THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1368/2016

In the matter between:

SAVINO DEL BENE (SOUTH AFRICA) (PTY) LTD **Applicant**

and

TIRISANO TRANSPORT AND SERVICES WORKERS UNION **First Respondent**

PAUL MAHLATJI **Second Respondent**

FORTUNATE MABOYA **Third Respondent**

MANISHA SINGH N. O **Fourth Respondent**

NBCFRFL **Fifth Respondent**

Heard: **07 July 2020**

Delivered: **09 July 2020 (This judgment was handed down electronically by emailing a copy to the parties. The 9th July 2020 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid-19 lockdown, this application was determined via video conferencing and the parties agreed to this arrangement. Review

application – the decision falls within the bounds of reasonableness. Held: (1) The application is dismissed. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application in terms of which the applicant seeks to review and set aside an arbitration award issued by the second respondent in terms of which it was found that the dismissal of Mr Paul Mahlatji and Fortunate Maboya (collectively referred to as the dismissed employees) is substantively unfair but and procedurally fair. The fourth respondent ordered the reinstatement of the dismissed employees and to pay each of them nine months' worth of backpay. The applicant was displeased with this outcome and launched the present application. The application is duly opposed.

Background facts

[2] The two dismissed employees were employed as a driver (Maboya) and driver assistant (Mahlatji) respectively. On or about 31 August 2015, it is alleged that the dismissed employees failed without proper cause to perform their duties with proper care required in that they did not follow work procedures by leaving a truck with registration letters ZVW 156 GP on North Road side at 12:17 unattended which contained cargo to the value of about R800 000.00.

[3] As a result the dismissed employees were charged with misconduct of gross negligence. A disciplinary hearing was held on 3 September 2015 and the dismissed employees were found guilty and dismissed on 9 September 2015. Aggrieved by their dismissal, the dismissed employees referred a dispute to the bargaining council alleging unfair dismissal. As indicated above, their dismissal

was found to be unfair. Aggrieved by the said outcome, the applicant launched the current application.

Grounds of review

[4] The applicant alleges that the arbitrator ignored the uncontested evidence that the dismissed employees admitted at the internal disciplinary hearing that they were aware of the rule and comprehended that the rule would include not leaving the truck unattended. Allegedly, the arbitrator failed to properly apply the law as contained in the Code of Good Practice: Dismissal, Schedule 8 to the Labour Relations Act[1] (LRA). The arbitrator misconstrued the nature of the enquiry, which enquiry involved gross negligence as opposed to not being allowed to stop and buy food. In the final analysis it is alleged that the arbitrator failed to apply his mind and reached conclusions that a reasonable commissioner could not reach. In a supplementary affidavit, the applicant re-emphasized the knowledge and importance of the rule.

Evaluation

[5] According to Grogan[2] negligence is a failure to comply with the standard of care that would be exercised in circumstances by a reasonable person. From this definition, it is to be observed that there must be a standard of care that ought to be departed from. In order to establish negligence in a workplace, an employer must show that there is a particular standard and that standard has been departed from, one a reasonable employee would not depart from. Often times a distinction between negligence and poor work performance is misconstrued. In negligence an employee knows what is expected of him or her but carelessly does not do what is expected of him or her. In poor work performance an employee is ordinarily out of dearth and require navigation to do what is required.

[1] No. 66 of 1995, as amended.

[2] Dismissal 3rd Edition John Grogan.

[6] Item 3 (1) of Schedule 8 to the LRA provides that all employers should adopt disciplinary rules that establish the standard of conduct required of their employees. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood by them. Some rules or standards may be so well established and known that it is not necessary to communicate them. The item emphasizes clarity and communication to ensure easy understanding. Therefore negligence does not happen out of the vacuum. There must be in place a particular standard set by the employer.

[7] In this dispute, the evidence of the driver's team leader, Ruben Van Der Merwe reveals that on the day in question whilst he was on his lunch break, he encountered the applicant's truck parked on the side of the road with no one inside. Later whilst waiting the dismissed employees emerged. All he said to them was he will meet them at the office. Most importantly at arbitration he testified as follows:

> 'RESPONDENT REP:Ruben can you explain to us what was wrong with that entire event?
>
> MR VAN DER MERWE: Firstly we are not allowed to have trucks next to the road without phoning your supervisor or your manager. Secondly, when I saw the truck with cargo inside it is a big risk for our company.
>
> RESPONDENT REP: What is the correct procedure when a driver drives a truck?
>
> MR VAN DER MERWE: The procedure is that you have to draw the cargo from the airline, either go towards our warehouse or go to the client itself to deliver. You may not pass any other shops or do private stuff with our trucks…
>
> RESPONDENT REP: Would you say that Paul and Fortunate know the rule that they are not supposed to stop for personal errands?
>
> MR VAN DER MERWE: Yes, they do know the rule.
>
> RESPONDENT REP: Why do you say they know the rule, how was it communicated to them?'

> MR VAN DER MERWE: They know the rule, because we communicate during meetings. I tell them most of the time to not stop for private use, this is a company vehicle, and you are not allowed to do that.'

[8] From the testimony of Van der Merwe emerged two rules; namely (a) not stop next to the road without phoning superiors and (b) not pass shops or do personal errands and stop for personal errands. Of course what is baffling is that Van Der Merwe was asked an open ended question – what was wrong with entire event as he encountered it. In answering that pertinent question he does not refer to a rule regarding leaving a truck unattended. However, the gravamen of the charges that led to the dismissal of the dismissed employees is for them leaving a truck unattended when it had cargo valued at R800 00 00. This is materially different from stopping for personal errands. The rule properly understood is broken once a truck stops for personal errands even if it did not load valuable cargo. To my mind that immediately creates a disjuncture between the applicable rule and the reason for the dismissal. If anything the rule as explained has nothing to do with the cargo and its value. Another important aspect is that in terms of the content of the rule, a driver may stop on the side of the road if he phones the manager or supervisor, I assume in order to obtain permission, there is no contravention of the rule. Still that has no connection with the cargo and its value. During submissions I enquired from the applicant's attorney as to what does leaving the truck unattended mean. In retort, she submitted that, that question was to be asked by the commissioner and he did not ask it because he made a premature stop on the existence or non-existence of the rule. The real issue is that the rule is vague in that if a driver alight from a stopped truck sit under the shade of a tree some 60-80 meters from the truck but still having a full view of a stopped truck, it cannot be said that the truck was left unattended. The definition of unattended is not being attended to, looked after or watched. The fact that Van Der Merwe did not find anybody inside the truck does not of itself mean the truck was unattended. Of course if it meant that, when Van Der Merwe was asked what was wrong with the "entire event", he could have without any hesitation stated the rule – truck

was left unattended. The fact that he did not, in his capacity as a team leader of the drivers tells an untold story.

[9] If one measures the rule against the provisions of the Code of Good Practice, one will observe lack of clarity and easy understanding. It is often easy for a witness to allege brazenly that a particular rule was communicated in meetings. However absent records or minutes of such meetings the evidence lack probative value.

[10] Turning to the evidence of the Airfreight Manager, Malinda Coker, one observed yet another rule. She testified as follows:

> 'RESPONDENT REP: What is the rule for drivers transporting cargo on the road and driving a vehicle?
> MS COKER: You as the driver or truck assistant is responsible for your truck and the cargo that is in the truck, because it belongs to your client and the truck belongs to your company.
> RESPONDENT REP: Are you allowed to make personal errands while you are driving the vehicle of the company with a cargo on it?
> MS COKER: No, it is against company rules, you cannot run personal errands with cargo on your truck, because you put the company's vehicle at risk for hijack, you put the client's cargo at risk for being stolen or hijacked as well. So you cannot.
> RESPONDENT REP: Would you say Paul and Fortunate knew the rule Malinda?
> MS COKER: Yes most certainly.
> RESPONDENT REP: Why would you say that?
> MS COKER: Paul has been with Savino I think for ten years….
> RESPONDENT REP: And Fortunate?
> MS COKER…is a very experienced driver, he also received with his contract of employment rules of our company…'

[11] What emerges from the testimony of Coker is that (a) a driver takes responsibility and (b) a driver is not allowed to run or make personal errands. When it comes to communication of those rules, she relies on experience and

the terms of employment contract. The paragraph she referred to simply deals with damage to vehicle and load. Therefore if there is damage to the vehicle or the cargo, there is no vicariously responsibility as it were but the employee/driver carries the responsibility. In *casu*, there was no evidence of damage either to the cargo or the truck. Therefore, the clause in Fortunate's contract cannot be invoked. Her evidence differs materially to that of Van Der Merwe when it comes to the rule involved. She said nothing about stopping generally. She only made reference to not making personal errands. Towards the tail end of her testimony in chief she said: "*Fortunate said yes he is aware that he cannot stop on the side of the road. Paul also knows that you cannot stop and leave a truck unattended*." She said nothing about phoning for permission. All of these is at odds with the clarity and ease of understanding principles. Experience has nothing to do with communications of a rule.

[12] Simon Ramokgoma testified that he is a driver in the employ of the applicant. He too, stated a different rule. He said:

> RESPONDENT REP: What I *(sic*) is the rule about when you drive a vehicle transporting cargo, about making personal errands and stopping, what is the company rule? Can you explain to us?
>
> INTERPRETER: We are not allowed to stop on the road with a load, but we do that.
>
> RESPONDENT REP: Did your manager ever or team leader, Mr Ruben ever communicate this to you that you are not supposed to stop for personal errands?
>
> INTERPRETER: He only told me that there was one time the truck was lost, because it was parked next to Shop Rite that is what he told me.
>
> RESPONDENT REP: But did he ever in a meeting tell all the drivers that they are not supposed to stop and do personal errands with the truck?
>
> INTERPRETER: I read it from the contract I signed.
>
> RESPONDENT REP: But did Ruben, can you answer the question, did Ruben ever tell you verbally that you are not supposed to stop?

> INTERPRETER: Yes he did explain to us that we must not park the trucks while we are on the road.
>
> (Own underlining)

[13] Despite masterful leading, Ramokgoma did not testify in the manner desired by the employer representative. It had to take an ire – can you answer the question – to nudge him closer and alongside the desired answers. That notwithstanding he contradicted Van Der Merwe on the content of the rule and the manner of communication of the rule. In cross-examination he testified that he was alone when Ruben communicated the rule. Later he testified that the rule exists in the contract and company rules. The last witness for the applicant was the chairperson of the hearing, Mr Nauta. In his short evidence in chief he testified that the rule they (the dismissed employees) affirmed to know is that of not being allowed to stop next to the road with a truck or a load. As pointed out above this Court observed a disjuncture between this affirmed rule and the reason for dismissal.

[14] Having said all that I turn to the award under attack. The fourth respondent rendered a clear and succinct award. As required by item 7 of the Code of Good Practice, she sought to establish whether there was any rule that barred the dismissed employees to leave a truck unattended. Any reasonable arbitrator would travel that path. The evidence before him established that the rule was not stated with any measure of clarity. In the absence of clarity about a standard or rule, it cannot be said that any negligence was established. I take a view that the findings of the arbitrator fall within the bands of reasonableness and is unassailable in law.

[15] In conclusion I have regard to the punted for grounds. It is incorrect that the arbitrator ignored the evidence of the alleged admission of the knowledge of the rule. Contrary to that contention the arbitrator stated the following:

> "66. It was the Respondent's evidence that the Applicants had at the internal disciplinary enquiry admitted to having knowledge of the rule. The

> Applicants explained that they had not admitted same but rather that they are responsible for the truck and as far as they understood this would include not leaving the truck unattended. There was no specific rule to this effect whether written or oral."

[16] Failure to apply the law intimates an error of law. It is by now trite that only material errors of law capable of distorting the outcome can vitiate an award. This allegation is made baldly. It is not apparent at all that the arbitrator misapplied the Code of Good Practice. The arbitrator did not misconceive the nature of the enquiry. In any misconduct case, as item 7 commands existence of a rule is prime, more particularly where negligence is alleged. Failure to apply one's mind implies taking into account irrelevant considerations and ignoring the relevant ones. There is no evidence of such in this matter.

Conclusions

[17] This Court arrives at a conclusion that the award falls within the bands of reasonableness and is unassailable in law. The applicant failed to establish the existence of a clear and understandable rule. The findings of the fourth respondent are justifiable in relation to the evidence tendered and is one that a reasonable decision maker may reach. Accordingly, the application for review must fail.

[18] In the result the following order is made:

Order

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

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Ms G Mthalane of Solomon Holmes Attorneys, Johannesburg.

For the Respondents: Mr Higgs of Higgs Attorneys Inc, Randburg.