

**IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Port Elizabeth)**

Case No: P698/2000

In the matter between:

Applicant

and

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

Landman J:

1] It is common cause that Mr Qavile was correctly found guilty on 19 August 1999 of the unauthorised use of a company vehicle, ie a Colt Bakkie, for private purposes. What was in issue was the fairness of the sanction. In determining the fairness of the sanction it was necessary for the Commissioner to consider any aggravating circumstances presented by the company and any mitigating circumstances presented by the employee. The evidentiary onus of presenting the mitigating factors rests on the employee.

2] It appears from the award that the Commissioner made two serious errors. First, he approached the matter on a piecemeal basis and failed to judge the facts of the case as a whole. It was not incorrect to examine each fact as he did. However, he was obliged to step back and make his factual findings on the evidence as a whole.

3] Secondly, the Commissioner failed to appreciate that although the onus is on the employer to show that the dismissal was fair, the employee bears an evidentiary onus to prove the mitigating factors on which he or she relies. It follows that the award is defective as contemplated in s 145 of the Labour Relations Act 66 of 1995 (the LRA).

4]What is to be done? Originally the employer wished me to substitute my decision for that of the Commissioner. However, at the conclusion of his address Mr Myburgh, who appeared for the company, withdrew that request on the basis that it would be necessary for the credibility of the witnesses to be assessed. He submitted that the only way to do this would be to remit the matter back to the CCMA for a fresh hearing.

5]The facts are before me in the form of the record. It is not the company's case that they were deprived of an opportunity to put their case before the Commissioner. Their complaint is about his reasoning, influenced by his misconception of the onus and his weighing up of the evidence.

6]Unless there are major credibility findings relevant to the matter this court is in as good a position as the Commissioner to adjudicate the matter.

7]The following are aggravating circumstances:

- (a) Mr Qavile had received a final warning at the instance of an arbitrator in 1995. This merely constitutes a background fact. It was no longer current.
- (b) Mr Qavile was not authorised to use a company vehicle because of his exceptionally poor and unfortunate record in driving company vehicles. Although I have indicated that his latest accident did not play a role regarding the sanction, the history of his driving skills coupled with his uninsurability is relevant to the consideration of any appropriate sanction.
- (c) Mr Qavile was fully aware of the rule prohibiting him from driving the vehicle for private purposes. He deliberately breached the rule.

8]The following are mitigating circumstances:

- (a) Mr Qavile admitted that he was guilty of misconduct and that it would be fair for him to be given a written warning. This admission does not carry the normal weight because, confronted with a damaged company vehicle outside the company's premises, he could hardly do otherwise.
- (b) The company through its management staff were aware that Mr Qavile used the vehicle without authorisation to do company business in town. But the nub of the employer's complaint is that Mr Qavile used the vehicle

for private purposes.

9]The list of aggravating and mitigating circumstances is however incomplete. The question of what Mr Qavile was doing with the vehicle is important. Mr Qavile was in possession of the Colt and using it for private purposes as from 07h04 when he exited the company's premises until he was involved in a collision. The collision took place at 08h10 or 07h20. His explanation or lack of explanation is important. This brings to the fore the time of the collision. I have considered whether this issue and the question whether Mr Qavile completed the control book can be decided on the balance of probabilities. It cannot. I am unable to make a credibility finding on the record. I am also mindful that if the version of a witness is credible it can displace an otherwise probable inference.

10]In the premises

1.The award is reviewed and set aside and remitted to the CCMA for a fresh arbitration before another Commissioner on the issue of the appropriateness of the sanction.

2.Costs of this application are to be costs in the fresh arbitration.

Signed and dated at BRAAMFONTEIN this 26th day of September 2001.

A A Landman

Judge of the Labour Court of South Africa