



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 1394/16

In the matter between

MENZI SYDNEY KHUMALO

Applicant

and

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

First Respondent

MXOLISI MANTSHULE N.O.

Second Respondent

DIGISTICS (PTY) LTD

Third respondent

Heard: 31 January 2018

Judgment: 2 February 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on **date**. In his award, the arbitrator held that the applicant had been fairly dismissed by the third respondent.
- [2] The factual background is not in dispute. The applicant was employed by the third respondent as a driver. He was dismissed on 18 January 2016, pursuant to him being found guilty of gross misconduct by failing to follow the drivers' code of conduct procedure and the Road Traffic Act, in that he had been found to have exceeded the applicable speed limit in the Belfast area. The applicant contested the fairness of his dismissal, a matter that was referred ultimately to an arbitration hearing conducted by the arbitrator. In the course of his award, the arbitrator ruled that the applicant's dismissal was procedurally fair. That finding is not contested in these proceedings. In regard to substantive fairness, the arbitrator came to the following conclusion:

In dealing with substantive fairness, this hearing was faced with an employee who denied speeding, challenged the very systems used to monitor driver behaviour and control of the vehicle. On the other hand there was an indirect admission to speeding but blamed on the vehicle and not the driver. Turning to that substantive fairness the only issue for consideration really is the appropriateness of dismissal as a sanction. A denial of clear information showing speeding does not put the Applicant in good light. In fact his denial was nothing but a bare denial; which on its own is not evidence and should be treated with the disdain it deserves. It is common knowledge that this country does not have human and other resources to police every metre of asphalt in order to catch errant drivers. For the applicant to claim that the absence of a traffic infringement notice means he was not in breach of any rules of the rules (sic) is a sign of a man out of touch with reality....

- [3] The arbitrator rejected the explanation proffered by the applicant that he had exceeded the speed limit because the vehicle's alignment was faulty, one of the tyres was worn and that he was driving downhill with a heavy load. The arbitrator

observed that all of these factors ordinarily ought to have compelled the applicant to drive more slowly. As the above quote from the award under review reflects, the arbitrator also noted the incongruence between the applicant's denial that he had exceeded the speed limit on the one hand, and his explanations for doing so on the other, all of which sought to shift blame from himself.

- [4] In regard to the appropriateness of dismissal as a sanction, the arbitrator took into account the applicant's personal circumstances, his length of service (just over three years) and significantly, the fact that he had on record a valid final written warning for speeding issued less than a month prior to the incident that gave rise to his dismissal. In those circumstances, the arbitrator upheld the sanction of dismissal.
- [5] The test to be applied in the present instance is well-established. It is not sufficient for the applicant to contend that the arbitrator came to a decision that is incorrect, or that a different arbitrator would have come to a different decision. This court is empowered to intervene by way of review if and only if the decision to which the arbitrator came is so unreasonable that no reasonable decision-maker could have come to it on the available material. That is a significant hurdle for any applicant to jump. Further, the Labour Appeal Court has cautioned against an approach that seeks to trawl through the evidence with a fine toothcomb, seeking misdirection on the part of the arbitrator in his or her assessment of it. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC), the LAC held that an arbitrator should afford the parties a full opportunity to have their say in respect of the dispute, identify the dispute that he or she is required to arbitrate, understand the nature of the dispute, deal with the substantive merits of the dispute and arrive at a decision that falls within a band of decisions to which a reasonable decision-maker could come on the available evidence.

- [6] The applicant's grounds for review are reflected in his founding and supplementary affidavits. In essence, the applicant contends that the arbitrator failed to consider and properly assess evidence that he had proffered in the arbitration proceedings, and that the arbitrator was biased. The latter ground was not pursued at the hearing of the application. In essence, the applicant's counsel made two primary submissions. The first was that the applicant had not breached the driver's handbook or the Road Traffic Act and that he could not therefore be said to have committed any offence. Secondly, the applicant submitted that dismissal was too harsh a sanction, in particular, having regard to his personal circumstances.
- [7] In regard to the first ground for review, it was not seriously disputed that the applicant had in fact exceeded the speed limit. The uncontested evidence disclosed that the applicant had been recorded driving at 83 km/h in an 80 km/h zone. The respondent monitors the speeds at which its vehicles are driven on a continuous basis. The applicant did not challenge the assertion that the third respondent's recordal systems had established that he had driven in excess of the applicable speed limit. Mr Mosime, who appeared for the applicant, submitted that the applicant was not guilty of any misconduct because he had not been caught speeding by the road traffic authorities, nor had they issued any notice of infringement. What this defence amounts to is one which would permit an employee to commit acts of misconduct, provided that he or she was not caught in the act. The purpose of the rule applied by the third respondent, and which the applicant was found to have contravened, is ultimately to ensure the safety of its drivers and other users of the road. It simply cannot be that the applicant was not guilty of any transgression of the rules simply because the traffic police did not trap him or issue any notice of infringement.
- [8] In regard to the appropriateness of dismissal as a sanction, the capacity for this court intervention was established by the Constitutional Court in *Sidumo*. In that case, the court held that, as I have mentioned above, this court by the review and

set aside an arbitrator's finding only if the finding falls outside of the band to which reasonable decision makers could come on the available material. The evidence that served before the arbitrator was that the applicant had infringed a workplace rule, that he had been warned on three previous occasions for the same offence and that a final written warning was in place at the time that he committed the offence for which he was ultimately dismissed. I fail to appreciate how it can be said that in those circumstances, the arbitrator's decision to the effect that dismissal was an appropriate sanction, can be said to be unreasonable. Other commissioners may well have come to different conclusions and given, for example, the marginal degree by which the applicant had exceeded the speed limit afforded the applicant yet another opportunity to redeem himself. But, as the authorities make clear, that is not the applicable test.

- [9] In short, in my view, both in relation to the existence of misconduct and the appropriateness of sanction, the applicant has failed to establish that the arbitrator's award is so unreasonable that it ought to be reviewed and set aside.
- [10] Finally, in regard to costs, the third respondent charitably does not seek any order for costs given that the applicant is an individual employee and that his representatives act for him on a *pro bono* basis.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. K Mosime, instructed by Moni Attorneys

For the third respondent: Adv. L Malan, instructed by Hogan Lovells Inc.