IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: PR191/21

In the matter between:

TASWU obo MAZWA **Applicant**

and

BOTHA DU PLESSIS N.O (cited in his capacity as Arbitrator of the South African Road Passenger Bargaining Council) **First Respondent**

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL **Second Respondent**

ALGOA BUS COMPANY (PTY) LTD **Third Respondent**

Heard: **29 June 2022**

Delivered: **11 August 2022**

This judgment was handed down electronically by circulation to the Applicant and the Third Respondent's Legal Representatives by email, publication on the

Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 13h00 on 11 August 2022.

JUDGMENT

NZUZO, AJ

Introduction

[1] In this application, the applicant craves an order of this Court reviewing and setting aside an arbitration award issued by commissioner Botha Du Plessis under case number RPNT6351. The arbitration award was issued on 07 July 2021 confirming the fairness of the applicant's dismissal.

Background facts

[2] The applicant is the Union of Tirisano Transport and Services Workers acting on behalf of Xoliswa Mazwi, whom I will later refer to as the employee. The employee was employed by the third respondent as a bus driver, a role that she had fulfilled for approximately six years. She was dismissed on account of misconduct. The events leading to the dismissal can be summarized as follows:

> 'On 26 February 2021, whilst on duty, the employee is alleged to have driven through red traffic lights and collided with a taxi that had attempted to cross the intersection. The employee was charged with *"Serious Accident/Reckless and Negligent Driving (driving through red traffic lights causing a serios accident) [sic]".*'

[3] At the disciplinary enquiry and even before this Court, the employee disputed crossing through the red traffic lights. Her argument was that at the time of her entering the intersection, the traffic lights showed amber light and only turned red after she had entered the intersection. She blamed the taxi driver for the collision whom she argued overtook a vehicle that had stopped waiting for the traffic lights to turn green. She argued that the taxi driver drove through the red

traffic lights and collided with the bus. The third respondent argued that she joined the intersection when the traffic lights were red and caused the accident. The applicant was then found guilty and dismissed.

[4] As the employee was not satisfied with her dismissal she declared a dispute of unfair dismissal, which culminated in the impugned proceedings. The commissioner found that the employee committed the act of misconduct for which she was found guilty and dismissed. The commissioner further found her dismissal to be substantively and procedurally fair.

[5] Unhappy with the outcomes of the arbitration, the applicant launched this application seeking an order setting aside the arbitration award and substituting same with an order of this Court to the effect that the employee's dismissal was substantively unfair, alternatively, to remit the matter back to the second respondent to be arbitrated by another commissioner. The review is based on a number of grounds, being that the accident was not serious; the rule/standard was not consistently applied and that the sanction of dismissal was too harsh.

[6] The third respondent opposed the application on grounds that the arbitration award was not only reasonable but also entirely correct on the evidentiary material before the arbitrator.

[7] It was argued on behalf of the third respondent that this review is an outcomes-based review. I agree, the attack is not directed at the procedure followed in the impugned proceedings. There is no allegation in the papers filed on record that the impugned proceedings are tainted with procedural defects. That being the case, I am enjoined to consider whether the arbitration award is a decision another commissioner could make in the circumstances.

The test for review

[8] The test for review is: "*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*"[1] To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[2]

[9] It is so that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the sanction with which non-compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.[3] This Court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result.[4]

Analysis

[10] In order to properly determine the issues germane in this litigation and arrive at an adequate decision on the matters at hand, I am required to consider whether there are irregularities in the impugned proceedings that brought about an unreasonable result. The applicant complains first about what she terms "*the factual error*" made by the commissioner where he stated that the employee was charged with insubordination and admitted it. I have perused the arbitration award and was unable to find where reference to insubordination was made. The commissioner did, however, make reference to a charge of reckless and negligent driving. That error too is of no consequence as the commissioner approached the dispute before him on the correct factual basis.

[11] I have been provided with two video footages of the accident and I had an opportunity to observe them. I am satisfied that at the time the employee was

[2] See: *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) at paras 12 and 13.
[3] See: *Country Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (1999) 20 ILJ 1701 (LAC) at para 11.
[4] See: *General Motors South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (2018) 39 ILJ 1316 (LC) at para 10.

approaching the intersection, the traffic lights were showing an amber light. At that stage, she was travelling at 40km/h and was required to reduce her speed. The video footages show that the employee accelerated, presumably, seeking to cross the intersection without stopping. The traffic lights turned red shortly before the employee entered the intersection. From this it follows that the employee was correctly found guilty of the act of misconduct for which she was charged.

[12] The next question which this Court must answer is whether dismissal was warranted *hoc casu* and to that question, I now turn. The third respondent was required to establish that the dismissal was effected for a fair reason, after following a fair procedure. The Code of Good Practice: Unfair Dismissal[5] notes that whether or not a reason for dismissal is a fair reason is determined by the facts of each case and the appropriateness of dismissal as a penalty.[6] I make no reference to the procedural fairness of the employee's dismissal as this litigation does not concern that. I discuss only the more limited issue of the fairness of dismissal as a sanction, given that the employer has established the existence of misconduct.

[13] In order to establish fairness of the sanction of dismissal, the third respondent must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This requires evidence, for example, that the trust relationship between the employer and employee had broken down. Put differently, an employer can dismiss fairly if it can prove that there was a transgression, the *nature* as well as the effect or *impact* of which was such as to make the sanction of dismissal appropriate.[7]

[14] It is not sufficient to rely on general statements made without providing supporting evidence and putting material in front of the decision maker to ensure that he or she reaches a reasonable decision. The employer has to look beyond the fact of misconduct, it must consider the effect of such misconduct on the employment relationship. Something more is thus required of the

[5] Schedule 8 to the Labour Relations Act no 66 of 1995, as amended.
[6] *Idem* item 7(b)(iv).
[7] *Edcon Ltd v Pillemer NO* [2010] 1 BLLR 1 (SCA).

employer than to prove that the employee was guilty of misconduct of a certain nature. Put differently, the chairperson of a disciplinary inquiry can no longer "*deal with the issue of sanction on a cursory basis*" and if there should be a dismissal dispute the employer must lead evidence regarding the appropriateness of the dismissal as sanction.

[15] The employer has the burden of proof in the sense of a persuasive burden - it must place enough material and facts before the decision maker to persuade such person that the sanction of dismissal was fair. It was argued on behalf of the third respondent that it is no longer a requirement that the employer must show that consequent to the act of misconduct trust has been destroyed. To support this contention, the third respondent relied on the decision in *Woolworths (Pty) Ltd v Mabija and Others*[8]. I have had time to read the judgement to which I was referred. The third respondent's reliance on the aforementioned judgment is entirely misplaced. Reading the judgment relied upon by the third respondent in context, it suggests no more than that the decision maker must consider the effect of the misconduct on the employment relationship. Indeed, the judgement goes on specifically to recognise and confirm that the mere fact that misconduct was committed does not *per se* lead to a breakdown in the trust relationship. The Labour Appeal Court found that the *court a quo* correctly pointed out that various factors should be considered before the conclusion that the trust relationship has broken down is reached. Those factors included the industry the appellant operates in; the nature of the misconduct and its effect on the parties, and whether training and progressive discipline cannot prevent a recurrence of the misconduct.[9]

[16] I am not persuaded by the argument proffered on behalf of the third respondent suggesting that the effect of the employee's misconduct to the employment relationship is no longer an issue that needs to be considered in determining whether dismissal was warranted or not. I hold a view that this remains one of the crucial requirements of a fair dismissal for misconduct, an enquiry which the commissioner is enjoined to make in the determination of dismissal as a fair

[8] (2016) 37 ILJ 1380 (LAC).
[9] *Woolworths supra* para at 19.

sanction. In such an instance, the employer is enjoined to establish that the contravention of the rule by the employee was sufficiently serious to warrant dismissal. The test frequently used when assessing the appropriateness of dismissal is the effect that the employee's misconduct have on the employment relationship.[10]

[17] It is difficult to fathom how a dismissal is substantively fair in a matter where no evidence, showing that the employment relationship has been rendered intolerable, was led.[11] While I accept that there are certain acts of misconduct which are of such a serious nature that not even the absence of evidence as to the effect of misconduct to the employment relationship can save an employee who is guilty of them from dismissal. Such acts of misconduct are those that are antithetical to any employment (ie. gross dishonesty and assault).

[18] I am not satisfied that the act of misconduct for which the applicant was charged and dismissed falls within that category, the commissioner has not concluded otherwise, with the result that evidence as to the suitability of dismissal ought to have been led for the determination of fairness of the applicant's dismissal. I have perused the transcribed record of the impugned proceedings and I found no such evidence. My inescapable conclusion therefore is that the commissioner's conclusion that the dismissal was fair in the circumstance of the case was not based on material placed before him but on speculation on his part. In my view, the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The arbitrator's conduct in this regard constitute misconduct, one which renders his award reviewable by this court.

[19] The third respondent had in force at the time a commendable Disciplinary Policy and Procedure (policy) which listed the progressive disciplinary steps as being the final written warning; two weeks unpaid suspension; or dismissal. The policy contemplates that the decision maker has a discretion to exercise in determining a suitable sanction. In the case of a first offender, depending on

[10] *Korsten v Macsteel (Pty) Ltd & Another* [1996] 8 BLLR 1015 (IC).
[11] See *Nyembezi v Nehawu* (1997) 1 BLLR 94 (IC) where the court held that if the employer has not led evidence that the employment relationship has been rendered intolerable, the dismissal is unfair.

the circumstances of the matter, a final written warning; two weeks unpaid suspension or dismissal may be imposed. There is no evidence led before the commissioner as to the suitability of the sanction of dismissal. That evidence would have shown why dismissal, which is harsher than other punitive measures for the misconduct, was preferred over others. This evidence would have enabled the commissioner to make his own assessment that the dismissal was not imposed capriciously. Without evidence as to the suitability of the sanction of dismissal, there was no basis upon which the commissioner could have come to the conclusion that the dismissal was substantively fair. The commissioner was not in a position to speculate on what evidence might have been placed before him showing that dismissal was warranted in the circumstance.

Conclusion

[20] I have to consider the grounds for review within the context of the test that this court must apply in deciding whether the commissioner's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the commissioner was reasonable based on the evidence placed before him.

[21] I must ascertain whether the commissioner considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the applicant. In my view, the commissioner's findings on the fairness of the applicant's dismissal fall outside the bounds of reasonableness based on the evidence that was placed before him.

[22] In the light of the above conclusions, it is my view that the appropriate order would be to grant the relief sought in this application. I have further had regard to the requirements of law and fairness in regards to the question of costs, and I am of the view that the appropriate order will be no order as to costs.

[23] In the result, the following orders are made:

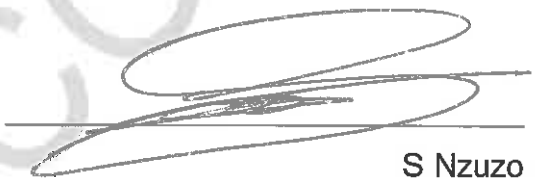
Order

1. The arbitration award issued by commissioner Botha Du Plessis dated 7 July 2021 under case number RPNT6351 is hereby reviewed and set aside.

2. It is replaced with an order that the dismissal of Xoliswa Mazwi, the applicant, is substantively unfair.

3. The third respondent is ordered to reinstate the applicant with effect from the date of dismissal and pay her the remuneration, which she would have been entitled to from the date of dismissal to the date of reinstatement.

4. There is no order as to costs.



S Nzuzo
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Charlie Higgs of Higgs Attorneys Inc.
For the third respondent:	Adv. le Roux
Instructed by:	Joubert Galpin Searle