



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1867/15

In the matter between:

4 PL FLEET (PTY) LTD

Applicant

and

JIM MBUYISELLWA MABASO

First Respondent

DANIEL H BAKANI

Second Respondent

**NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY**

Third Respondent

PRINCE KEKANA

Fourth Respondent

Heard: 11 January 2017

Delivered: 19 January 2017

Summary: Disciplinary Penalty – Dismissal – Arbitrator finding misconduct not amounting to gross insubordination and thus sanction of dismissal too harsh – On the totality of evidence finding reasonable – Arbitrator’s failure to consider valid final written warning unreasonable.

JUDGMENT

Beckenstrater AJ:

Introduction

- [1]. This is an unopposed review application in which the Applicant employer (Applicant) seeks to review and set aside an arbitration award of the Fourth Respondent, an arbitrator of the National Bargaining Council for the Road Freight Industry (Arbitrator). The Arbitrator found that the dismissal of the First and Second Respondent employees by the Applicant was not an appropriate sanction for the offence of which the Arbitrator found them guilty. He ordered their re-instatement together with partial (five months) back pay. The Applicant seeks to review the award challenging the finding relating to the appropriate sanction.

Background

- [2]. Two previous employees of the Applicant, the First and Second Respondents, had been engaged by it as drivers of ultra-heavy trucks. It was alleged that on 6 October 2014 both the First and Second Respondent had been instructed to park the trucks they were operating outside of the Applicant’s yard, next to a company called Scania, in Heyneke Street, Nelspruit. Instead of doing this they had driven those trucks to a shopping mall near Pirtek, a few kilometers away, without authorization.

- [3]. Consequent on these allegations the First and Second Respondents were charged with misconduct which was categorized as follows:

“Charge:

Gross Misconduct including but not limited to:

1. **Gross Insubordination**
 - a. Failure to adhere to common and well established rules and regulations established by the employer by not parking the vehicle at Scania.

and/or
2. **Unauthorized use, possession and abuse of the company vehicle for personal use by:**
 - a. instead of parking the vehicle at Scania you took the vehicle out of the yard and drove to Pirtek and went shopping;
 - b. using company fuel to drive to the mall and purchase your personal groceries without permission.

and/or
3. **Being in breach of the key principle of the Code of Conduct as described in Schedule 8(1)(3) of the Labour Relations Act being the right of the employer to reasonable conduct and proper performance.”**

- [4]. Pursuant to disciplinary hearings both the First and Second Respondents were found guilty of the allegations against them and dismissed. They then referred an unfair dismissal dispute to the Third Respondent Bargaining Council. After an initial default award in favour of the employees was rescinded, the matter came before the Arbitrator for determination.

- [5]. The transcript of the arbitration reveals that on 6 October 2014 the Applicant's depot manager for Nelspruit, one Jan Venter (Venter), had not been at the premises as it was a weekend and he was working from home. Venter telephoned Meshack Khanye (Khanye), the Applicant's mechanic and foreman and, because the Applicant's yard at the time was full, told him to instruct the

First and Second Respondents to park their trucks next to Scania. The advantage of parking trucks near Scania was that those trucks would be visible from the Applicant's yard and within 20 meters of it, although to get to that point one would have to drive about 500 meters around the back of the Applicant's yard. Khanye duly instructed the First and Second Respondents to park the trucks next to Scania. The First and Second Respondents, however, then drove the two trucks they were operating to Pirtek, an alternative place about 4 kilometers from the Applicant's depot.

- [6]. Venter later saw that the trucks were not parked at Scania when he checked their location via the Applicant's truck tracking system. He telephoned Khanye to confirm whether the instruction had been given. When Khanye confirmed this he phoned both the First and Second Respondent confirming with them that they were parked at Pirtek and instructing them immediately to move the vehicles and park them next to Scania. This they then did. By the end of the arbitration both the First and Second Respondents accepted they had been given instructions by Khanye and had not complied with those instructions. They both however contended that the parking space near Scania had been full and this is why they had driven to Pirtek, a place which they contended was an alternative parking area used by the Applicant from time to time.
- [7]. At the arbitration, the First Respondent, Jim Mbuyisellwa Mabaso (Mabaso), stated that when he was in the Applicant's yard he could see that the parking in Scania was full. Thus when Khanye gave him the instructions he told Khanye that he was not going to park at Scania because it was full. He then took the truck and went to Pirtek. Khanye admitted being told this when he gave the First and Second Respondents the instruction but thought Mabaso was joking because there was parking available outside Scania. The Applicant furthermore led evidence to indicate that there was parking space all along Heyneke Street near Scania such that up to 20 trucks could park there at any one time. Beyond

simply stating that the parking outside Scania was full Mabaso did not seriously challenge this evidence of the Applicant.

- [8]. The Second Respondent, Daniel Bakani did not repeat the version about seeing that the parking was full and advising Khanya of this. He stated that he had driven around the front of the Applicant's premises (rather than the back way to Scania). That route took him down Wolfaard Street which also intersects Heyneke Street. From there he said he could see the parking was full. He admitted that he did not stop the truck at that stage but simply drove past slowly and, after seeing that the parking was full, drove to Pirtek. On arrival at Pirtek he found the First Respondent already parked there.
- [9]. The First Respondent admitted that if he had difficulty going to any place or parking at any place he had been instructed to, he would normally communicate with Venter about this. On the day in question he did not do so because his phone had run out of battery life.
- [10]. It was also undisputed at the arbitration that the First Respondent was, at the time, subject to a final written warning given to him on 6 December 2013 and effective for 12 months for —
- “gross misconduct including dereliction of duties by being in breach of the company rules and regulations by being guilty of:
1. Careless and reckless driving.
 2. Damage to company vehicle.
 3. Causing major financial loss to the company.”
- [11]. By the end of the arbitration the Arbitrator was grappling with the issue of the appropriate sanction. The closing discussion in argument records the Arbitrator mentioning to the parties that he would be considering the matter before issuing a written award, having particular regard to the following concerns:

"I have listened to the evidence and I have got concerns you know and I think I will go and do some research. The problem that I have with both of you [talking to the employees] is that there is no remorse . . . the evidence is clear that you did not follow an instruction . . when I give you an opportunity, you still say, I love my job, I didn't do anything wrong . . . which means if I take you back to work, you will do the same thing . . . and which is a problem for me because I looked at what the company is saying. The company is saying, you breached the trust you know that the Labour Relations Act is very clear... you know an employee should be dismissed for gross insubordination if it is a serious misconduct, alright. And I'm battling, I'm battling because when I listened to the evidence of all the witnesses, they did not convince me that the misconduct, it's so serious that it deserves misconduct (sic – clearly meaning dismissal). And that is why I'm going to do research . . ."

[12]. In the award the Arbitrator then reasoned as follows:

"[29] I have to determine whether dismissal was an appropriate sanction for this contravention, **The Code of Good Practice: Dismissal** Item 3 clause 4 stipulates that dismissal would be appropriate where the misconduct was serious and the code gave gross insubordination as an example. **Grogan**, his book **Dismissal**, Juta 2013 on page 197 stated that for insubordination to be considered gross it must be serious, persistent and deliberate. These employees conduct was not serious because they were asked to park in a public street and they parked in a different public street. Their conduct was not persistent because they complied immediately Venter called them, which is what he ought to have done in the first place. The employees conduct was not deliberate because they argued that the trucks were going to obstruct traffic. I take full guidance from these authorities and find that the employees' conduct was insubordinate but not gross.

[30] The Labour Appeal Court in **Wasteman Group v South African Municipal Workers' Union – (2012) 8 BLLR 778 (LAC)** held that there

was a clear distinction between insubordination which did not warrant dismissal and gross insubordination which attracted dismissal. The Labour Appeal Court found that the decision of the Labour Court to reinstate an employee who was insubordinate was appropriate because he complied immediately he was alerted that he was insubordinate. I am bound by this judgment and find it appropriate to the facts before me.

- [31] I therefore find that dismissal was not an appropriate sanction for this contravention. I further find that the dismissal of these two employees was substantively unfair.”

The Review

- [13]. The Applicant’s challenge to the Arbitrator’s finding is simply expressed in the founding affidavit (where no supplementary affidavit has been filed) in the following terms:

- “15. The arbitrator failed to take the seriousness of the transgression into consideration and also failed to take into consideration the value of the property that was put at risk.
16. The arbitrator further failed to take into consideration that the reinstatement could cause that other drivers also take unnecessary and irresponsible chances with company vehicles by going off route and insubordinately ignore a direct lawful instruction. This will result in the total breakdown of discipline amongst drivers that will have serious financial implications for the business.
17. The arbitrator therefore failed to understand the seriousness of the transgression the Respondents had to be dismissed.”

- [14]. While the Applicant’s challenge has not been detailed it is clear that it seeks to review the award on the basis of what has become known as a “*penalty review*”.

*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ still sets out the appropriate test in considering penalty reviews in the following terms:

“In approaching the dismissal dispute impartially a Commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The Commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up, in terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances”.

[15]. The *Sidumo* judgment then continues at paragraph 115 to record:

“However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine's valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach...

To my mind, having regard to the reasoning of the Commissioner based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. This is one of those cases where the

¹ [2009] 12 BLLR 1097 (CC) at paras 78-9. (*Sidumo* judgment)

decision makers acting reasonably may reach different conclusions. The LRA has given that decision – making power to a Commissioner”.

- [16]. The facts of this matter seem to fit into the facts and principles dealt with in the above passages of the *Sidumo* judgment. The Arbitrator indeed appears to have either not understood or downplayed the seriousness of the contravention but in the final analysis I do not think this made his finding one no reasonable commissioner could make.
- [17]. The Arbitrator records in the award that the parking at Scania was on a public road 500 meters from the Applicant’s yard while the parking at Pirtek was on a public road 4 kilometers from the Applicant’s yard. The award does not show the significant benefit of parking near Scania – which is that that parking is at the back of the Applicant’s yard and within sight thereof.
- [18]. The Arbitrator also saw fit to record that—

“Khanye did not show the employees the parking that was available. There was no dispute that the Pirtek parking was used previously. There was no written rule stating when they stopped using it. There was no evidence to show that they were aware that Pirtek parking was now outlawed. The version of the employer is weakened by these factors”.

I do not agree with the Arbitrator’s conclusion that somehow the Applicant’s version is “*weakened*” by these factors. As set out above, despite initial denials at the arbitration, both the First and Second Respondents eventually conceded that they had been given a direct instruction to park near Scania and had not done so. The real relevance of the previous use of the parking near Pirtek and the dispute about whether parking there had been totally outlawed is to perhaps suggest that it was not a high risk parking area.

- [19]. Notwithstanding these errors in the Arbitrator's analysis I cannot fault his conclusion that on all the evidence before him the conduct of the First and Second Respondents did not amount to gross insubordination. While they may not have obeyed a lawful instruction there is nothing on record that suggests that they parked the Applicant's vehicle at Pirtek with any intent to challenge the employer's authority. As noted in *Palluci Home Depot (Pty) Ltd v Herchowitz and Others*²

"... [A]cts of mere insolence and insubordination do not justify dismissal unless they are serious and willful. The failure by an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to or defiance of the authority of the employer may justify dismissal, provided it is willful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is willful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her."

- [20]. The Arbitrator in considering *Wasteman Group v Sambou*³ was keenly aware of this situation and I believe came to the correct and certainly a reasonable conclusion that the First and Second Respondents' conduct did not amount to gross insubordination.
- [21]. Advocate Froneman, on behalf of the Applicant, argued that the test for ascertaining whether misconduct amounted to gross insubordination rather than simple insubordination was whether the conduct was serious, persistent and deliberate. Firstly, however, it cannot be said that the First and Second Respondents' conduct was persistent. As soon as they were confronted by

² [2015] 36 ILJ 1511 (LAC) at para 22.

³ [2012] 8 BLLR 778 (LAC).

Venter they moved the trucks to Scania. Secondly, my understanding of the authorities is that the requirement for the conduct to be “*serious, persistent and deliberate*” in order to amount to gross insubordination is a requirement that the conduct which is taking place (in this matter the refusal to obey an instruction) is shown to be defiant. There is no evidence that what the First and Second Respondents intended (in the *dolus directus* or *dolus indirectus* meaning of the word) to undermine the employer’s authority. It is rather more likely that the First and Second Respondents took their trucks to Pirtek for their own purposes while they were not immediately required by the Applicant. This most certainly amounts to misconduct, but to my mind does not constitute gross insubordination. The conduct of the First and Second Respondents is thus distinguishable from the cases relied upon by Mr Froneman. In *SAMWU & Others v Ethekwini Municipality & Others*⁴ the employees had intentionally locked the employer’s gate preventing its operations. The Court found that this conduct was not only intentional, but indeed malicious. In *City of Johannesburg v Swanepoel N.O & Others*⁵ the employee’s refusal to obey an instruction to transfer to a different department had persisted for several months and through several meetings.

- [22]. I do not accept the Applicant’s argument that to reinstate the First and Second Respondents, after they had been found guilty of not obeying an instruction, would undermine authority at the workplace. The question the Arbitrator had to consider was whether it was fair to have dismissed them in the first place. The Arbitrator clearly thought that progressive discipline would have been more appropriate. The evidence before the Arbitrator showed the long service of the First and Second Respondents, that no financial loss was suffered by the Applicant and that the Respondents immediately moved the trucks to Scania when Venter contacted them. Subject only to the observation I make below, on the evidence before the Arbitrator I do not think that the award on sanction is one that a reasonable decision maker could not reach.

⁴ (2017) 38 ILJ 158 (LAC).

⁵ (2016) 37 ILJ 1400 (LC).

- [23]. There is however a material factor which the Arbitrator appears to have overlooked and that is the valid final written warning which had been issued to the First Respondent. While it did not relate to exactly the same type of offence it is relevant because it was also categorized as an offence relating to "*being in breach of the company rules*". During the arbitration itself the Arbitrator had been aware of its relevance and had debated it with the First Respondent. By the time the award came to be written however no reference was made to it. In this regard the Arbitrator failed to consider a material fact before him. Moreover, the Arbitrator was of the view that some lesser sanction would have been appropriate. Then, on his own reasoning, previous progressive discipline such as the final written warning would have had a material impact. In my view no reasonable Arbitrator would have found the sanction of dismissal in relation to the First Respondent to be unfair had he or she taken into account all the factors set out above and the final written warning. The outcome of the matter in relation to the First Respondent consequently falls to be reviewed and set aside.
- [24]. Finally and once again accepting the Arbitrator's finding that the Second Respondent had been guilty of misconduct but that misconduct did not warrant dismissal it appears that the Arbitrator omitted to make an appropriate award in that regard. It would be unreasonable in the circumstances to reinstate the Second Respondent with no progressive disciplinary measure being recorded.

Order

- [25]. In the above circumstances I make the following order:
1. The arbitration award of the Fourth Respondent under the Third Respondent's case number GPRFBC 32503 of 27 August 2015 (the award), insofar as it relates to the First Respondent, Mr Jim Mbuyisellwa Mabaso is reviewed and set aside.

2. The dismissal of Mr Jim Mbuyisellwa Mabaso was procedurally and substantively fair.
3. The award, insofar as it relates to the Second Respondent, Mr Daniel Bakani is amended by the addition thereto of the following: "*The reinstatement of Daniel Bakani is subject to the imposition of a final written warning valid for a period of twelve months*".
4. There is no order as to costs.

Beckenstrater AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate L S Froneman

Instructed by:

Viljoen & Meek Attorneys

LABOUR COURT