees.'

- [4] I do not think that it is all that hard to discern what the commissioner was

attempting to say. He dealt pertinently with dismissal as a sanction for a first offence of unauthorised use of a company vehicle. Although the language is diffuse, the thrust of the reasoning is clear enough. For dismissal to have been a fair sanction for a first offence, the commissioner would have liked to have seen a greater emphasis by the appellant on the seriousness of the transgression. One way of doing this would have been to commit the rules to writing. Another would have been to debate the rules - and this rule in particular - with the employees or their union. Evidence that this had been done would have been more cogent than that of the fourth respondent's supervisor whose testimony concerning how others understood the rule would inevitably have been coloured by his own perceptions.

- [5] Mr Van der Riet for the third and fourth respondents argued that central to the commissioner's difficulty with the dismissal was the familiar problem of the setting of standards. An employer is entitled to set its own standards for the workplace having regard to the exigencies of the business. That much is trite. For example, in mines where there is a danger of escaping methane gas, a miner would almost certainly be dismissed for a first offence of having matches or cigarettes on his person when going underground. The rule is severe, but it is necessary. It has been brought home to everyone and everyone accepts the standard.

[6] In the present case the commissioner was doubtful whether, as a matter of objective fact, the disciplinary standard, the level of severity, had been sufficiently well embedded in the minds of the appellant's drivers. The group industrial relations executive of the appellant's parent company says in the founding affidavit that the supervisor's evidence that all drivers knew that they could be dismissed if they made unauthorised use of the appellant's vehicles was not properly challenged in cross-examination. The witness was, however, in cross-examination referred to a memorandum issued a day after and probably pursuant to the disciplinary enquiry. It was, he said, a re-affirmation of a long-standing system. A startling feature of the memorandum (having regard to its timing and purpose) is that it did not 're-affirm' the appellant's policy on dismissal for the unauthorised use of motor vehicles, much less make it clear that there was a serious risk of dismissal even in the case of a first offence. If the memorandum is indicative of the level of precision in communicating disciplinary standards to the drivers, I am not surprised that the commissioner remained unpersuaded of the appellant's communicative powers. In these circumstances I am not satisfied that the fourth respondent's failure to give evidence should be counted against him. It cannot be said that the appellant's case on this topic cried out for an answer.

[7] Mr Franklin for the appellant did not argue that if the commissioner did not gravely misunderstand the evidence, the court *a quo* should have interfered with his award. Unless this were so, there would have been no misdirection sufficiently serious to qualify as a gross irregularity or as an abuse of power in terms of s 145(2) of the Labour Relations Act 66 of 1995. The Commissioner, on what I consider to be perfectly rational grounds, found the sanction to have been too severe. The court *a quo* was not at liberty to substitute its discretion for his. No interference on review would have been permissible. The court *a quo* was correct in deciding not to interfere.

[8] In conclusion I ought to mention that none of the parties filed a power of attorney. They were given leave to file such powers of attorney accompanied by an application for condonation by no later than one day after the hearing of the appeal. Condonation is granted. The problem is, however, endemic. Few practitioners seem to pay any regard to rule 6 of the rules of this court. Continuing disregard of the rule will inevitably lead to a greater reluctance to grant condonation.

The appeal is dismissed with costs including the costs of the application for leave to appeal.

Attorney for Appellant: Deneys Reitz, Mr St E Wilken

Appearance for Appellant: Adv. A E Franklin

Attorney for 3rd & 4th Respondents: Cheadle Thompson & Haysom, G
Doble

Appearance for 3rd & 4th Respondents: Adv. J G Van der Riet

CONRADIE JA

I agree

NICHOLSON JA

I agree

MOGOENG AJA