



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2512/13

In the matter between:

LESEGO SAMUEL LEKOBA

First Applicant

and

SMOLLAN CAPE (PTY) LTD

First Respondent

LAWRENCE NOWSENETZ N.O

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 11 August 2016

Delivered: 5 December 2017

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction and background:

- [1] The applicant, Mr Lesogo Samuel Lekoba (Lekoba), seeks an order reviewing and setting aside the arbitration award issued by the Second Respondent, Commissioner Lawrence Nowsenetz (Commissioner) on 25 October 2013 wherein it was found that his dismissal by the first respondent (Smollan) was substantively fair. Smollan Cape (Pty) Ltd (Smollan) opposed the application.

- [2] Lekoba was employed by Smollan as a Field Manager from 27 July 2011 until his dismissal on 26 July 2013 on the grounds of alleged misconduct relating to gross negligence and abuse of a company vehicle. He is alleged to have during 26 and 27 June 2013, driven a company vehicle at excessive speeds of up to 202 km/h in contravention of Smollan's Fleet Management Policy.

The arbitration proceedings:

- [3] The dispute having been referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for arbitration after conciliation had failed, it came before the Commissioner for arbitration at which two witnesses testified on behalf of Smollan, whilst Lekoba and his wife testified on his behalf. Lekoba from the onset at the arbitration proceedings disputed the accuracy of the tracking system which was used as evidence in proving that he had travelled at excessive speed on the days in question. He went further and alleged that the system and the data or reports generated were manipulated. In substantiation of his claims, Lekoba pointed to the discrepancies between the odometer reading in the vehicle at the time of the alleged incident and the actual readings as recorded and reflected in the GPS report from the tracking device in the vehicle.
- [4] Lekoba further alleged that the charges against him were trumped up and a plot by Smollan, as it sought to get "rid" of him. To support his conspiracy theory, Lekoba further points that in the past, he was dismissed and had referred a dispute to the CCMA which had resulted in his reinstatement. According to him, Smollan was displeased with these turn of events, hence the trumped up charges against him.
- [5] Henning Pretorius, the Smollen's Regional Manager and Lekoba's direct supervisor's testimony was that the latter as a Field Manager had 24 people reporting to him, who were involved in merchandising and other activities at various stores. As part of Lekoba's responsibilities including promotions, and supervising merchandising etc., he was required to drive from store to store and was also allowed personal use of the company vehicle.
- [6] Pretorius further testified that the company vehicles are fitted with tracking devices managed by Autotrack, which is contracted to monitor Smollen's fleet of vehicles. The device generates reports/data of driving patterns of drivers including crashes

and extreme driving. A 'crash' alert was received relating to a vehicle driven by Lekoba, which indicated the vehicle was travelling at high speed. The report also indicated that on 26 June 2013, Lekoba drove a company vehicle at speeds between 118 and 120 in an 80km/h zone. On 27 June 2013 at about 02h19, the vehicle was recorded as having been driven at speeds of between 195km/h on a 60km/h road at about 02h19, triggering an alert on the device.

- [7] Pretorius had asked Lekoba to explain himself in the light of Autotrack report, and his initial response was that he was in a hurry. He was asked to write a statement to elaborate on his explanation, and in his written statement, he merely stated that he drove the vehicle responsibly. As his version of events was not satisfactory, this had led to a disciplinary process being instituted. Pretorius denied that Lekoba was at any stage victimised, and contended that a broken trust relationship led to the dismissal. He further denied that the Autotrack reports or the tracker devices could have been manipulated. According to Pretorius, Lekoba was well aware of the company policy pertaining to the use of its vehicle, having been trained and briefed in weekly meetings in that regard.
- [8] Smollan had also called upon Ms. Candice Grant-Olivier, Autotrack's General Manager for Operations to testify on its behalf in respect of how the devices in motor vehicles operated. Her evidence was that the tracking system was accredited by various institutions and is not linked to the physical odometer in the vehicle. She further testified that the devices' technology was 100% reliable and that it was absolutely impossible for anyone to manipulate the data generated. The devices are GPS based, and are further insurance approved. A 'crash alert' is any disturbance to the unit at any speed of over 40km/h, which could be created by *inter alia*, going over speed humps, hitting a pothole too fast, going off tar onto gravel road etc. If a crash alert is received, the customer response sensor would analyse the trip and if the vehicle stops directly thereafter, it would indicate an accident, and the customer would then be informed.
- [9] According to the report generated for 26 June 2013, the vehicle in question was driven at a top speed of 202km/h. Grant-Olivier under extensive cross-examination by Lekoba also explained how the system worked, how data and speed was recorded, and how the devices operated separately from odometers in the vehicle.

She testified that the odometer was not relevant for the purposes of speed reading, as the information on the device was generated from the satellite GPS. She explained the discrepancies between the odometer readings in the report and the vehicle itself to the fact that the odometer reading was a value that was inputted into the system when the device was installed, and it had nothing to do with the GPS reading of the speed travelled. She reiterated that it was impossible to manipulate the system or the reports.

- [10] Lekoba in his testimony repeated that he was victimised for asserting his rights against Smollan at the CCMA by referring disputes. He disputed the tracker readings based on the discrepancies with actual odometer readings in the vehicle, and contended that the reports were manipulated. He denied having reached speeds of up to 202km/h, and contended that he had driven the vehicle responsibly throughout. This was even so as he was travelling with his wife who would not have allowed him to drive recklessly.
- [11] Under cross-examination, Lekoba conceded that despite being afforded the opportunity, he had refused to present mitigating factors at the internal disciplinary enquiry. His contention was that he did not see the need to do so for something he did not do. He nonetheless conceded that anyone found driving a company vehicle at excessive speeds must be dismissed.
- [12] Lekoba's witness and wife, Judy Lekoba testified that on 26 or 27 July 2013 they had travelled at night at about 23h00 from Pretoria towards Lehlabile in Brits. They slept over and travelled back at about 02h00. She denied that her husband drove over the speed limit. She was referred to the tracker report, and when it was pointed out to her that there were discrepancies between her version and the report in regards to the times and the places the vehicle had travelled, her response was that the report was faulty.

The award:

- [13] Having summarised the evidence, the Commissioner concluded that;

*"The Respondent has proven that the Applicant is guilty as charged. The Code of Good Practice: Dismissal in Schedule 8 of the **Labour Relations Act**, 1995 (the*

code) provides that dismissal for a first offence is appropriate in cases of serious and/ or repeated misconduct. No mitigation factors are present. The Applicant has been untruthful and shown no remorse. He has broken the relation of trust with the company by his irresponsible and dangerous driving conduct. The rule is reasonable and clear. Whether he was driving for private purposes or not is immaterial. The dismissal was appropriate and was substantively fair.”¹

The grounds of review:

- [14] Lekoba seeks that the award be reviewed and set aside on a variety of grounds, which are captured in paragraph 12 of his founding affidavit as follows;

‘It is further submitted that the Second Respondent committed misconduct in relation to the duties of a Commissioner, alternatively, or committed gross irregularity in the conduct and outcome of the ruling, alternatively exceeded his powers, alternatively, committed another act which constitute a ground permissible in law for the review and setting aside of that act, alternatively failed to apply his mind to the relevant issues in accordance with the provisions of the Act and tenets of natural justice, alternatively committed a material error of law and interpretation, in terms of section 145 and/or section 158 and the Constitution, Act 108 of 1996, alternatively that there was no rational connection between the evidence before the Second Respondent and the findings made rendering the ruling grossly unreasonable decision maker could have reached such decisions’
(Sic)

- [15] Lekoba persisted with his contentions that the Commissioner failed to take into account that the data relied upon by Smollan was manipulated, and sought to further rely on a document purportedly indicating that he was not the driver of the vehicle in question at the time of the incident. Common sense nonetheless prevailed at these review proceedings when it was conceded on his behalf that this document, (Annexure “LSL2” to the founding affidavit) was not presented at the arbitration proceedings, and could thus not be relied upon in these proceedings.
- [16] Lekoba further challenged the Commissioner’s award on the basis that he had relied solely on the accuracy of the information furnished by Autotrack and the tracking report without any further corroborating evidence. He further complained that the

¹ Paragraph 14 of the award

Commissioner failed to take into account his assertions that he was subjected to victimisation in view of previous disputes he had referred to the CCMA.

- [17] Lekoba further took issue with the Commissioner's reliance on the tracker report in coming to his conclusions. He nonetheless contended that the Commissioner should have taken into account that he did not receive any traffic fines for the alleged transgressions.
- [18] Smollan's contentions were that there was no basis laid out in the founding affidavit for the award to be reviewed and set aside, nor was there anything pointed out in the transcribed record of proceedings that the award was susceptible to a review. It was submitted that the Commissioner's award was well-reasoned and the findings therein rationally followed from the evidence.

The test on review and evaluation:

- [19] The applicable test in review proceedings brought in terms of section 145 of the LRA is well established. The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached in relation to the material placed before him or her². It has also been held that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material³.
- [20] Section 188 (2) of the LRA requires any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedures to take into account any relevant code of good

² *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para [110]

³ See *Goldfields Mining South Africa (Pty) Ltd v CCMA* (2014) 35 ILJ 943 (LAC) at para [20], and also at para 16, where it was held that;

"In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at"

See also *South African Medical Association obo Mabuza and Others v Commissioner Moletsane and Others* (JR834/12) [2014] ZALCJHB 66 (14 March 2014) at para [8]

practice in terms of the LRA. In this regard, Item 7 of Schedule 8 – Code of Good Practice: Dismissal provides that;

‘Guidelines in cases of dismissal for misconduct’: ‘Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.’

[21] In this case, and having trawled through the transcribed record of proceedings and the award itself, I am satisfied that the Commissioner afforded the parties a full opportunity to state their respective cases at the hearing, correctly identified the issues that he was required to arbitrate, understood the nature of the dispute he was required to determine, and dealt with the substantive merits of the case or dispute before him.

[22] As further apparent from the Commissioner’s award at its paragraph 14, he took into account the factors to be considered under Item 7 of Schedule 8 of the Code of Good Practice in coming to a conclusion that the dismissal was fair. The issue with most dismissal cases as required in terms of section 188 (1) (a) of the LRA, is a determination of whether the employer has demonstrated that the reason for a dismissal was fair. In this case, Lekoba was dismissed for gross abuse of company vehicle by driving it at excessive speeds of up to 202 km/h, and gross negligence by

committing the said act. On his version, he conceded that an employer was entitled to discipline and dismiss an employee in such circumstances.

- [23] The Commissioner's obligation therefore was to have regard to the evidence placed before him, which was the tracker records as presented and explained by Grant-Olivier, an expert in such matters. Evidence presented indicated that between 26 and 27 June 2013, Lekoba had in the evening and morning of the said dates, travelled between Pretoria/Atteridgeville and Brits at such speeds. Lekoba's responses to the allegation was that the tracker reports and the data was manipulated to his disadvantage.
- [24] Grant-Olivier however on behalf of Smollan and under sustained cross-examination had consistently refuted any allegation that the reports or data was susceptible to manipulation. She had conceded that there may be discrepancies between the odometer readings as reflected in the vehicle, and the vehicle odometer reading as reflected in the report. This however according to Grant-Olivier had no bearing, and she had explained how ultimately it was the report as generated from the GPS satellite that gave a true reflection of the speeds driven. In the end, other than these discrepancies, there was no reason to doubt the veracity or authenticity of the data and the reports generated from the devices installed in the vehicles. Lekoba without similar expert evidence could not genuinely refute that the reports and data were indeed correct.
- [25] The Commissioner in the absence of any credible evidence to support Lekoba's version that the data or reports were manipulated was bound to accept Smollan's version as presented by Grant-Olivier as probable, and to reject Lekoba's unsubstantiated version that the reports or data had been manipulated. There was nothing placed before the Commissioner other than the data and the reports from which to make a finding that indeed Lekoba had been speeding. His denials coupled with those of his wife did not take his case any further, particularly since the high-watermark of their case was that the data and reports were either faulty or manipulated. Lekoba's half-hearted contention that in the absence of traffic fines in regard to the incident there was no basis to charge him. This argument is nonetheless unsustainable in that the mere fact that a speedster was not caught at the time of the transgression does not imply that he was not at any stage speeding.

- [26] Lekoba had similarly attributed his dismissal to a conspiracy theory that Smollan always wanted to get rid of him because he had exercised his rights to take disputes against it to the CCMA. Again, Lekoba's cross-examination in that regard revealed that indeed after his reinstatement by the CCMA following an earlier dispute, he was placed back into his original position. He nonetheless complained about deductions to his salary without his knowledge. This issue cannot be indicative of any victimisation. He was clearly aware that any alleged deductions to his salary was in contravention of the provisions of section 34 of the Basic Conditions of Employment Act, and nothing prevented him from pursuing any dispute in that regard with the Department of Labour. The deduction of his salary does not have anything to do with the allegations that he had committed gross misconduct, which in terms of the company's disciplinary code and procedure was dismissible, even for the first offence.
- [27] In circumstances where it was not in dispute that Lekoba was fully aware of Smollan's Vehicle Policies, which required employees to ensure that they drove company vehicles responsibly and carefully by abiding by all the country and district traffic laws, and further on the basis of his acknowledgement that Smollan was entitled to discipline and dismiss employees where they did not adhere to these policies, I fail to appreciate how it can be said that the Commissioner's findings do not fall within a band of reasonableness.
- [28] A significant factor which the Commissioner further took into account is that Lekoba had been untruthful and had shown no remorse. Lekoba's stance from the disciplinary enquiry, as further demonstrated during his cross-examination in the arbitration proceedings, was that he did not see any reason to show any remorse or plead in mitigation as he had not done anything wrong. In my view, and further in the light of Lekoba's persistent refusal to acknowledge any wrong-doing on his part, the Commissioner's conclusions that he had broken a trust relationship with the company through his irresponsible and dangerous driving cannot also be faulted.
- [29] To conclude then, Lekoba's founding affidavit and the grounds of review as set out therein do not sustain a conclusion that the outcome arrived at by the Commissioner is one that a reasonable Commissioner could not have come to in the light of the material before him. The Commissioner's award is accordingly found to be

unassailable, and it follows that the review application ought to be dismissed. I have further had to the requirements of law and fairness, and I am of the view that a cost order is not warranted in this case.

Order:

[30] In the premise, the following order is made:

1. The application to review and set aside the arbitration award issued by the Second Respondent dated 25 October 2013 is dismissed.
2. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Mr J. Galananzhele of J Galananzhele Inc

For the First Respondent:

Ms S. Lancaster of Crafford Attorneys

LABOUR COURT