THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2655/14

In the matter between:

RAM TRANSPORT (SOUTH AFRICA) (PTY) LTD **Applicant**

and

THE NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

COMMISSIONER W.N. NKGOENG N.O. **Second Respondent**

TEBOGO SIMON MAGODI **Third Respondent**

Heard: 31 July 2019

Judgment delivered: 1 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator). In his award, the arbitrator found that the third respondent had been unfairly dismissed by the applicant and ordered his reinstatement with retrospective effect.

[2] The material facts are recorded in the award and I do not intend to repeat them here. It is sufficient for present purposes to record that the third respondent was employed by the applicant as a driver and that he was dismissed on 1 July 2014 after having been found guilty on charges of grossly negligent and reckless driving, and bringing the applicant's name into disrepute. The third respondent challenged the fairness of his dismissal and the matter was ultimately referred to an arbitration hearing before the arbitrator. The charges brought against the third respondent were the consequence of a report received by the applicant from a member of the public complained that a vehicle bearing the applicant's branding was observed on the N1 overtaking string of vehicles on the wrong side of the road, clearly marked double line prohibiting vehicles overtaking from either side of the road.

[3] At the arbitration hearing, Mahlangu testified, as did the third respondent. There was initially a dispute about the identity of the vehicle that had been the subject of the complaint. The complainant had identified a vehicle with registration number BY 45 SW GP. The vehicle owned by the applicant and driven by the third respondent on the route to Musina on the day in question bore the registration number BY 45 SN GP. This was the basis on which the third respondent contended at the arbitration hearing that he had never driven a

vehicle with registration number identified by the complainant and that there was another vehicle travelling the same route on the same day with that registration number. In his analysis of the evidence, the arbitrator came to the following conclusion:

> 33. However, the prompt abilities are that the vehicle on page 13 was the same vehicle allocated to the applicant and his crew. My conclusion is supported by the content of page 16 of the bundle of documents. It is in this context that I had no reason to accept the version of Mr Abel Mahlangu to be more probable that the vehicle seen by Carel Breytenbach [the complainant] speeding and overtaking from the wrong side of the road was the company vehicle registration number BY 45 SN GP that was allocated to the applicant and crew.
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> 34. I find the applicant's argument based on one letter of the number plate not convincing at all. The author of the email even though he was not called to testified (sic), his testimony would not have made any difference. He would still not be able to tell what was the correct number plate and further as to who was driving when the incident happened.

[4] This conclusion is not disputed. What is in dispute and what lies at the core of the present application of the following two paragraphs of the award:

> 35. The next question to be answered is whether the applicant was a driver at the time of incident or not? It appears not to be in dispute that the two drivers would alternate. Despite our cautionary rule on evidence of a single witness, I do not know why the respondent decided not to call Thabo [Mamosebo] to give evidence as the only person who was the applicant at the time. It is therefore my finding on a balance of probability that the respondent has failed to substantiate evidence that the applicant was guilty of the said offence.
>
> 36. I have no reason not to accept the un-controverted version of the applicant that he had signed vehicle control sheet as confirmation that he handed back a petrol card and pole slips. It thus follows that the dismissal of the applicant by the respondent was substantively unfair.

[5] The context to this conclusion is evidence by the third respondent that he and his co-courier (Thabo Mamosebo) shared responsibility for the driving of the vehicle

and that he (the third respondent) was not the driver at the time at which the incident took place.

[6] The applicant contends that the arbitrator's conclusion is reviewable on the basis that he failed properly to have regard to the evidence and that in consequence, the outcome of the arbitration proceedings (in the form of the arbitrator's award) falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. In particular, the applicant contends that the arbitrator was faced by a material dispute of fact and that he failed properly to adopt the proper approach to determine which of the two irreconcilable versions before him was the more probable.

[7] The test to be adopted in proceedings such as the present are established and does not warrant repetition. In short, the court powers to intervene on review require the applicant to establish that the arbitrator committed a reviewable irregularity and that the irregularity had the result of an award that is unreasonable, in the sense that no reasonable decision-maker could come to the decision to which the arbitrator came on the available evidence. (The applicant does not contend that the arbitrator misconceived the nature of the enquiry, the other basis for review in terms of s 145 of the LRA.)

[8] In my view, the present application stands to succeed. The arbitrator dismissed the applicant's version only on the basis that its representatives at the arbitration hearing failed to call Thabo Mamosebo as a witness and, it would seem, that the third respondent had signed a vehicle control sheet on his return from Musina only for the purpose of handing back a petrol card and toll slips.

[9] Had the arbitrator embarked on an assessment of the third respondent's credibility, he would have found that the third respondent had put up a patently false version when he claimed that the vehicle that was the subject of the complainant's report had not been driven by him. The version that the vehicle concerned had not been allocated to him and Thabo and that it was a vehicle owned by the same employer which happened to be on the same road on the same morning was nothing less than fanciful. When evidence was led that the

complainant had stated that the registration number of the vehicle that he had observed being driven recklessly 'appeared to be' or 'looked like' BY 45 SN GP, the third respondent nonetheless persisted with his version. The arbitrator's finding that the third respondent had in fact put up a false version in his defence ought to have alerted him to the third respondent's credibility, all, more accurately, the lack of it. Further, the evidence clearly discloses that the defence that he was not driving at the relevant time is a defence that was never raised at the third respondent's disciplinary hearing. This much was confirmed by Mahlangu in his evidence. The first time that the third respondent alleged that he would state that he was not the driver of the car was in the arbitration hearing when Mahlangu was cross- examined by the third respondent's representative. In response to what appeared to be no more than a musing by the third respondent's representative that given the fact that there were two drivers '*I will be able to say whether uh maybe it was the other driver was driving at 16:00 although it is this one who handed in at 18:00 but earlier the other driver was the one*', the arbitrator intervened. The following exchange took place:

> COMMISSIONER: is it, is it going to be your, your case that it was not the applicant was driving the car, instead, instead it was Thabo who, who was driving the car?
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> APPLICANT REPRESENTATIVE: Uh, yes Commissioner.
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> COMMISSIONER: Put, put it to him.
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> APPLICANT REPRESENTATIVE: That…
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> COMMISSIONER: And remember, and remember that one who alleges must in truth, put it to him.
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> APPLICANT REPRESENTATIVE: the applicant is going to tell the commission that at 16H00 hours uh 16H10 he was not the one driving, although he was the one who handed him the motor vehicle. What would you say?
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> MR ABEL MAHALANGU: He is the one that was driving.

[10] The evidence discloses further that Mahlangu interviewed the third respondent in respect of the incident after the applicant's receipt of the complaint and that the third respondent stated he knew nothing about the incident. In his examination in chief, the third respondent testified that because he was new to the specific branch and was learning the route, Mamosebo was responsible for the vehicle and that he (third respondent) was the co-driver. He testified further that at the time when he and Mamasebo left the hub, Mamosebo was driving. They proceeded to a shop nearby in order to buy food, after which the third respondent drove to Musina, and that Mamasebo drove on the return trip. When it was put to the third respondent under cross-examination that when he was initially questioned about the incident, he stated that he could not recall who drove the vehicle at the time. The third respondent offered an explanation to the effect that at the time of the disciplinary enquiry, he was not certain who drove the vehicle when the incident occurred, but that after the disciplinary enquiry he had perused documents in respect of the deliveries and determined who drove the vehicle. When asked why these documents had not been presented at the arbitration hearing, the third respondent stated that they were the property of the applicant and that it would be illegal for him to have removed them. When he was asked how he gained access to the documents given that he had been dismissed on 1 July 2014, the third respondent stated that he went back to their last customer where they delivered parcels and perused the documents there. The third respondent again changed his version when he said:

> I never said I went to, to the shop and, I said I went to documents that I've delivered. I didn't say went to the company and asked for the papers. I said I went to the papers that I've delivered, it's what I have said, the invoices that I have delivered, it's what I said.

[11] This version, to the effect that the third respondent drove to Musina to attend at the client's store to clarify whether or not he was the driver of the vehicle for the purposes of an appeal hearing is far-fetched. There was no need for the third respondent to drive all the way to Musina to recollect when it was that he drove the vehicle. Further, it was never a version that was put to the applicant's witness

when he testified. More fundamentally, one might have expected the third respondent, if his defence was that he was not the driver of the vehicle, to have said so in no uncertain terms from the outset. The fact that he instead contested the identity of the vehicle as a primary defence and that his representative late in cross-examination suggested that since there were two drivers, the third respondent may not have been driving at the relevant time, calls the third respondent's version into question.

[12] Further, the third respondent failed satisfactorily to explain why it was that his name and signature appeared on the incoming drivers sheet on the relevant date, when the vehicle returned to the hub. The third respondent had signed as the driver of the vehicle and signed the incoming drivers sheet. Under cross-examination, he proffered a version that on returning to the hub, he and Mamosebo remained seated in the vehicle and that the security guard approached him, as the passenger, to fill out the incoming drivers sheet. He stated that he did so to effect the return of petrol cards and toll slips, although there is no indication on the form that this was the purpose of signature. Again, this is not a version that was put to the applicant's witness and stands in stark contradiction to the evidence by the applicant's witness that drivers return to the hub and sign the register to signify their return to base.

[13] In short, had the arbitrator scrutinised the evidence, he would have found that the third respondent was an unreliable witness and that in particular, his initial reliance on a false version of events, only to be replaced with an entirely different version put to the applicant's witness only at the end of his cross-examination and then only on the arbitrator's prompting, had the consequence that the third respondent's version fell to be rejected. It is not open to arbitrator's simply to resort to the onus without a proper evaluation of the evidence and determination of the probabilities. I would venture to say that a resort to the onus of proof may be employed only when the probabilities are evenly balanced – it is not a mechanism to avoid the proper determination of a factual dispute. The arbitrator ought properly to have found, on the available evidence, that it was more

probable than not that the third respondent was the driver of the vehicle at the time of the incident and that he had driven the vehicle recklessly and brought the company into disrepute. The arbitrator's award that stands to be reviewed and set aside.

[14] Little purpose would be served to remit the matter to the bargaining council for rehearing. The incident complained of took place more than five years ago, and the court is a full record of the proceedings under review. Insofar as it is necessary for the court to consider an appropriate sanction for the misconduct that the third respondent committed, there is no dispute that the third respondent's conduct was serious, and that he endangered his own life, and those of his co-driver and other road users. Given further the capacity in which the third respondent is employed, they can be no question that dismissal is an appropriate sanction.

[15] The applicant's representative charitably did not pursue the issue of costs, and in the circumstances and on the exercise of the court's discretion in terms of s 160 of the LRA the interests of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The arbitration award issued by the second respondent under case number LPRFBC 31207 dated 30 October 2014 is reviewed and set aside.
2. The second respondent's decision is substituted by the following:

   'The applicant's dismissal was substantively and procedurally fair'.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr J Du Randt, DDP Attorneys

For the respondent: Ms NN Zulu, Ismail & Dhaya Attorneys