



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case Number: JR1083/11B

In the matter between:

HESTONY TRANSPORT (PTY) LTD

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY
COMMISSIONER PM VENTER N.O
DAVID BETHANI MATOBAKO**

**First Respondent
Second Respondent
Third Respondent**

Heard: 11 July 2017

Delivered: 30 November 2017

Summary: Application of review test to review application, based on award finding that dismissal for misconduct was unfair. No grounds for review established, particularly as review grounds not adequately pleaded. Matter dismissed.

JUDGMENT

FOURIE.AJ

- [1] This is an opposed review application in which the applicant, Hestony Transport (the employer) seeks to challenge an arbitration award in which the dismissal of the third respondent (the employee) was held to be unfair, and reinstatement was ordered.
- [2] The matter has been delayed by many years. It also appears that the original papers went missing and had to be reconstructed. It does appear that the original founding affidavit in the review proceedings is dated 25 October 2011, some five weeks after receipt of the arbitration award. According to the founding affidavit in an application to dismiss the review on grounds of delay, the review application was launched on this date. I am therefore satisfied that the review application was brought within the six-week statutory timeframe, and that the Court has jurisdiction to entertain the application.
- [3] The lengthy delays that have occurred since the review application was instituted, are unfortunate, and there does appear to have been significant delay on the part of the applicant in prosecuting the review application. Nonetheless, in my view it would be in the interests of justice to consider and determine the review application on its merits, and to consider the issue of delay in prosecuting the review application when determining costs.
- [4] In brief, the facts are as follows. The employee was employed as a long distance truck driver. He was due to report at one of the employer's depots, but when he did not arrive, the operations manager (Nel) located the vehicle using tracking technology, and found that it was parked next to a tavern. He drove to the tavern with a substitute driver, and found the employee asleep in the cab. He noticed that the employee smelt of alcohol, and instructed that he accompany him back to the depot, where he was subjected to two breathalyser tests, both of which indicated that the employee was over the statutory blood/alcohol driving limit. This led to a disciplinary inquiry which

resulted in the employee's dismissal.

- [5] At arbitration, the version summarised above was presented, but the evidence of Nel was not presented. He had since left the company, and was only available to present evidence by telephone. The arbitrator refused an application to allow this, on grounds listed in the award. I deal with this issue separately.
- [6] The employee's version of events, both at the internal hearing and at arbitration, was briefly as follows: He consumed cough medicine while driving, as he was sick. He stopped at the tavern on his way back to the depot to watch a football game as there was no tv at the depot. He did not drink anything as he was feeling ill. After the game he fell asleep in the cab of the vehicle, where he was woken up by the operations manager. The positive breathalyser tests must have resulted from the cough mixture, which he did not realise contained alcohol.
- [7] The arbitrator noted that while it was suspicious that the employee had deviated from his set route (to go to the tavern), he was not charged with misconduct other than being intoxicated while on duty. The arbitrator also noted that the employee was only subjected to a breathalyser test three hours after his shift ended. The arbitrator took note of the evidence of the employee's supervisor, to the effect that the trust relationship had not broken down, and concluded that the employer had failed to prove the misconduct complained of. He ordered that the employee be reinstated.
- [8] On review, the applicant adopted somewhat of a shotgun approach to pleading the basis on which the award should be set aside. Besides noting that the arbitrator declined to allow Nel's evidence to be presented by telephone, no attack is made on this critical finding. It is trite that review grounds must be properly pleaded in the founding affidavits, before they can

be relied upon as a basis on which to attack the award. An exception to this rule is probably where a material error of law (such as lack of jurisdiction) is apparent from the award. Then the court may *meru motu* take this into consideration and may overturn the award on this basis.

- [9] An arbitrator has a fairly broad discretion in determining the manner in which the arbitration proceedings will be conducted. The exercise of a discretion, such as the decision to disallow hearsay evidence, is subject to challenge on review, but a proper case must be pleaded in order to challenge the exercise of a discretion. That challenge is notably absent from the founding affidavit.
- [10] While there is much to be said in favour of a more permissive approach to the inclusion of evidence in what is supposed to be an informal inquiry, the carefully reasoned decision by the arbitrator to disallow the telephonic evidence of Nel is not susceptible to review on the basis of a gross error of law of which the court could *meru motu* take notice of.
- [11] The decision to disallow Mr Nel's telephonic evidence, coupled with the failure of the applicant's representative to apply for a postponement to obtain a subpoena for Mr Nel, is probably fatal to the applicant's case. It rendered much of the hearsay evidence of Mr Smith, which was provisionally allowed, subject to confirmation by way of direct evidence, as being of little probative value.
- [12] The result is that the employee's version, as improbable as it may sound to a cynical observer, constituted the only direct evidence of the events of the evening in question. It is not so far-fetched that it can safely be rejected out of hand. The employee had been employed for seven years, with no prior disciplinary infractions. The deviation from the authorised route, particularly while driving a loaded truck, is hardly trivial, but the employee was not charged with misconduct in this regard.

[13] For these reasons, I find that the arbitration award is one that could reasonably have been reached on the evidence before the arbitrator.

[14] The employer seems to have taken an inordinately long time to prosecute this review application. The employee, who had limited legal resources, brought an application to have the arbitration award made an order of court during 2014. In 2015, the employee brought an application to dismiss the review for want of proper prosecution. It seems that neither of these applications were argued, and given the approach I have adopted, it is not necessary to make rulings on the merits of these interlocutory applications, but I do think that the employer should be ordered to pay the costs thereof, as it appears to have been the primary cause of the delay in prosecuting the review application.

[15] In the circumstances, I make the following order:

Order:

1. The review application is dismissed.
2. The arbitration award under review is made an Order of Court.
3. The applicant is ordered to pay the third respondent's costs, including the costs in the interlocutory applications in this matter.

Greg Fourie
Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr R Orton – Snyman Attorneys

For the Third Respondent: Advocate S Mushay

LABOUR COURT