



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR18/15

In the matter between:

TRANSNET RAIL ENGINEERING

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

ANTONIO MOODALEY N.O.

Second Respondent

NATIONAL UNION OF METALWORKERS OF SA

Third Respondent

(‘NUMSA’) OBO HENRY MYBURGH

Heard: 13 September 2017

Delivered: 3 November 2017

Summary: Substantive fairness – no proof that the commissioner ignored material facts - finding beyond reproach.

Procedural fairness – where there is no prejudice suffered by an employee due to delay in instituting disciplinary, a finding of procedural unfairness is untenable.

JUDGMENT

NKUTHA- NKONTWANA JIntroduction

[1] This is an application in terms of s145 of the Labour Relations Act¹ (the LRA) for an order reviewing and setting aside the award issued on 10 December 2015 by the second respondent (commissioner), acting under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicant (Transnet) is challenging the commissioner's finding that the dismissal of Mr Myburgh was substantively and procedurally unfair. The application is opposed by Third Respondent (NUMSA).

[2] Mr Myburgh was employed as a forklift operator with four years' service. He was dismissed on 28 October 2014 after being found guilty of dishonesty arising from the alleged misuse of a company vehicle. He was charged with Gross misconduct: Dishonesty and/or misuse of company vehicle: the charges were couched as follows:

1. That you on 28 March 2014, misused the company vehicle for purposes not related to work in that, you went to SAPS in Mount Road Port Elizabeth which had nothing to do with work.
2. That you on 31 March 2014, misused the company vehicle under the pretence that you are visiting a family of a deceased employee in Motherwell and instead travelled to various destinations not in line with your initial purpose, thereby abusing the company vehicle for private purpose.
3. That on 11 April 2014 at approximately 11:00 until 14:41 you misused the company vehicle under false pretence that you were visiting SATAWU offices in Port Elizabeth whereas from the data

¹ Act 66 of 1995 as amended.

obtained from the Vehicle Event Data you never visited or reached your destination (SATAWU Offices) but instead you went to other places.

- [3] Transnet's main grounds of review are that the award issued by the commissioner is not justifiable in relation to the reasons given for such award; that it is not rational or justifiable in its merits or outcome and is not an award that a reasonable decision maker could have arrived at on both substantive and procedural fairness.

Review Test

- [4] The Labour Appeal Court (LAC) handed down an important judgment in *Head of the Department of Education v Mofokeng*,² in which Murphy AJA relied on both of the aforesaid judgments in finding as follows:

[30] The failure by an arbitrator to apply his or her mind to issue which are material to the determination of a case will usually be an irregularity. However, the [SCA] in *Herholdt* ... and this court in *Gold Fields* ... have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[31] ... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] ... To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the

² *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); Subsequent to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result ...

- [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order.'

Substantive fairness

- [5] The facts in this matter are mostly common cause. Mr Myburgh, who was the chairperson of the shop steward council, and other shop stewards were passengers in the company vehicle that had been signed out and driven by Mr Sozwe, a fellow shop steward, for their use during the three impugned trips. Out of all the passengers, he was the only one charged and dismissed. Also Mr Sozwe, the driver was charged for the same misconduct, amongst others, and dismissed.
- [6] The issues for determination were whether a passenger in a company vehicle could be held accountable for its misuse and/or failure to correctly complete trip authorisation form and logbook in terms of the Policy; inconsistent application of discipline and appropriateness of the sanction.
- [7] Transnet led evidence of Mr Manfred Louw, Corporate Employee Relations Manager who testified that even though Mr Myburgh was not the driver, he was the chairperson of the shop steward council and played a major role in

the decision to request the company vehicle. He was, therefore, liable for the misuse of the company vehicle and dishonesty.

- [8] The commissioner correctly rejected Mr Louw's evidence as the Policy only refers to the driver's responsibilities in relation to the usage of the company vehicle and the documentation of individual trips.
- [9] In these proceedings, Transnet argued that Mr Myburgh was using the company vehicle to execute his official duties as a shop steward hence he was liable for its misuse. That the commissioner overlooked Transnet's evidence that the trips were consequent to the decision by the shop steward council. These submissions are flawed given the fact that out of the whole body of the shop steward council, it is Messrs Myburgh and Sozwe who were singled out for discipline.
- [10] Even though the commissioner found that the Policy is only applicable to drivers and not passengers, he proceeded to deal with each incident on the charge sheet.
- [11] In respect of the incident of 28 March 2014, the commissioner accepted Mr Myburgh's evidence that the trip to visit the family of the deceased employee had been authorised; the explanation proffered for the detour to Mount Road Police Station, to identify the body of the deceased, was reasonable; and that the trip was not for personal reasons hence it could not be said that he committed an act of dishonesty or misused the company vehicle. It is interesting to note that the same finding was made by the commissioner in Sozwe's matter and was never challenged by Transnet.
- [12] In respect of the incident of 31 March 2014, the commissioner found that there was no policy prohibiting stops on authorised trips. The stops were necessary since there was a diabetic patient, Mr Myburgh himself, who had to eat before taking medication. The stops were en route to the authorised destination. Therefore, they could not have constituted a misuse of company vehicle or dishonest conduct.

- [13] In respect of the incident of 11 April 2014, the commissioner found that, even though the trip to look for an employee who was AWOL was unauthorised, there was a valid request by Ms Van Brochen Rhode to undertake same. The driver was responsible for amendment of the trip authorisation and not the passenger.
- [14] On consistency, the commissioner found that there was no reasonable explanation proffered by Transnet for not charging other shop stewards. He found accordingly that Transnet applied discipline inconsistently.
- [15] In all the circumstances, I am unable to find that the commissioner ignored any material factor in evaluating the evidence on substantive issues. The commissioner's findings in this regard are beyond reproach.

Procedural fairness

- [16] Transnet correctly argued that the commissioner misdirected himself in his finding on procedure as it is solely based on the fact that Transnet did not charge Mr Myburgh timeously. Despite having noted that there had been no prejudice suffered by Mr Myburgh as a result of the delay, he still found that Transnet acted procedurally unfair.
- [17] It is clear that the commissioner followed a checklist approach to the requirements of procedural fairness in terms 4.1 of item of the LRA Code of Good Practice: Dismissal (the Code) which is not required.³ What is crucial is that Mr Myburgh had been confronted with a set of facts that are sufficiently particular to enable him to respond thereto and offer a rebuttal or explanation that gave an account of his innocence.⁴
- [18] In my view, the commissioner applied a standard of procedural fairness that is out of sync with the informal model of procedural fairness provided for in

³ *Malelane Toyota v CCMA* [1999] 6 BLLR 555 (LC).

⁴ *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* [2006] 9 BLLR 833 (LC) at 841H – 842E.

the Code of Good Practice: Dismissal. This, in itself, constitutes a reviewable defect.

Conclusion

[19] In all the circumstances, I have no reason to interfere with the finding of the commissioner that the dismissal of Mr Myburgh was substantive unfair. On the contrary, when it comes to procedure, the commissioner certainly misconceived the true enquiry in that, despite having noted that Mr Myburgh was not prejudiced by the delay in instituting disciplinary hearing, he still found that the procedure was unfair. That conclusion is not sustainable on the facts of this case and certainly does not fall within the category of reasonable decision makers.

[20] In the interest of justice, I am hesitant to remit this matter back to the CCMA because of the consequential delays.

[21] On costs, in the light of the partial success by both parties, I make no order as to costs.

[22] In the premises, I make the following order:

Order

1. The review on the ground that the first respondent's finding in respect of substantive fairness is unreasonable is dismissed;
2. The review on the ground that the first respondent's finding in respect of procedural fairness is unreasonable succeeds. The award in this regard is replaced with the following order:

2.1 The dismissal of Mr Myburgh is procedurally fair.

3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate M Simoyi

Instructed by: Siya Cokile Inc. Attorneys

For the respondent: Advocate G Grogan

Instructed by: Gray Moodliar Attorneys