

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1230/09

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

MOSERI, F

Second Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

First Respondent

RAFFEE, MS N.O.

Second Respondent

PELA PLANT (PTY) LTD

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award handed down by the second respondent (the commissioner) after he had found that the second applicant's dismissal by the third respondent was both substantively and procedurally fair. The commissioner's finding that the dismissal was procedurally fair is not being challenged.
2. The application was opposed by the third respondent.

The background facts

3. The second applicant was employed by the third respondent on 16 August 2007 effective from 4 August 2006 as a truck driver. On 22 July 2008 he was issued with a notice to

attend a disciplinary enquiry. He was charged with gross dishonesty in that he was driving a company truck without the correct licence and unauthorised absenteeism for 18 and 21 July 2008 when he did not report to any supervisor or manager. The disciplinary hearing took place on 25 July 2008. He was found guilty on both charges. The chairperson recommended a sanction of summary dismissal on both charges. On 28 July 2008 he received a letter from the human resources director informing him that he was dismissed on the charge of gross dishonesty but that it would be superfluous to impose a sanction on the second charge. On 29 July 2008 he lodged an appeal against his dismissal. The appeal hearing took place on 1 August 2008. His appeal was dismissed on 5 August 2008.

4. On 5 August the first applicant, the National Union of Mineworkers (NUM) on behalf of the second applicant (Moseri) referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. The dispute remained unresolved after conciliation and proceeded to arbitration on 24 March 2009.

The arbitration proceedings

5. The third respondent called Kobus Jonker as its witness. He testified that he is the human resources officer. He also helps the human resources director and helps with disciplinary hearings. He is employed by Protech Kutele which is the holding company and the third respondent is a subsidiary company. The third respondent employs about 370 employees

and most of the employees are machine operators and drivers. Moseri appeared at a disciplinary hearing. Jonker and a Ms Barwick did an audit in June 2008 on the drivers to check if they had the correct licences. They picked up that Moseri did not have the correct licence. He has a C1 licence but was driving a big truck. The truck was weighing 18 000 kg unloaded and 36 000kg when loaded. A person with a C1 licence drives a truck or something of the weight that is equal or less than 16 000kg. He should have had a C licence and not a C1. He could not with the C1 licence drive the vehicle that he was driving. This was serious and was fraud and he could kill people. They found that he told Phillip that he could drive the truck in question on a public road. He admitted this at the disciplinary hearing. Moseri was charged with gross dishonesty because he told two lies. Firstly, he lied to Phillip by misrepresenting the fact that he could drive the truck and secondly, he lied about having a valid PDP. In terms of the company rules he must notify the employer immediately when either his PDP or his licence expired for management to arrange for the renewal thereof. His PDP expired on 12 November 2006 and he should have informed management about this. He had also signed a document that he would obey all the traffic laws. He must have a valid licence in terms of the National Road Traffic Act. If this is disregarded, people can die and the machines can get seriously damaged causing major liability to the third respondent. In August 2006 Moseri was earning R13 per hour. He lied to Phillip and in December his salary was raised to R16 per hour being an approximately 19% increase. He lied to Phillip round about November 2006 which is why his remuneration was increased. As a result of Moseri's lies, the third respondent was prejudiced in that not only did he get a better rate but it was exposed to a higher rate risk of someone dying or possible damage to the machines or trucks. He received the increase because he misrepresented to Phillip that he could drive

a bigger truck. Jonker said that he was the complainant at the disciplinary hearing which was chaired by Johan Swart. At the disciplinary hearing Moseri admitted that he is guilty of having driven vehicles that he needs a code C licence for since August 2006 with only a code C1 licence and that his PDP had expired at the time when he was confronted about it as a result of an audit done by human resources. He admitted that he knew that he did wrong by doing so and not reporting this to the company before they confronted him. Mr Zwane was not allowed to represent Moseri because he was from NUM which was not a recognised trade union and Zwane was not an employee. He was allowed to remain as an observer but was disruptive and he was asked to leave the premises. Moseri also said that if a person is hungry he would do anything and his rate is bigger if he drives a bigger vehicle and he received R13 per hour. It was well known that if he drives a bigger truck he would get a better salary. He was grossly dishonest. The truck is worth close to R1,2 million. Moseri appealed and Jonker was the complainant in the appeal hearing which was chaired by Charmaine. He was asked at the appeal hearing if he told the respondent that he did not have the right licence. He said he did not tell them but they were fully aware that he has the wrong licence. Jonker said that they were unaware that he had the wrong licence. He had a criminal record for reckless and negligent driving and could not get a PDP. Moseri committed serious misconduct and was seeking reinstatement. He could not have a valid PDP for five years in terms of the Act so reinstatement would be impossible. They also discovered that he had other serious misconduct as stated in the expert report and reinstatement would be a big problem.

6. During cross examination Jonker said that because the third respondent grew, they decided to do an audit to see if the drivers had correct licences. This was his first audit.

He does not know whether audits were done in the past. Phillip had asked Moseri if he could drive a particular truck and he said that he could. He was the workshop manager. He could state whether it was company practice to ask a person whether or not he could drive a truck. Moseri was employed PPK Labour Services and a transfer took place. He was asked whether he was charged for the PDP and he said that it was part of the charge. They discovered before he was dismissed that his PDP had expired. The commissioner said that the PDP had expired in November 2006 and this meant that he could not be on a public road and that by looking at the charges he could see that he was not charged with breaching the employment contract. Moseri did not misrepresent to him but to Phillip. He denied that the third respondent was negligent in giving its trucks to incompetent people and said that Moseri misrepresented himself. It was put to him that Moseri did not misrepresent himself to the third respondent and he repeated that he did. It was put to him that in one of the documents it is stated that he has a code 10 licence and he said that he was not with the company then.

7. Phillip Themba Shibandekano (Phillip) was the third respondent's second witness. He testified that he is employed by the third respondent for the past 11 years. He allocates vehicles and report back to Hardie Swanepoel because he must be aware of who drives which truck. Moseri was charged with gross dishonesty because he is guilty. Around October or November 2006 they had a site in Potgietersrus. Moseri came to the workshop in Midrand. He asked him if he could drive down to Potgietersrus and he answered that he could and that it was closer to his family. He was obviously going to drive on a public road from Midrand to Potgietersrus and he did not say that his PDP was

also expiring. He had no PDP and a licence and the truck that he was driving was a 10 cube. He was dishonest because the contract states that he must inform him when his PDP had expired. He knew and was told that he had to report to him. He was asked whether Moseri was dishonest on purpose or it was a mistake. He said that it was on purpose because if he told them after two or three days, he would have understood but he kept quiet for one and a half year. The lie was that he said that he could drive the vehicle to Potgietersrus during October or November 2006. He was asked whether he said that he could drive the vehicle off road or on a public road. He said that he could drive the vehicle on a public road and it was all the way to Potgietersrus. A person could not drive to Potgietersrus off road. He drove to and from Potgietersrus on a public road without a licence for more than a year. He had allocated the truck to him which he signed for during October or November 2006. This was shortly before his wage increase. He would not have given him the tipper truck if he had told him the truth. He only had a C1 licence and he needed an EC1 or EC licence and his PDP had expired in November 2006. It was new tipper truck which he had allocated to him and he signed for it. He knew that he had a C1 licence and knew that his PDP had expired in November 2006. He misinformed him and it was his intention because it continued for a whole year. He was not honest and lied to him. The benefit that he got was that he earned more money and did not deserve that. He was paid as a driver for a 10-ton truck but he was a minibus driver. He is guilty of the charge of gross dishonesty and it was like stealing. He could not be reinstated since he had not been honest with the third respondent. It would be difficult to work with him. If other employees did the same thing, people could be killed. It is very important for safety sake to have the correct licence and there could be an injury and it could be very dangerous. When he allocates a truck, the driver must tell him about his

licence which he has in his pocket. Most of the drivers who do not report that their PDP have expired or who misrepresents about their licences, get dismissed.

8. During cross examination Phillip said that he employed Moseri and discussed it further with human resources. He was attending the arbitration hearing because he had allocated the truck to Moseri during October/November 2006. He had asked him if he could drive the truck. He was asked who had allocated the truck to Moseri in August 2006 and he said that Moseri was a spare driver and he could have been allocated a truck by the site foreman if he had a truck before he gave him one. He knows Simon Lepphoto. He found him in the seat and he had allocated trucks in October/November 2006. He was asked what Lepphoto did during August 2006. He said that Lepphoto checked Moseri to see if he could drive the truck. He did not rely on Lepphoto. It was put to him that Moseri was tested knowing that he had only a code 10 licence and was asked if he knows Solly Msibi. He said that he did and that he worked at human resources. He did not know if Msibi hired Moseri. The tipper that he allocated was a T96 which was a new truck. He said that he was not coached in answering and that he was telling the truth. He did not know whether Simon tested Moseri but he was tested in a tipper truck but misrepresented his licence. He was asked how he could say that he was guilty of dishonesty when he did not testify at the disciplinary hearing. He said that he never had a licence and told him otherwise. He agreed that he could drive a tipper. He agreed that in 2006 or 2007 he gave him the T96 but he was tested by Jerry who did not give him a report. He said that he was initially working at the workshop and then he allocated trucks. He initially showed them the sites.

9. The second applicant - Moseri - testified that he started working on 4 August 2006 and was employed as a truck driver. He was earning R17 per hour which was about R4 500.00 per month. He could not find employment since his dismissal. He went to Protech in Midrand because he heard a rumour that they were looking for drivers. They took him to Kempton Park where Simon Lephoto tested him by taking him to the off road site. He was tested in a Mercedes Atego T52 which is a code 14 truck. After that, he was taken to head office where they took his driver's licence and identity document. He took out a contract and gave it to the clerk to fill out. He had a code 10 licence with a PDP. Simon knew that he had only a code 10 licence. He at no stage made a misrepresentation when they came to check the truck and his licence. They made a tag which stated that it was his truck. He said that Phillip was lying when he said that he could drive the truck which meant that he had a licence. He said he never asked him if he had a licence but had asked him if he could go to Potgietersrus and he said yes and that it was near his home. Nothing was said about the truck that he was going to drive there. Whilst he was employed, he never damaged any of the trucks. He has never seen the minutes of the disciplinary hearing. He does not agree with the contents of the minutes and said that some points were added. During the disciplinary hearing he complained about the conduct of the chairperson because he was harsh with him. He had called for union representation but the chairperson told Zwane to sit there and shut up like a mouse. He was writing all the time and he did not tell him what he was writing. He did not write down what he was saying. He did not give him an opportunity to call other witnesses and looked down on him because he does not have any money and he has money.

10. During cross examination he said that in the pre-arbitration minute it is recorded that he was denied representation and this related to Zwane. It was put to him that Zwane was of an external non-recognised union and he could not represent him and was asked if he agreed with it. He said no and that the third respondent had lawyers and he could not buy a lawyer. It was put to him that he had said to Phillip that he could drive on a public road. He disagreed and said that he could go to Potgietersrus to work there and knew very well the truck that he drove. It was put to him that he said that he allocated him a new truck and that he signed for it. He said that he did not allocate a truck to him. It was put to him that he was saying on the one hand that he did allocate the T96 truck and on the other hand that he did not and that he was contradicting himself. He said that he did not allocate the truck at page 71 and it was given to him by Simon Lephoto at Silverstars. It was put to him that it was the first time that he alleged this and Phillip had said that he allocated him the truck on page 71 and was adamant about it. He was asked if he was saying that Phillip did not allocate the T96 to him. He said he did not allocate any truck to him. Phillip was lying when he said so and he does not know why he told lies. Simon Lephoto had asked him to complete the form for the T96. It was put to him that Phillip told him to do so and this was not put to Phillip. He said he did not know why it was not put to him. He was asked if he agreed that he was acting illegally when he drove the truck at page 71 on a public road. He said that he was wrong on the law but in terms of the company, he was right. He said that Isaac Manamela also drove without a code 14 licence. He was asked if he told anyone that he did not have the right licence for the truck. He said he had told Solly Msibi and Jonker and they came and checked. They told him that he must get his PDP. He was asked why this was not put to Jonker during cross examination and he said he did not know but Zwane knows that he told him many times

and he was told that the third respondent knew. It was put to him that he did not cross examine Jonker about this when he testified and was asked what his response was. He had no answer. He denied that he ever said that he was guilty. It was put to him that at the disciplinary hearing he pleaded guilty and this was the reason that no witnesses were called and that he did not challenge the procedure. He agreed that when he appealed he did not complain about it. He was asked why at the appeal hearing he did not mention that his PDP was expiring. He said that he told Jonker and Solly. He was asked who had to renew his PDP and he said that he had to. He had planned to renew his PDP in April/May 2007. It was put to him that he did not tell Jonker and Solly about the PDP expiring and that he was testifying about it for the first time and did not put it to Jonker during cross examination. He denied that. It was put to him that he was grossly dishonest by not telling someone at the third respondent and telling Phillip something different because of his conduct by driving without a licence and without a PDP for 1,5 years and that he got a higher rate because of this. He said no. He started with R13 per hour which was the correct rate for a code 10 licence. He was asked how he jumped from R13 to R16 per hour. He said that he told Msibi who took him from R13 to 16. He was asked if Simon tested him to drive on the site only. He had no answer. He agreed that Simon was not a traffic officer and could not test him to drive on a public road. It was put to him that he was untruthful to Phillip and that he had admitted this in the disciplinary hearing but he was now trying to deny it. He denied that. It was put to him that he did not tell Jonker or Solly of the expiry about his PDP and that he did not have a licence and that he was being untruthful in his evidence. He denied that. It was put to him that he was being dishonest which goes to his credibility and that he had been found guilty before in numerous court cases and was asked to look at his criminal record. He

said that if they persisted in bringing in his private life he would see them in court. During re-examination he said that he worked in Isando before he worked for Protech.

The arbitration award

11. The commissioner issued an award dated 6 April 2009. He recorded that the issue was whether Moseri's dismissal was unfair both procedurally and substantively. Moseri was charged with gross dishonesty in that he was driving a company truck without the correct licence. It was recorded in the pre-arbitration minute that the following was material on procedure namely that he was denied legal representation at the disciplinary hearing. He alleged that the chairperson of the disciplinary hearing conducted the hearing in a grossly unfair manner by his tone and instruction during the hearing which was intimidatory. On substance he alluded that the fact that he drove a code 14 vehicle with only a code 10 licence did not make him grossly dishonest or dishonest

12. The commissioner stated further that the third respondent relied on the contract of employment where the following was material at page 7:

"12.1 The employee undertakes to immediately notify the employer during the subsistence of this contract of:

 - * Any charges in respect of dishonesty or violence that are being brought against such employee by the National Prosecuting Authority.*
 - * Endorsement of driver's licence".*

13. The commissioner said that under paragraph 14 of the contract of employment the following was relevant:

- “14. The employee confirms that all documentation, information and credentials presented to the employer in support of the application for employment are authentic and the employee agrees that in the event of any of the above documentation, information, credentials subsequently proves to be false, this will be sufficient grounds for termination of the employee’s services.*
- 15. The employee shall within a reasonable period, notify the employer of any change in his/her status, such as address, marital status, telephone number, qualification or any other relevant changes.”*
14. The commissioner said that it was common cause that the third respondent’s motor vehicle’s driver’s licence was a C10 and not a required C14 for the trucks that he was driving. It was further common cause that his professional driving permit had expired on 12 November 2006 without it being renewed. Moseri commenced employment on 4 August 2006 as a truck driver earning R4 500.00 per month. He was dismissed on 28 July 2008 and has not found employment since. He claimed that on 4 August 2006 he went to Protech Midrand as they were looking for drivers. At the interview he was taken to Kempton Park where Simon Lephoto gave him a truck to test and to tip the soil. The truck used was a Mercedes T52. He presented to Lephoto a code 10 driver’s licence. Lephoto took him to the head office where a contract was signed and completed. Lephoto had not asked for anything other than that. When he was asked to go to Mokopane, he agreed because it was near his home. The chairperson did not allow him to be represented by his union. No further evidence was presented on procedure or any other deviation from fair procedure.

15. The commissioner said that it was common cause that Moseri drove trucks at the third respondent's place of business which required him to have a code 14 driver's licence. He only had a code 10 driver's licence. It was further common cause that his professional driver's permit had expired and that he did not alert the third respondent about this. The commissioner said that on the question of procedure, documentary evidence was presented and testimony was led that there was nothing untoward at the disciplinary hearing other than the question relating to the relevance of the questions being put. He was not legally entitled to be represented by a union official.
16. The commissioner said that the onus does not lie with an employer to verify an employee's driver's licence. The presumption that because an employee could drive a motor vehicle with the necessary licence, lies in favour of the employee (that the said employee) has such a licence. For the employee later to suggest that at all stages, the employer carried knowledge that he did not have the requisite licence and the employer nonetheless "allowed" the employee to continue driving such a motor vehicle was no defence. The contract of employment clearly stipulates that if the expiry of a professional driver's permit is pending, the onus lies on the employee to renew it and not the employer. Secondly, he could not find any evidence before him suggesting that the third respondent carried knowledge that he did not have the necessary driver's licence. For the second applicant it was simple: he could have refused to drive the motor vehicle where he knew that he did not have the requisite driver's licence. No disciplinary hearing could have followed for him refusing such an instruction.
17. The commissioner said that there was no evidence before him indicating that there was

any procedural flaw as the disciplinary hearing minutes and the testimony before him indicates that the chairperson was neither biased nor intimidatory. The second applicant was entitled to be represented by a fellow employee in terms of our law. He found that dismissal was not unfair both procedurally and substantively.

The grounds of review

18. It was contended on behalf of the applicants that the commissioner had failed to apply his mind to the issues before him, failed to appreciate the inquiries that he was required to conduct and rendered an award that was unreasonable in relation to the evidence that was before him.

Analysis of evidence and arguments raised

19. It is common cause that Moseri was employed by the third respondent as a truck drover in August 2006. At the time of job interview he gave the third respondent a copy of his driver's licence, which was a code 10. Moseri drove vehicles for the third respondent which required a code 14 driver's licence. On 22 July 2008 he was charged with two charges; gross dishonesty in that he had been driving trucks for the third respondent without the correct licence and unauthorised absenteeism. A hearing took place on 25 July 2008. He was found guilty on both charges. He was dismissed on the gross dishonesty charge and no sanction was imposed for the unauthorised absenteeism.
20. The arbitration proceedings focused entirely on the gross dishonesty charge. No evidence was led, or arguments submitted, in respect of the charge relating to absenteeism. Notwithstanding the above, the commissioner found that there was no evidence before

him that the third respondent carried knowledge that Moseri did not have the necessary driver's licence. It would appear to have been on this basis that the commissioner found that Moseri had been grossly dishonest, rendering his dismissal substantively fair.

21. It is trite that awards would be reviewable when the award is one that a reasonable decision maker could not reach. In assessing whether the decision reached by the commissioner was reasonable or not it must be borne in mind that an employer must rely on the reasons given for the dismissal at the time of the dismissal.
22. The reason given by the third respondent for the dismissal of Moseri, at the time of his dismissal, was that he was grossly dishonest in driving vehicles he was not qualified to drive. In order for the commissioner to reasonably find that the dismissal of Moseri was substantively fair, the commissioner had to find that Moseri had deceived the third respondent about his qualifications. The common cause facts established the opposite, right from the outset of his employment, Moseri had been entirely honest about his driver's qualifications. The commissioner had recorded this but then concluded that there was no evidence before him that the third respondent was aware of the fact that Moseri only had a code 10 licence. In the absence of evidence that Moseri sought to conceal his actual qualifications from the third respondent, the commissioner could not reasonably conclude that he had made himself guilty of gross dishonesty. In the answering affidavit it was contended that Moseri's dishonesty lay not in disclosing to his supervisor, Phillip, that he only had a code 10 licence, and that this warranted the finding of gross dishonesty. The contention does not survive any serious scrutiny. There is no suggestion that Phillip ever asked Moseri what his qualifications were and received a dishonest answer. Phillip

merely asked Moseri if he was capable of driving certain vehicles to which Moseri answered in the affirmative. Moseri was not dismissed for imprudent behaviour that he should have refused to drive those vehicles but was dismissed for gross dishonesty.

23. The commissioner could not reasonably have concluded that Moseri was guilty of an act of gross dishonesty. The award stands to be reviewed and set aside.

24. There is no recorded transcript of the arbitration proceedings. This Court cannot deal with this matter based on the material before it. An appropriate order would be to refer the dispute to the CCMA for a *de novo* hearing before another commissioner.

25. There is no reason why costs should not follow the result.

26. In the circumstances I make the following order:

26.1 The arbitration award dated 6 April 2009 under case number GAJB23153/08 issued by the commissioner is reviewed and set aside.

26.2 The dispute is referred to the CCMA for a *de novo* hearing before another commissioner other than the second respondent.

26.3 The third respondent is to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : C ORR BY CHEADLE THOMPSON AND
HAYSOM INC

FOR THIRD RESPONDENT : P BUIRSKY INSTRUCTED BY SALJEE DU
PLESSIS VAN DER MERWE INC

DATE OF HEARING : 9 JUNE 2010

DATE OF JUDGMENT : 26 OCTOBER 2010