



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA,
JUDGMENT

Not Reportable

Case no: JR 1017/09

In the matter between:

CARGO MOTORS (PTY) LTD

Applicant

and

RENE HYSER N.O

First Respondent

DISPUTE RESOLUTION CENTRE: A DIVISION OF

THE MOTOR INDUSTRY BARGAINING COUNCIL

Second Respondent

UPUSA obo DAVID MAKGANYETSI

Third Respondent

Heard: 16 August 2011

Delivered: 25 November 2011

Summary: Review Application. Dismissal for misconduct. Late filling of the record. Arbitration Award set aside, the matter is remitted back to the second respondent to be heard afresh.

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of in which the applicant seeks an order reviewing and setting aside the award of the first respondent (the arbitrator) dated 11 March 2009 and issued under the auspices of the first respondent under case number MINT 15103. The arbitrator found the dismissal of the third respondent (the employee) to have been procedurally fair but substantively unfair.

[2] There are a number of problems that have arisen in this review application. The first relates to the issue of the complaint by the respondent that the record was filed late. The record was filed about six months late. The delay in filing the record was caused by the problem of the tape recording cassettes from the second respondent. The problem was further compounded by the fact that the arbitrator had left the country for England. It was thus not possible to obtain the assistance of the arbitrator for the purposes of reconstructing the record. If for whatever reason it was to be said that the applicant delayed in speedily persecuting the review in that it delayed in filing the record such delay was in the circumstances of this case reasonable and acceptable. The other issue that arose concerned the right of the employee's representative, Mr Luthuli to appear for having been his representative initially before UPUSA was deregistered. The employee has subsequent joined another union for which Mr Luthuli is an official.

Background facts

[3] The employee in this matter was prior to his dismissal employed by the applicant as a driver and was dismissed for a number of acts of misconduct. During his employ with the applicant, the employee was mainly responsible for transporting the clients of the applicant whenever they had brought their vehicles for servicing or other mechanical problems to the applicant, including having to collect them whenever the car was ready for collection.

[4] The employee was charged with the following acts of misconduct:

6.3.10.1 Unauthorised use of the company vehicle in that on various occasions you used the company vehicle for personal use and drove unauthorised people around, utilising the said vehicle as a taxi.

6.3.10.2 Misuse of clients vehicle in that on 8/09/2008 you drove around in a clients (sic) vehicle and was seen going to a taxi rank for no apparent reason;

6.3.10.3 You accordingly also derelicted (sic) your duties in that it took you five hours to deliver the vehicle as required to

6.3.10.4 Dishonesty in that on 8/08/2008 when phoned by the company you lied as to your whereabouts.'

[5] It is common cause that the applicant had a rule prohibiting its drivers from transporting members of the public with its vehicles, except if those members of the public were its clients.

[6] As concerning the charge of unauthorised transportation of members of the public, the case of the applicant at the arbitration hearing was that on the day of the incident the employee transported two members of the public in the applicant's vehicle on his way to drop Ms Pillay, one of the employees of the applicant at the licensing department. On that particular day, the employee was instructed to transport Ms Pillay to the licence department.

[7] Ms Pillay testified that on their way to the licensing department the employee picked up members of the public one of whom he dropped at Game store. Ms Pillay further testified that the employee had to pick her up later once she had finished with her application for a driver's license. On that occasion as they were driving back to the workplace, the employee picked up another lady and dropped her at the Pick 'n Pay store.

[8] Although the employee did not dispute picking up members of the public on his way to the licensing department, he contended that they were clients of the applicant who had requested that he should drop them on his way to the licencing department. The charge also included the allegation that even on his return from picking up the employee from the licensing department he picked up another member of the public and dropped her at Pick 'n Pay.

[9] The other complaint against the employee, who at the time of the disciplinary hearing was on an unexpired final written warning for taking the applicant's vehicle from the premises without authorisation, concerned unauthorised use of the applicant's vehicles. The applicant further stated that there was suspicion that the employee was using its vehicle as a taxi to transport people. Although the applicant was never caught transporting people for a fee on the applicant's vehicle or its clients' vehicle, the applicant led evidence at the arbitration hearing indicating that the employee was seen at one stage driving into a taxi rank.

[10] The further charge against the employee relates to dereliction of duty. This charge relates to 8 August 2008, when the employee was instructed to take a client's vehicle to the licensing department and for clearance with the police. On his departure from the applicant's premises the employee was followed by two other people driving a different vehicle. The employee was not aware that he was being followed. He was also not aware that whenever his manager phoned him the two people who were following him would listen in their conversation.

[11] It was alleged that straight out of the applicant's premises the employee drove to the taxi rank and stopped there for no apparent reason and this was according to the applicant unauthorised. The unauthorised stop at the taxi rank was also picked up by the client through his tracker. During the telephone conversation with his manager the employee lied and said that he was at the Boksburg licensing department when he was in fact at the taxi rank. The movement of the employee was traced throughout by the applicant's tracking system.

Grounds for review

[12] The applicant challenges the arbitration award of the arbitrator on the following grounds:

7.9.1 Factual findings by the 1st Respondent herself, in fact did not correspond with the evidence and the documents properly placed before the 1st Respondent in this matter;

7.9.2 The 1st Respondent exceeded her powers in terms of the Act;

7.9.3 The 1st Respondent did not properly, rationally and justifiably apply her mind to the facts or law in this circumstances;

7.9.4 The 1st Respondent did not properly apply the relevant provision of the Constitution of the Republic of South Africa in this instance;

7.9.5 The 1st Respondent failed to afford the Applicant a fair and proper hearing in the circumstances and failed to properly conduct the arbitration proceedings in the circumstances;

7.9.6 The award made by the 1st Respondent is not justifiable to the reasons given for such award, and such award is not rational or justifiable in its merits or outcome;

7.9.7 The 1st Respondent failed to properly apply her mind to have proper consideration of the facts and the law, in respect of common cause fact, and the 1st respondent exceeded her powers in this regard;

7.9.8 The 1st Respondent failed to properly, justifiably and reasonably determine and assess the evidence properly before the 1st Respondent in this matter.

7.9.9 The award of the 1st Respondent is not a determination a reasonable decision maker could arrive at.'

The arbitration award

[13] The arbitrator accepted the version of the employee as concerning the allegation that he transported members of the public on the day in question. She further accepted his explanation in relation to the issue of deviation from his prescribed route. She found that the employee had gone to buy food and in that regard did not contravene the workplace rule. In relation to this charge; the arbitrator found that the case of the applicant was weakened by the fact that it failed to produce the log book to show the movement of the employee on that particular day.

Evaluation

[14] The first issue to deal with in this matter concerns the issue of the incomplete record of the arbitration hearing. The duty to ensure that a full and proper record is placed before the court rests with the applicant. An applicant who fails to place a proper record before the court runs the risk of having his or her review application

dismissed for that reason alone. The courts have also said that the applicant has the duty to take steps to ensure the reconstruction of the record where the electronic recordings are missing or are defective.¹

[15] The other approach which the courts have followed when faced with the problem of a defective record is to determine the review application on the material before the court.²

[16] Turning to the facts of this case, I do not believe that it would be fair and just to dismiss the applicant's review on the ground of failure to present a proper record in the circumstances where the problem of the transcription is no fault of the applicant. The applicant can also not be faulted for failure to take steps to have the record reconstructed as the arbitrator has left the country.

[17] The issue that then remains is to determine as to whether this court is able on the material before it to determine the review application. The material before the court is insufficient for the court to fairly and objectively determine the review application. The review application revolves around the issue of whether or not the arbitrator interpreted the facts which were placed before her in a fair and proper manner. This would also include having to assess whether the arbitrator denied the applicant a fair hearing in the manner that she assessed the probabilities.

[18] The reading of the arbitration award reveals that the arbitrator was faced with two conflicting versions in relation to the allegation that the employee transported members of the public on the day in question. The arbitrator does not provide reasons for accepting the version of the employee and rejecting that of Ms Pillay. In the absence of the reasons by the arbitrator and a proper record this court is not in a position to properly assess the reasonableness or otherwise of the finding of the arbitrator. The same applies to the other charges proffered against the employee. There is insufficient material to determine the reasonableness or otherwise of the findings made by the arbitrator in that regard.

¹ See *JDG Trading (Pty) Ltd Russels v Witcher NO and Others* (2001) 3 BLLR 300 (LAC) and *Life Care t/a Ekuhlengeni Care Centre v CCMA and Others* (2003) 5 BLLR 416 (LAC).

² *Department of Community Safety: Werstern Cape Provincial Government v General Public Service Sectoral Bargaining Council and Others* (2011) 32 ILJ 890 (LC). In *Balesan v Motor Bargaining Council* (2011) 32 ILJ 297 (LC), the Court remitted the matter where the record was defective to the bargaining council to be heard afresh.

[19] It needs to be pointed out that whilst there is some basis upon which the arbitrator can be criticised for unreasonableness, justice on the facts and the circumstances of this case dictates that the matter be remitted back to the second respondent for a determination by an arbitrator other than the first respondent.

[20] In the premises the arbitration award made by the first respondent is set aside and the matter is remitted back to the second respondent to be considered by an arbitrator other than the first respondent with no order as to costs.

MOLAHLEHI J

Judge of the Labour Court

APPEARANCES

For the Applicant: Snyman Attorneys

For the Respondent: The union official

LABOUR COURT