



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 1693/16

In the matter between:

PIETER BREED

Applicant

and

LASER CLEANING AFRICA

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

**COMMISSIONER MXOLISI
MANTSHULE N.O**

Third Respondent

Heard: 7 February 2017

Delivered: 24 March 2017

Summary: (Review – grounds of review in reality grounds of appeal – even if evaluated as if they amounted to a review based on rationality, alleged defects would not render award reviewable.)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant has applied to review and set aside an arbitration award issued by the third respondent in favour of the first respondent. The arbitrator found that the applicant's dismissal was procedurally and substantively fair. The applicant had been dismissed for two charges of misconduct relating to the unauthorised use of company vehicles whilst on leave in March 2016 and wilful damage to company property in February 2016.
- [2] The arbitrator found that the applicant's dismissal was procedurally fair because the applicant decided not to attend the disciplinary enquiry. The applicant did not do so because he did not consider himself bound by the disciplinary enquiry process adopted by the employer as part of its policies. He insisted instead that, he was entitled to a hearing in terms of the principles of *audi alterem partem* or natural justice. The arbitrator found that the employer was entitled to follow its own disciplinary procedures in the absence of a written contract stating otherwise. The arbitrator reasoned that since the applicant did not attend the hearing of his own free will, he had waived his right to be heard.
- [3] With regard to the first charge, the arbitrator found that the Policy governing the applicant's use of vehicles was set out in writing on 8 December 2014. It specifically identified him by name as being entitled to use the vehicle to and from work. The policy also stated that private use of the vehicle without prior consent was prohibited. The policy also stipulated that the vehicle had to be parked on the company premises when the employee went on leave.
- [4] The charge arose when the applicant took the vehicle to Kwa Zulu Natal South Coast when he was on personal leave from Tuesday 1 March 2016 to Thursday 3 March 2016. It was common cause that whilst on special leave in March 2016, the applicant had driven the vehicle to the KZN South coast without notifying the employer. The arbitrator found that the applicant saw nothing wrong with his conduct because he did not believe

he was bound by the policy. The arbitrator found that it was untenable for the applicant to regard himself as exempt from the policy especially when his own terms of usage were expressly spelt out in the policy. I note in passing that these terms were specifically drafted to allow the applicant the limited use of the vehicle for his personal transport. The policy was implemented by the employer in December 2014 and the relevant portions stated:

“To all assigned users of company vehicles,

With the recent purchase of the additional bakkie, we have reviewed our current vehicle running costs and will make certain necessary changes to the company vehicle policy as follows:

1. The company vehicle is for the sole use of transporting staff and laser cleaning equipment to and from our offices to site and back. Any staff member who uses a company vehicle outside these parameters, without prior consent of the director or the company will face the necessary disciplinary action.

...

4. Company car private use now whilst we have been extremely accommodating over the last 12 months in assisting staff members with transport requirements, it has become necessary, in line with managing the company's expenses more effectively, to implement the following changes.

- a) Pieter Breed and Willem Breytenbach are the only two vehicle drivers who have consent to make use of company transport to get home at the end of each day and back to work the following morning. This is seen as a privilege and NOT a condition of your employment.

- b) With immediate effect the company will no longer contribute towards your fuel cost in order to get from work back home and vice versa, this cost will in future be for the assigned driver/s of the vehicle. It is expected that Pieter Breed and Willem Breytenbach are to present the deemed fuel usage and cost to Lorette, for the purpose of making it a monthly salary deduction from the paper. Failure to do this will result in management making the decision as what the deemed personal fuel spend is each month, and deducted accordingly from their salaries each month.

c) The company will also no longer be liable for any E-toll costs or toll gates relating to your chosen route of travel between home and the office, this will also be treated as in clause (b).

c) The company is happy to carry the wear and tear cost, as well as any servicing costs as per the manufacturer's requirements during the warranty period of the vehicles, whilst in use by yourselves.

d) The standard practice of utilising company transport in order to get home and back to work each day, will be limited to one vehicle only for both Pieter Breed and Willem Breytenbach on a daily basis. This reduces any unnecessary expense and the last two drivers to share the fuel cost, relative to distances to from their respective homes to the office and back. The only exception to this rule, will be in the event of one or other been assigned to a project that does not allow either to? Travel together. In this instance the affected driver will make use of the second vehicle with management's prior permission to do so.

- [5] The arbitrator felt that the applicant had wilfully and deliberately defied the employer's authority by taking the vehicle for his personal use whilst on leave without seeking prior authorisation and that the applicant had wilfully and deliberately defied the employer's authority. The arbitrator rejected the applicant's contention that he was entitled to use it because it was an 'emergency situation' which required him to use the vehicle.
- [6] The policy adopted in December 2014 required vehicles to be left at the employer's premises when an employee was on leave. Management acknowledged that the applicant had objected to the policy but insisted that he was told that he had to abide by it. The company had intended to use the vehicle in a client demonstration but had to postpone the event because the vehicle was not available. It was common cause that the applicant did not advise anyone that he had taken the vehicle to the South coast.
- [7] In relation to the second charge which arose from damage caused to a compressor which the applicant pulled off a vehicle it was being transported in, the arbitrator accepted the undisputed evidence that, despite the established practice at the firm, in terms of which employees paid for damages they caused, he had behaved recklessly with the

equipment causing the damage. The existence of a policy of reimbursing the employer for damage to its property, did not entitle employees to treat the property recklessly.

- [8] Having found the applicant guilty of both charges, the arbitrator considered whether dismissal was an appropriate sanction. In this regard he considered the gravity of the misconduct and the rationale for the existence of rules in the workplace. He was of the view that the employer was faced with an employee “who wanted his way and nothing else in the workplace” and that because of his attitude a sanction less than dismissal would not resolve the problem.

Grounds of review

- [9] I appreciate that the applicant is a layperson. His grounds of review are formulated more like grounds of appeal and are somewhat inchoate even as grounds of appeal. As such, his application stands to be dismissed on this basis alone. However, I have considered the applicant’s complaints about the arbitrator as if they were grounds of review relating to the reasonableness of the award, making generous allowance for this severe defect in the pleadings. Nonetheless, just because the applicant is a layperson, it does not mean that a less stringent test applies in assessing those complaints interpreted as grounds of review. In regard to those complaints of the applicant which simply repeat his criticism of the original disciplinary enquiry, unless he has related those to the reasons he attacks the Commissioner’s award, I have not dealt with those complaints because they are not relevant to reviewing the Commissioner’s reasoning and findings.
- [10] As far as I can tell from the papers and the applicant’s argument presented in court, apart from simply repeating the case he made at the arbitration, the applicant criticises the Commissioner’s reasoning on the following grounds, which I have grouped together:
- [11] On the question of procedural fairness, the applicant believes that the arbitrator failed to consider that the employer had offered him a settlement package before proceeding with the disciplinary action once he rejected it

and that, accordingly, his belief that the hearing would not be fair was justified. His distrust of the employer's motives was also justified because of the way the employer had imposed the transport policy on him. The applicant further takes issue with the Commissioner for accepting that the employer's disciplinary procedure was binding on him even though he had never consented to it and for allegedly ignoring the fact that the LRA protected his 'right to an informal hearing'.

- [12] The arbitrator ignored evidence presented at the enquiry that the employer's evidence was false and that he had never waived his right to a fair hearing because he had notified the chairperson and the arbitrator of his wish to be heard in an unbiased hearing following the principles of natural justice.
- [13] The applicant claims that when the arbitrator said he did not have a right to object to a disciplinary enquiry being held except in the case of pre-dismissal arbitrations, the applicant became so distracted that he forgot to present certain important evidence in his testimony. He also believes that the arbitrator's reference to pre-dismissal hearing as being the only time when an employee could object to the process was an interference with his right to natural justice.
- [14] The arbitrator erred in finding that the chairperson had not breached the *audi alterem* principle when he proceeded with the disciplinary enquiry because the chairperson was an independent party with no prior connection with the employer. It appeared that the applicant is of the view that the chairperson could not have proceeded with the enquiry without his side of the story being investigated beforehand. The applicant believes that the investigative phase prior to instituting disciplinary proceedings was an integral part of his right to a fair hearing and the failure to discuss the allegations with him during the investigation phase deprived him of the right to an informal hearing. He also seemed to be of the view that something was amiss because in other disciplinary enquiries the manager, Mr Games had conducted the hearing himself.
- [15] The arbitrator further allegedly ignored clear and undisputed evidence that there was a rule in place that he had unrestricted use of the company

vehicle within reason and that his fuel costs and toll fees were paid for in accordance with an agreement reached *before* he accepted employment, and the employer had not honoured that prior agreement.

- [16] The arbitrator ignored evidence that the charge of wilful damage to company property depended on the existence of a rule that required the reporting of any damage without exception, which did not exist.

Evaluation

Procedural Issues

- [17] It is obvious that the applicant labours under a misapprehension about the kind of hearing that an employer must conduct according to item 4 of schedule 8 to the Labour Relations Act, 66 of 1995 ('the LRA'). That provision reads:

“(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”

(Emphasis added)

- [18] The requirements of a fair procedure set out in the extract above set out the *minimum* requirements that a disciplinary enquiry ought to comply with. It is important to note that the emphasised words merely highlight that an employer is not obliged to hold a formal enquiry like the respondent did in this case.¹ However, nothing prevents an employer from convening a

¹ See *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 1644 (LC) at 1654F-H where Van Niekerk J made the following comment about employers who follow formal procedures :

”This is not to say that employers and unions cannot agree to retain the criminal justice model if they are so inclined, whether by way of a

more formal inquiry with more procedural safeguards for the employee than the LRA requires. In this case, the employer appointed an external chairperson, who is less likely to be reluctant to find in an employee's favour than another employee who might be influenced by considerations about how their employment career might be affected if they made a finding adverse to what they perceived to be the employer's wishes. The employer could have appointed one of its own managers to conduct the enquiry, but decided to go one step further in making the process a more independent one by appointing a third party who was not an employee and with no prior involvement in the issues to be considered or in the failed negotiations to try and arrive a termination by consent. There is always a certain degree of inherent bias in internal enquiries which cannot be avoided and in this instance the employer took additional steps to minimise that possibility.²

- [19] In so far as the applicant believes his right to a fair procedure includes a right to be consulted or interviewed during any preliminary investigation that perception also rests on a commonly held misconception. It is the disciplinary enquiry where the employee is entitled to be given an opportunity to put his or her side of the story. It is not necessary for an employer to engage with the employee in all the steps leading up to that enquiry unless that is required by a disciplinary procedure.³

collective agreement (as was the case in *MEC: Dept of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2004) 25 ILJ 2311 (SCA); [2005] 2 BLLR 173 (SCA)) or by way of a contract of employment or employment policies and practices. In this instance, employers are obviously bound to apply the standards to which they have agreed or that they have established."

(emphasis added)

² See *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 583C-F on the unavoidable practicalities of prior contact between parties in an internal enquiry, which alone cannot justify an allegation of bias.

³ See *National Union of Mineworkers on behalf of Employees v Grogan NO & another* (2010) 31 ILJ 1618 (LAC) at 1641-2 where the Labour Appeal Court stated the following:

"[35] Counsel for the appellant attacked the audit that has been referred to above on the basis that since it was conducted in secret without the appellant or dismissed employees being represented there, the subsequent dismissal was procedurally unfair and the arbitrator's failure to so hold was unjustifiable and/or unreasonable. In my view there is no basis for this attack on the audit. The audit was part of an investigation that the employer conducted before it could take a decision whether or not there were reasonable grounds to initiate disciplinary

[20] When the applicant decided not to go to the enquiry and present his complaint he effectively denied himself the opportunity of presenting his side of the story to the chairperson. If he wanted to re-open discussions with his employer on settling the matter or to debate the rules relating to transport nothing stopped him from requesting such a discussion. However, when it came to defending himself against the charges, it was the enquiry set up by the employer which provided him with the opportunity for him to do so. He cannot complain of lack of *audi alteram partem* if he did not make use of the reasonable opportunity to present his side of the case.⁴

[21] Not only is there nothing unreasonable about the arbitrator's findings on procedural fairness but they were also perfectly correct on the facts and in law in my view.

charges against the relevant employees. The audi alteram partem rule had no application at that stage. The employees would be given an opportunity to be heard in subsequent disciplinary enquiries. At that stage the affected employees would have an opportunity to do their own audit in order to be able effectively to challenge at the disciplinary enquiries the findings made pursuant to the employer's secret audit. In the light of this I reject the appellant's contention that the

arbitrator's failure to find that the employees were entitled to attend the audit was unjustifiable or unreasonable or constituted a gross irregularity."

(emphasis added)

⁴ See ***Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC)** where the Labour Appeal Court stated :

[40] The reason why, generally speaking, an employee is not obliged to attend his disciplinary hearing is that a disciplinary hearing is there to comply with the audi alteram partem rule before the employer may take a decision that may affect the employee or his rights or interests adversely. An employee can make use of that right if he so chooses but he can also decide not to exercise it. However, if he decides not to exercise that right after he has been afforded an opportunity to exercise it and a decision is subsequently taken by the employer that affects him in an adverse manner, he cannot be heard to complain that he was not afforded an opportunity to be heard.

[41]. The fear that the employer may take an adverse decision against the employee without the employee stating his side of the story is the reason why employees normally attend their disciplinary hearings. All an employer can do, if an employee fails to attend his disciplinary enquiry, is to proceed with the disciplinary enquiry in the employee's absence and make such decision as he considers to be right in the light of all the evidence before him.'

Substantive matters

[22] The company transport policy cited above was implemented in December 2014. The email in which it was contained also invited anyone who had an issue with the policy to see the managing director before the end of that month. The applicant's claim was that when he was employed it was agreed that he would have the right of private use of the company vehicle and that he never accepted the policy as laid down by the employer in December 2014. Under his cross-examination at the arbitration, the managing director agreed with the applicant that he could make private use of the vehicle, within reason. However, even under special circumstances he did not consider a 2000 km road trip could be considered reasonable use. Even if it was an emergency, the applicant ought to have consulted about using the vehicle for such a trip and requested permission to do so. In his view such use was a matter for him to decide in the exercise of his discretion and not a matter for the applicant to decide unilaterally.

[23] For his part, the applicant was insistent that because he did not consider himself bound by the requirement of obtaining permission to use the vehicle, he was entitled to use it in the circumstances of the family emergency he faced. He also testified that despite the introduction of the transport policy in December 2014 he still received payment of his transport costs. Among the points he emphasised was that there was no rule in place for the use of a vehicle in an emergency and that work was not inconvenienced by him having the vehicle because an alternative appointment was made when the vehicle would be needed after he returned. Although he freely acknowledged that the normal rule when he was on leave was to leave the vehicle at the office, the emergency he was dealing with meant it was acceptable for him not to follow the rule on that occasion though he did feel obliged to pay for the fuel expenses because of the distance involved.

[24] Even if I accept for argument's sake that the applicant had never agreed to the revisions to the transport policy introduced in 2014, it was not unreasonable for the arbitrator to conclude that when it came to the

emergency personal use of the vehicle, the applicant was not entitled to have retained the vehicle during his leave and used it to travel to the South Coast without obtaining prior authorisation. What is clear is that, the applicant believed that it was for him to determine whether emergency private use of the vehicle was reasonable and the extent to which it was necessary.

- [25] In relation to the charge of damaging the compressor, it was not a conclusion that no reasonable arbitrator could have come to in deciding that, notwithstanding the principle of reimbursing the employer for damage done to equipment, it was because the damage was inflicted recklessly that disciplinary action was warranted.
- [26] There was also no reason on the evidence to believe that if the applicant was simply given a warning, the problem would be resolved. He clearly did not accept his conduct in taking the vehicle was wrong and there was no reason to believe a warning would have any corrective effect, because the applicant did not accept the validity of the rule under which he was disciplined. Likewise, he did not accept that it was not sufficient that the employer was simply reimbursed for damage done to equipment, in circumstances where the damage was caused recklessly.
- [27] The test for review based on rationality, which is the most favourable interpretation of the inadequate grounds of review advanced by the applicant, has been expressed summarily as follows by the LAC, which illustrates how far an applicant needs to go to succeed in a review application relying on this approach:
- “[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to

have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork.”⁵

[28] Even on a very indulgent assessment of the applicant’s grounds of review, he has not met the threshold set by the LAC in showing any failures in the arbitrator’s reasoning he complains of which would have necessarily altered the outcome if they had not been made. As mentioned, if the ‘grounds of review’ as set out by the applicant had been prepared by a legal professional, they would probably have been rejected out of hand as not settling out recognised grounds of review.

[29] Despite the applicant’s lack of success, given his financial circumstances and that he conducted the review himself, it would not be appropriate to award costs against him in these proceedings.

Order

[30] The applicant’s review application is dismissed.

[31] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

⁵ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at 950

APPEARANCES

APPLICANT:

In person

FIRST RESPONDENT:

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LABOUR COURT