



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR112/2021

In the matter between:

DWARSRIVIER CHROME MINE PROPRIETARY LIMITED Applicant

and

AMCU OBO PRINCE TAU

First Respondent

DONALD KGALAKE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 5 November 2024

Delivered: 28 February 2025

This judgment was handed down electronically by emailing a copy to the parties. The 28th of February 2025 is deemed to be the date of delivery of this judgment.

JUDGMENT

ITZKIN, AJ

Introduction

[1] The applicant (DCM) seeks an order reviewing and setting aside an arbitration award in which it was found that Mr Tau's dismissal was substantively unfair, and DCM was ordered to reinstate Mr Tau retrospectively. AMCU (on behalf of Mr Tau) opposes the review application.

[2] The allegations for which Mr Tau was dismissed arose from an incident on 6 May 2021. He was dismissed for having *"allowed the Miner (Regina Phetla) to give [him] an unlocked elephant foot bag with explosives to transport it to explosives store"* and having *"transported explosives on a disapproved vehicle in terms of regulation 4.2(1)(b)(VI) of the Mine Health and Safety Act 29 of 1996 as amended"*.

[3] It is not controversial that Mr Tau was the driver of a vehicle which carried a bag containing explosives. The central controversy pertains to whether he knowingly did so.

Analysis

[4] The applicant advances three grounds of review. All of them ultimately pertain to the Commissioner's preference of Mr Tau's version (that he was unaware that the bag in the vehicle he drove contained explosives) over DCM's version (that he was).

[5] Mr Bodenstein, a Project Manager, testified for DCM. He testified about the process applicable to transporting explosives in a safe and compliant way, which included locking elephant foot bags in which they are carried and transporting them in approved vehicles.

[6] Mr Bodenstein gave evidence that on 6 May 2021, he saw a vehicle at 'strike 12' and found Mr Joe Kgomongaka (Mr Tau's supervisor) and Mr Tau at the vehicle loading rig jumpers onto it. Mr Tau was the driver. He noticed the elephant bag on

the vehicle, which was closed with an elastic band and not with a lock. When he looked inside, it contained a detacord, a safe starter and stingers, and he asked where it came from. According to Mr Bodenstein, “[t]hey said, no, it came from strike 17, the miner at strike 17 have asked them to take the explosives back to the ... (indistinct)”.

[7] Mr Bodenstein was then asked whether he had also directed this question to Mr Tau, to which he responded by stating that Mr Tau was present when the question was asked. He also stated that they had both said that they had obtained it from Ms Phetla at ‘strike 17’, who had asked them to return it.

[8] Mr Tau’s evidence was that Ms Phetla had not spoken to him regarding the bag (when handing it over), and had spoken to Mr Kgomongaka. He testified that he had heard them talking but could not hear what they were talking about. His version was essentially that he was not aware of the contents of the bag.

[9] He also testified that the same bakkie was used by others to transport explosives in locked elephant foot bags and that, on previous occasions, he had followed instructions in doing so. He also alleged that he was “*still learning*” and that he was not trained on how to transport explosives. This testimony did not, however, relate to the incident on 6 May 2021 for which he was dismissed (on which his version was that he was unaware of the contents of the bag).

[10] Mr Tau called Ms Phetla as his witness. Her evidence was that on the day of the incident, she went to the bakkie and gave the explosives to Mr Kgomongaka, who said he would take the bag to the magazine. According to Ms Phetla, at the time, Mr Tau was talking to the blasting assistant, and she was unsure of whether or not he had heard her exchange with Mr Kgomongaka.

[11] Mr Kgomongaka did not testify at the arbitration, having passed away before the arbitration.

[12] The issue of whether or not Mr Tau was trained regarding the requirements for transporting explosives is a ‘red herring’ for present purposes. This is so because

the essence of his defence relating to the 6 May 2021 incident was that he was unaware of the bag's contents, and not that he knowingly transported explosives on that date because of a lack of training.

[13] The central issue remains whether or not the Commissioner's determination that Mr Tau was unaware of the contents of the bag (and was thus not guilty) was a decision that could reasonably be arrived at on the evidence.

[14] The Commissioner was faced (on the one hand) with the evidence of Mr Bodenstein, which suggested that Mr Tau was aware that the vehicle was carrying the bag containing explosives, and (on the other hand) with the evidence of Mr Tau, who denied being aware of the explosives.

[15] Ms Phetla's evidence on the issue did not significantly move the needle in either direction, as she was unaware of whether Mr Tau had heard her conversation with Mr Kgomongaka regarding what the bag contained (albeit that she testified that Mr Tau was talking to the blasting assistant, which tends to support Mr Tau's version that he was not focussed on her discussion with Mr Kgomongaka and did not hear what was said).

[16] In the context of this evidence, can it be said that the award is incapable of reasonable justification on the totality of the evidence before the Commissioner?

[17] The answer to this question is "no".

[18] The position may have differed if Ms Phetla had testified that she had informed Mr Tau of what was in the bag (or that he heard her conversation with Mr Kgomongaka), or if Mr Kgomongaka had been available to testify and had testified to that effect.

[19] This did not occur, and the probabilities in favour of both countervailing versions were relatively closely balanced, with the result that the Commissioner's

preference for Mr Tau's version cannot be said to fall outside a band of reasonable decisions.

[20] Regarding costs, in accordance with the requirements of law and fairness, it would not be appropriate to make a costs order in this matter.

[21] In the result, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

R Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

P Mohlahlo of Edward Nathan Sonnenbergs

For the First Respondent:

S Swartz

Instructed by:

LDA Incorporated Attorneys