

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no.: JR 2459/17

In the matter between:

**NGULULU BULK CARRIERS (PTY)
LIMITED**

Applicant

and

KAMOGELO FREDDY MOKHAWANE

First Respondent

**COMMISSIONER THOMAS NTIMBANA
N.O.**

Second Respondent

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

Third Respondent

Heard: 9 January 2019

Delivered: 12 July 2019

Summary: Application for the review of the decision of the Second Respondent to reinstate a dismissed employee. Review application centres on decision of Second Respondent approach to the issue of sanction. Principles relating to reviews of this nature considered, restated and applied.

JUDGMENT

SNIDER AJ

[1] This is an application for the review of an arbitration award made by the

Second Respondent (the Commissioner) pursuant to an arbitration between the Applicant (the Employer) on the one hand, and the First Respondent (the employee) on the other, under the auspices of the Third Respondent. The arbitration was heard on 1 September 2017 and 18 October 2017. The award is dated 22 October 2017.

Background

- [2] Briefly, the background to this matter is as follows. The employer operates in the logistics industry and particularly, it appears from a conspectus of the evidence in the matter as a whole, and for the purposes of this judgment, in the bulk long distance transporting of various products, including products produced in the mining industry.
- [3] The Employee was employed by the Employer as a fleet controller from September 2007 until his dismissal on 20 June 2017.
- [4] A major aspect of the Employee's duties was to monitor the activities of trucks which were operated by the Employer for the purposes of its business. In order to monitor the activities of the trucks the Employer utilises what appears from the evidence to be a sophisticated tracking system which provides the fleet controllers with a variety of real time and historical information.
- [5] The allegations against the Employee¹ are –
- “a. serious misconduct in that on 4 May 2017 and 5 May 2017 you did not perform your duties as employed for. H2111 (HHN728MP) loaded at Lion on 4 May 2017 and stand at Lydenburg until the 5 May 2017 17H08 at not picked on the tracking or let management know about it;
 - b. on 5 May 2017 – did pick-up truck H2111 (HHN728MP) off-route but did not let management know about it;

¹ Bundle of documents page 5.

- c. did not pick-up that H2111 (HHN728MP) off-loaded a load of Glencore Lion close to Kwenya Dam at plus / minus 18H54 on 5 May 2017; and
- d. lost to company through your negligence.”²

[6] The issue which the Commissioner was required to decide was whether the Employee’s dismissal was substantively fair. The Employee sought reinstatement. The procedural challenge to the dismissal was abandoned during the course of the arbitration.

[7] Extensive evidence was led by the Employer in relation to the functioning of its business *vis a vis* the tracking and fleet controlling aspect and it was made clear that a key, if not vital, part of a fleet controller’s role is to communicate with his managers if he observes anything untoward on the tracking system.

[8] Evidence was given that the tracking system operates on the basis of what is called a “Geofence”. The Geofence is an area electronically demarcated by the computer system within which certain trucks are entitled to operate, offload etc. The system provides data to the fleet controllers in respect of all of the trucks relevant activities.

[9] It will indicate when a truck stops, speeds, goes off its designated route, or tips its load. When a truck is operated normally, the colour green is indicated on the system. If the truck is speeding it is indicated by brown, when the truck is standing it is indicated by blue, when it is red it is either tipping outside the Geofence or there is a hijacking in progress.

[10] If a truck departs from the demarcated Geofence space, the system gives an alert that the driver is off route.

[11] It is also possible, not only to view the activities of a truck as they are happening, but also to view the activities of the truck historically.

² The charges are quoted verbatim.

- [12] The trucks also have a hijack panic button which gives an alert to the fleet controller on the tracking system when operated by a driver.
- [13] It was emphasised in the evidence of Mr David Wessels (“Mr Wessels”) on behalf of the Employer that there is “*one golden rule, communication and communication, if you see something wrong you immediately report it to your superiors*”.³ This was not disputed. There was no attempt by the Employee to establish criteria in terms of which certain failures to communicate events were acceptable.
- [14] Mr Wessels gave evidence that the Employee had sent a bulk SMS to all drivers “*not to use the Bambi road, so all the drivers knows*.”⁴ This was the evidence of the Employee in his statement as read by Mr Wessels at the arbitration.⁵ This statement was not challenged in evidence and further, the last two lines states “*I know it is my job to check history but only check movement*”⁶ was similarly not challenged.
- [15] Mr Wessels further stated that a condition such as this, where there are four trucks off road is an event which constitutes “*a big red light*” and “*big trouble*”.⁷ Further evidence was given by Mr Wessels that there are a number of members of management who the Employee could have contacted under the circumstances.
- [16] The Employee gave evidence and, with respect, even without the benefit of having seen the demeanour of the witness it is quite apparent that he was being less than candid with the Commissioner.
- [17] The versions which he gave in his evidence was far removed from what had been stated by the Employer’s witnesses, yet none of these versions were put to the Employer’s witnesses. This is not only highly irregular but it seriously calls into question the veracity of the Employee’s case as a whole.

³ Transcript page 14 lines 10 to 14

⁴ Transcript page 23 lines 20 to 24, cited verbatim

⁵ Page 10 fourth last line

⁶ Page 23 line 25 to page 24

⁷ Page 25 and 26.

- [18] For example, the Employee says that there was another fleet controller who ought to have reported the vehicles being off-road as well. He also said that the tracking system shows the route, but if the truck took a wrong route it cannot indicate it.⁸
- [19] This is not only completely at odds with the evidence of the Employer's witness, but manifestly highly improbable.⁹ He also says that only the senior controller has access to this system which shows the actual movement of the truck. Again this is highly contradictory and improbable.
- [20] The Employee then says that his failure to observe could have happened because of so many trucks he was involved in, one or two could have been missed, unnoticed. Again this flies in the face of his previous evidence.¹⁰
- [21] The Employee also says that it was he who stopped the "Bambi road" route and he did it through a WhatsApp message, but some of the driver's don't have WhatsApp on their phones so they wouldn't have known of the change. It will be borne in mind that in his statement he refers to messages not WhatsApps. Again, the prospect that the cancellation of the route would have been done by the employee without it being effective, to the knowledge of the Employee, or where the Employee should have known, is highly improbable.
- [22] In cross examination, notwithstanding his presence throughout the arbitration, the Employee denies having heard what the witnesses said about the truck tipping. Again this is simply unsupportable.¹¹ His representative and his failure to put the Employee's version to the witnesses casts a deep shadow over his case.
- [23] In this regard the Labour Court in *Masilela v Leonard Dingler (Pty) Ltd*¹²

⁸ Page 102 .

⁹ Page 102.

¹⁰ Page 108 of the transcript lines 13 to 15.

¹¹ Page 128 of the transcript.

¹² (2004) 25 ILJ 544 (LC).

held that:

"[28] ...It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438 –

...It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.'

[24] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹³ the Constitutional Court held that –

"[61]... If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[25] The Employee further gave evidence that "*if during the time when the truck was offloading I was in the office I should have seen it, because (inaudible) the latest stage when the truck was approaching N4. I asked them why they are using that route. They said that they do not know whether that route is still being used or not, because their phone does not have WhatsApp so they missed the information.*"¹⁴

[26] This is entirely contradictory to the Employee's earlier evidence. Earlier he says that he cannot see when trucks go off road and he cannot tell when trucks are tipping. Again this is simply not credible evidence. Effectively

¹³ 2000 (1) SA 1 (CC).

the Employee denies the “history” function of the system in respect of which unchallenged evidence was given by the Employer, and then admits that the tipping would have been visible in the history function of the system.¹⁵

The material parts of the award

[27] In essence there is only one paragraph of the award which is relevant for the purposes of determining this review application.¹⁶

“In this case, I seriously doubt if the applicant’s defence on constancy (consistency)¹⁷ will find any application. The only critical question to be determined in this case is whether the applicant’s failure to report to his superiors about the four trucks that was using unauthorised route justifies immediate dismissal. In digesting this question, I took into account the reason why the applicant failed to report, his effort in contacting the four drivers in question, the fact that such route had just been cancelled a week before, his inability to noticed that the load was already tipped illegally and the fact that the driver in question ran way til to date.”

The grounds for the review application

[28] The following grounds of review were advanced on behalf of the Employer:

- 28.1 the Commissioner didn’t properly apply his mind to the evidence that the Employee saw four trucks going off the route; and
- 28.2 he failed to apply his mind to the evidence that the Employee did not report the authorised use.

[29] If regard is had to the passage referred to above it is indeed the case that the Commissioner did not properly consider this evidence that was before him. He says that he took into account the reason why the Employee failed

¹⁴ Page 135 of the transcript, this passage is quoted verbatim.

¹⁵ Page 139 lines 5 to 9 of the transcript.

¹⁶ Paragraph [24] page 17 of the bundle.

¹⁷ My insert, save for this insert the passage is quoted verbatim.

to report, yet there was no satisfactory reason given. The Employee simply stated that he phoned the relevant drivers and that he had informed them by WhatsApp and some of them did not have WhatsApp on their cellphones. Neither these, nor the other feeble reasons allegedly given by the drivers, are reasons for the Employee to not report the trucks going off route. Nor is the fact that the instruction had only been given a week before. The Commissioner entirely fails to analyse this factual matrix.

- [30] These events must be viewed in the context of clear and unchallenged evidence of the Employer to the effect that communication is key in situations of this nature. Mr Wessels was emphatic in this regard and stated that *“in transport there is one golden rule you call it communication and communication. If you see something wrong you immediately report it to your superiors.”*¹⁸
- [31] The Commissioner also took into account, in this regard the Employee’s inability to notice that the load was already tipped illegally. Even on the Employee’s own evidence he would have been able to determine the tipping by looking at the history of the relevant truck’s movement. Even to the extent that there might be contradictions in this regard, the Commissioner failed to resolve them in any manner whatsoever.
- [32] The fact that the driver in question ran away is neither here nor there for the purposes of a proper analysis of the evidence by the Commissioner.
- [33] The Commissioner did not apply his mind to the evidence that the financial loss cause to the Employer was approximately R700 000, which illustrates the seriousness of the Employee’s conduct and the importance of the tracking and reporting responsibilities which are at the heart of his duties.
- [34] The Commissioner also takes the view that even if the Employee had informed his superiors, same would not have prevented such theft by the

¹⁸ Page 14 of the transcript lines 11 to 14.

driver since the load was already tipped off when he contacted the drivers.¹⁹

- [35] There is no evidence to this effect. On the contrary, Mr Wessels gives evidence that people could have been rushed to the scene and that they have people close by²⁰. For all the Commissioner knew at the time, swift action by the Employee in detecting and reporting the unlawful tipping of the load could have led to the theft being prevented or possibly even the thieves being intercepted.
- [36] The Commissioner, by finding as he did, is saying that not reporting is in order. Not only is this a contradiction to the Commissioner's findings that Employees ought to act in good faith towards their employees, but, in addition thereto, it completely undermines the Employers' rules and functioning in relation to the control of its fleet. This is not a proper analysis.
- [37] The Employee did not show remorse²¹ nor did he plead guilty. He denied the misconduct. Nevertheless in these circumstances, where the Commissioner effectively finds him guilty of the offence, he was reinstated with R65 200 in back pay.
- [38] The Commissioner failed to take into account that the Employee disingenuously, and without having put the relevant parts of his version to the Employer's witnesses, clung on to a crumbling defence throughout his testimony at the arbitration. This is a factor that the Commissioner should have taken into account against the Employee.
- [39] Another aspect of the Commissioner not taking into account the seriousness of the Employee's conduct is that not only did he not report the four trucks having left the route, but he also did not report that the relevant truck had been stationary in Lydenburg for a period of 19 hours.²² It is indeed the case that the Commissioner took no account of these

¹⁹ Page 18 paragraph [25].

²⁰ Transcript page 18 lines 15 ff.

²¹ *County Fair Foods (Pty) Ltd v CCMA and Others* [1999] 11 BLLR 1117 (LAC) paras [17] to [18].

aggravating factors relative to sanction which he should have properly considered.

- [40] Juluka Johnathan Kubayi, a senior fleet controller in the employ of the Employer gave evidence and emphasised the importance of communication, which the Commissioner simply failed to take proper account of.
- [41] The Commissioner did not undertake a balanced assessment of the fairness of the sanction of dismissal comparing properly and analytically between the interests of the Employee and the Employer. He considered the Employee's situation virtually exclusively.
- [42] In the premises and with regard to the seminal dictum in *Sidumo and Another v Rustenburg Platinum Limited and Others*²³ I am of the view that the Commissioner come to a conclusion on sanction that a reasonable Commissioner could not have come to.
- [43] Notwithstanding that the question of fairness does involve a value judgment on the part of each individual commissioner, and that there are a range of outcomes which can be regarded as reasonable, the facts of this matter indicate that the Employee conducted himself in a manner which was entirely contrary to his obligations in terms of his employment contract and that this had serious consequences for the Employer. Not only this, but if the Commissioner's award stands it will create for the Employer a grey and uncontrollable area in a key part of its business, where other fleet controllers would be able to escape the consequences of their misconduct on the thinnest of excuses.
- [44] The Employee's conduct in not having his version put to the Employers' witnesses and then advancing a version which is clearly not plausible or reasonably believable must be held against him. The Commissioner simply failed to have any regard to the manner in which the Employee conducted

²² Page 7 lines 22 to 23 of the transcript

his case in this regard.

[45] Bearing in mind that I have all of the relevant material in this matter before me, and that many of the facts are common cause, I am of the view that it would be a forgone conclusion if this matter were returned to the Bargaining Council to reconsider the decision.²⁴

[46] The remission of this matter to go back to the Bargaining would simply cause further delays and I am in as good a position as the Commissioner was to decide the matter.²⁵

[47] Accordingly I make the following order –

Order

1. The award is set aside;
2. the award is substituted with a finding that the dismissal of the Employee was substantively fair;
3. there is no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Naseen J-bhay – Yusuf Nagdee Attorneys

For the Respondent: No appearance.

²³ [2007] 12 BLLR 1097 (CC)

²⁴ *CSO Valuation (Pty) Limited v CCMA and Others* [1998] 12 BLLR 1271 (LC).

²⁵ *Ibid* at [19]; *Tedco Plastics (Pty) Limited v NUMSA and Others* (2000) 21 ILJ 2710 (LC).