



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges

Case no: C266/2019

In the matter between:

ANDILE BHELE

Applicant

and

SUPER SQUAD TRADING (PTY) LTD

First Respondent

**NATIONAL BARGAINING COUNCIL FOR
THE ROAD AND FREIGHT AND
LOGISTICS INDUSTRY ("NBCRFLI")**

Second Respondent

A SINGH BHOOPCHAND

Third Respondent

Heard: 28 August 2025

Delivered: 19 May 2025

Summary: (Review – Misconduct – incitement to commit misconduct – Alleged incitement to halt a moving truck - Employee seeking urgent advice after being accused of drinking – Evidence of his call to a third party seeking advice – activating handbrake on conclusion of the call and running away – claim interpretation inadequate – record not supporting that – Allegation of reliance on hearsay incorrect

- Poor quality of phone recording – audible portions capable of supporting an inference - Review dismissed)

JUDGMENT

LAGRANGE, J

Nature of the application

[1] This is an opposed review application. The applicant, Mr A Bhele ('Bhele'), wants the court to set aside an arbitration award, by the Third Respondent ('the arbitrator'), who found that his dismissal for inciting another employee, Mr N Madola ('Madola') to act illegally by engaging the handbrake of a moving vehicle was substantively fair. Madola, a driver's assistant, was dismissed for engaging the handbrake of a moving vehicle.

The review application

Factual background

[2] A brief summary of the pertinent evidence is necessary before turning to the award and the grounds of review.

[3] Bhele was employed by the respondent ('Super Squad') as a driver. He was off duty on the day when the incident giving rise to the disciplinary action occurred.

[4] Mr J Mouton ('Mouton') who was employed as a driver gave evidence of what he had witnessed on 19 October 2019.

[5] On that day, Mouton was driving a truck from Cape Town to George, accompanied by Madola, as a driver's assistant. He became aware Madola was surreptitiously drinking alcohol while they were in the truck. When they stopped to fill up with diesel in Paarl, Madola stood outside the truck and drank openly. When Mouton told him to discard the liquor, Madola ignored him so he phoned his supervisor for advice on what to do. The latter told him to return to the depot.

[6] After Mouton's conversation with the supervisor, Madola made a phone call to the supervisor to apologise. Afterwards he made a number of calls to friends and to Bhele. Initially, Madola's call to Bhele was audible on speaker phone. After a while

Madola asked Mouton to speak with 'Andile' (Bhele's first name), but he refused to because he had no reason to speak with him. A recording made by Mouton of the call was played at the arbitration hearing. Mouton had recorded Madola's call but only Madola's side of the conversation was audible.

[7] The phone conversation between Madola and Bhele continued. The only 'Andile' Mouton knew of at the company was the applicant. If the 'Andile' Madola was talking to was not Bhele, Madola would not have referred to him as if he was an 'Andile' whom Mouton knew. Mouton was under the impression Madola was phoning around for advice about what he should do about his situation.

[8] As they were approaching an intersection Madola ended the call thanking the person he had been speaking to. Immediately thereafter, Madola then insisted that Mouton should stop and pull over, but Mouton said he couldn't until they came to robots or a stop street. Madola then attempted to grab the handbrake. He eventually succeeded causing the truck to jack-knife on a bridge, nearly causing an accident. Madola then jumped out the truck.

[9] Mouton testified that at the disciplinary enquiry Bhele did not dispute anything about the recording of the phone conversation.

[10] During the arbitration the interpretation of Mouton's recording of Madola's side of his phone conversation was truncated because it had to be replayed and there was a debate about whether the word 'xela' in isiXhosa means to 'say' or to 'spy' on someone. Combining all the pieces of the interpretation, the main portion of what Madola said to the 'Andile' he was speaking with reads:

"Yes we are turning around. He's saying that I'm drinking. I'm not the driver. Yes, advise me. We are going to the DC we are turning around. Here you are Jan. Jan doesn't want to take it. Andile he doesn't want to talk to you. He's saying we're turning around we're going to the DC. We're not going to the Garden Route. I wanted to go on the Garden Route. I want to go on the Garden Route now we are going to the DC. He's come back. He has reported me and saying that I'm drinking. He's reported me to Sugan. I'm listening. I'm listening. If I was the one with the power must I do, we are going to the DC now. Joh ! I hear you brother...(slurred speech)...sure. I'm going to pull the handbrake. ... Jan I want to get off here. I want to get off here. What are you doing? Wait, now what are you doing? I'm going to get off here.

Get out, get out. You know mos why your are getting out. Get out. Andile mos told you. I hear mos Andile told you you must get out, so get out. He's says you mad you. Get out, there's the police also he's blocking the way here by me. You know you guilty mos."

The underlined portion reflects Madola's exchange with Mouton when the handbrake was activated. 'Sugen' is Mr S. Reddy ('Reddy'), the operations team leader for Clicks Cape Town based at the Cape Town Distribution Centre ('the DC'), who instructed Mouton to return to the DC after he reported that Madola was drinking and would not heed his instruction to stop. Reddy also testified in the arbitration hearing.

[11] Bhele's principal issues with Mouton's recording were that:

11.1 There was no proof that Madola was talking to him when the incident occurred. He said he had daily conversations with Madola, whom he said was his best friend, but claimed to have been asleep in his truck at the Phillipi depot on the night in question. At the disciplinary hearing he had said he was off duty at the time. He agreed that Madola had phoned him that day, but their conversation was a private matter. He also challenged Mouton's right to record the call. He queried the fact that Mouton did not mention in his written statement that he had instructed Bhele to pull up the handbrake.

11.2 Even though, under cross-examination, he never challenged Mouton's account that he had made the recording, when it came to his turn to testify, Bhele suggested the recording could just have been fabricated and should not be accepted as evidence of anything that took place. He argued that it should be ignored in any event because it was hearsay evidence. There was no evidence in the transcript of what the person speaking to Madola on the phone had said.

[12] What Bhele did not dispute is that, during the call, Madola asked Mouton to speak to Andile. Further, he did not dispute that Madola acknowledged he was listening to the person he had called and was asking the other person to advise him. He confirmed that Madola had told that person, in Xhosa, that he was going to pull up the handbrake.

[13] In the findings of the disciplinary enquiry chairperson, the chairperson noted that Bhele had said that when Madola said he was 'pulling up the handbrake', in isiXhosa, that simply meant he was 'jumping off'. When asked in the arbitration hearing to confirm that he provided this interpretation, he simply attributed this to

poor interpretation of what he said. He also said he would never have advised Madola to pull up the handbrake because that would be a suicidal thing to do and he would never have suggested that to him.

The arbitrator's reasoning/the award

[14] Briefly, the arbitrator's key findings were as follows.

[15] The arbitrator found that the Super Squad's version that Bhele had been phoned by Madola for advice was more likely as there was no reason to doubt Mouton's version that Madola was speaking to Bhele. She found it was the only reasonable inference to draw that Bhele had advised him to pull up the handbrake.

[16] The fact that Bhele was off duty at the time was not relevant because he still owed a fiduciary duty to act in good faith towards his employer at all times.

[17] In view of the potentially serious consequences of what could have happened when the handbrake was activated, the arbitrator found that the misconduct was serious and there were no mitigating factors. Because Bhele refused to take any responsibility for what happened, the prospect of him improving his behaviour was remote.

[18] Accordingly she concluded that Bhele's dismissal was substantively fair.

Grounds of review

[19] The principle grounds of review raised were that:

19.1 The arbitrator ought not to have relied on the evidence because the interpreter could not speak Xhosa properly and Bhele was entitled to proper interpretation.

19.2 The arbitrator could not rely on Mouton's evidence to determine what Bhele allegedly said to Madola because it was hearsay evidence.

19.3 The arbitrator improperly relied on an inaudible telephonic recording.

Evaluation

Interpretation

[20] It is trite that a party is entitled to interpretation¹. Unlike *Mabitsela's* case, where the arbitrator refused to arrange an interpreter, in this case there was an interpreter, but Bhele claimed the interpreter, a Zulu speaker, was not proficient enough in isiXhosa. Plainly, if an interpreter is incompetent that is tantamount to

¹ *Mabitsela v Department of Local Government* (2012) 33 ILJ 1869 (LC) at paragraphs 15 – 19.

denying the party needing one of their right to interpretation. In this instance, if one examines the record, there is only one occasion when there was a dispute over the interpretation. It concerned the interpretation of one isiXhosa word occurring in Mouton's recording of Madola's telephone call. That was whether Madola was saying that Mouton was 'spying on him' or just saying that he was drinking. This was discussed above. Whichever, version one relies on, nothing much turns on this, as the import of what Madola said was to the effect that Mouton had told Reddy that he was drinking.

[21] For the remainder of the record, Bhele was content to rely on the interpreter, except on occasion when he did not wait for interpretation and chose to speak directly in English. He emphasised in English that his phone call with Madola on the day of the incident, had nothing to do with it and challenged what he characterised as the 'hearsay' nature of Mouton's testimony.

[22] It is also significant that Madola had been speaking on the phone in isiXhosa, so no translation was necessary for that crucial evidence. In relation to Mouton's and Reddy's evidence, Bhele never once indicated any difficulty in understanding it. In his grounds of review Bhele makes no mention of what portion of their testimony he did not understand at the time, nor does he explain in what respect his case might have been misconstrued or poorly presented as a result.

[23] In the circumstances, the record does not demonstrate a witness prejudiced by the quality of interpretation, and I am not persuaded the arbitrator committed misconduct, by not replacing the interpreter.

Hearsay

[24] In terms of s3(4) of the Law of Evidence Amendment Act, 45 of 1998, hearsay is *"... evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence"*.

[25] In relation to the hearsay claim, Mouton was not testifying about what Madola said on the phone for the purpose of relying on the truth of anything Madola said. He was simply giving his direct testimony of what he observed Madola doing in the course of their trip. None of his evidence depended on the credibility of Madola for its probative value. Consequently, his evidence did not constitute hearsay evidence. He did not claim to understand everything Madola said in the phone call, but could

confirm that he had recorded it, and could testify to the fact that Madola asked him to speak to someone called 'Andile' during the course of the phone conversation. He also testified about Madola's action in proceeding to grab the truck handbrake immediately on ending the call. None of that evidence was hearsay. As far as the evidence of what Madola said on the call Mouton's recording was played in the hearing to prove what Madola said. That was also not hearsay evidence led to establish the truth of what Madola had said.

[26] From Mouton's evidence an inference could be drawn that Madola was in conversation with someone called "Andile", and Madola was seeking advice from him on what to do about the situation he was in. The evidence relied on was circumstantial in nature. It is true Bhele could not cross-examine Madola, but he could have called as him as a witness if he wished to challenge Mouton's evidence or to testify about whom he was speaking to and what the true nature of the conversation was.

Inaudibility of the recording of Madola's call.

[27] It is true there were portions of the recording of Madola's part of the phone conversation, which were not clear. Ironically, it was Bhele who confirmed that what Madola was saying at the end of the call was that he was going to pull up the handbrake. The gist of what was audible and was translated was mentioned in the summary in paragraph 10 above. The arbitrator was entitled to take account of that portion of the recording. If Bhele wished to contend that crucial bits of what Madola said were not recorded, he was at liberty to summons Madola, whom he claimed was his best friend, to fill in the gaps.

[28] On the testimony of Mouton and the audible portions of Madola's call it was not unreasonable to draw an inference that Madola had phoned Bhele because he was his close friend and a driver at the same company, and he needed urgent advice about how to deal with the serious situation he had got himself into. It is evident that Madola assumed Mouton knew which 'Andile' he was referring to and Mouton testified the only one he knew was Bhele. No evidence was led to identify a single other person having the name Andile that he might have been speaking to. It is also not unreasonable to believe that Bhele would have tried to help his good friend in his hour of need.

[29] Because Madola was desperately seeking advice on what to do, it would make sense that when he said he was 'listening' to the person he called, that he was being given advice. When he then confirmed that he had 'heard' him and that he was going to lift up the handbrake, it is not implausible to infer that he was acting on the advice received from the person he was speaking to.

[30] It is true that Bhele testified he would never had advised Madola to do something so dangerous, but the evidence points strongly to a finding that that was the advice conveyed to Madola who was desperate to avoid being returned to the depot. Bhele did not admit to being the other party to the Madola's phone conversation, and went so far as to suggest that the recording was a fabrication, so he could not offer an alternative explanation for Madola's reckless action as he ended the call.

Conclusion

[31] In conclusion, I am not persuaded there were material flaws in the conduct of the arbitration, which had the effect of depriving Bhele of a fair hearing. Secondly, in the arbitrator's evaluation of the evidence she did not arrive at conclusions no reasonable arbitrator could have reached.

Order

1. The review application is dismissed
2. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Z Mapoma instructed by Mphahlwa Ndlamhlaba Inc.

For the Respondent: M Chenia from Cliffe Decker Hofmeyer Inc.