DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

21/02/22
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR574/21

In the matter between:

WESTERN BULK CARRIERS (PTY) LTD **Applicant**

and

SOLOMON MODIPA N.O. (cited in his capacity as Arbitrator of the National Bargaining Council for the Road Freight and Logistics Industry) **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **Second Respondent**

KESEKENG BENEDICT KEGOPOTSEMANG **Third Respondent**

Heard: **9 February 2022**

Delivered: **21 February 2022**

Summary: Application to review and set aside arbitration award – review test – substantive fairness - reasonableness of arbitrator's decision – arbitrators' decision not reasonable on the facts before him

JUDGMENT

DEANE, AJ

Introduction

[1] This is an unopposed application to review and set aside an arbitration award issued by the First Respondent under case number NWRFBC60853, dated 14 March 2021, pursuant to the arbitration proceedings between the Applicant and the Third Respondent, in accordance with the provisions of section 145 and/or 158(1)(g) of the Labour Relations Act[1] (LRA).

[2] The matter relates to an unfair dismissal dispute of the Third Respondent. The Third Respondent was dismissed on 24 April 2020.

Material Background Facts

[3] It is common cause that the Third Respondent was appointed as a Truck Driver from 7 November 2019. He was charged with:

3.1 Failing to carry out a reasonable instruction – follow trip route.
3.2 Costing the company unnecessary costs and vehicle damages caused by incorrect routes followed.

[4] The Third Respondent followed a route from Ramatlabama depot to Hallatshoop via Migdol, where the Third Respondent loaded the truck.

[5] When the Third Respondent returned to Ramatlabama he did not follow the same route from Hallatshoop via Migdol but followed the route to Hallatshoop via Vryburg instead of Kameel.

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

[6] Mr Johan Gouws (Gouws) the Third Respondent's controller saw the Third Respondent following the wrong route when he was already approaching Vryburg and called the Third Respondent to request reasons for this. The Third Respondent said that he understood what he was doing as a driver.

[7] The rule that a driver should use the same route to return to the departure point is not in a written policy but is prescribed.

[8] The Third Respondent had used the prescribed route on no less than three different occasions.[2]

[9] At the arbitration hearing Mr Ganson Govender (Govender) the Applicants Human Resources Manager testified that the Third Respondent should have consulted with Gouws prior to changing the prescribed route.

[10] The Third Respondent testified that he was not directed on which route to take and that he was never told to use the same route on his return.

The Arbitration Award

[11] In the Award the First Respondent made a finding that the Applicant had acceded that there is no policy that requires employees to use the same routes they used when they return from a particular trip.

[12] The First Respondent referred to the case of *Fidelity Cash Management Services vs CCMA and others*[3] where the Court prescribes that fairness is determined mostly on the basis of the reason for the dismissal which the employer had given at the time of the dismissal.....in other words, the Respondent bears the onus to prove that it has a rule and that the rule was contravened".[4]

Grounds for Review

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[2] Transcript, pg. 8.
[3] [2008] 3 BLLR 197 (LAC).
[4] Arbitration Award, pg. 5, paras 33-34.

[13] The Applicant's grounds for review are the gross irregularity of the First Respondent by making:

13.1 an error of fact in respect of the first charge.

13.2 an error of fact in respect of the second charge by finding that there is no concrete proof to show that the truck was damaged as the Third Respondent travelled back.

Legal Principles

[14] In is trite that the test the Labour Court is required to apply in a review of an arbitrator's award is, *"is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"*[5] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[6] the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make, and the reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and Others*[7] where it was held *that "the question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable."*

[15] Therefore, for the applicant to succeed with the review application, it must be established that the Commissioner's decision fell outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by him.[8] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

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[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110. (*Sidumo*).
[6] *Ibid* at paras 118-119.
[7] *Computicket v Marcus NO and Others* 1999 (20) ILJ 343 (LC) 346.
[8] Fidelity Cash Management Services v CCMA and Others [2008] 3 BLLR 197 (LAC) at para 103.

Analysis

[16] The first charge relates to a failure to follow a reasonable instruction. In determining whether the employee was guilty, the arbitrator has to consider (a) whether the instruction was lawful, reasonable or fair; (b) Whether the employee was in a position to carry out the instruction; and (c) Whether there was a lawful or reasonable excuse for her to refuse to carry out the instruction?

[17] In this case Govender testified that "*proof was given him....of the route he should have followed and the route he had actually taken*".[9] He further testifies that "*generally, if there is a change of such instruction, it should be the driver's duty to go back to the controller and telling them matters have changed and could he change the route that was prescribed for whatever reason, they could be? He did not do that.*"[10]

[18] Govender further testifies that routes whilst it may not be a written rule it was a "*generally accepted practice. Could I just elaborate, I say generally accepted and to a policy because once it's a policy then he might not create for, no, in the transport business, there are unforeseen circumstances. There are riots, there are strikes, there are, there floods. So if there's a policy it means that you got to go back change the policy before you change the instruction. So that is why I say it's a prescribed route and maybe upon arrival at that point, something happened, and there is a service delivery strike, we have to take another route, but then the company will prescribe it.*"[11] Govender further testifies that "*he [the Third Respondent] took the route without the permission of the company*".[12]

[19] It is clear that there are prescribed routes and that should a driver need to deviate from the prescribed route for any reason whatsoever, they are not disbarred from doing so, but that they should first inform and then get permission to take an alternative route.

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[9] Transcript, pg. 6.
[10] Transcript, pg. 7.
[11] Transcript, pg. 13.
[12] Transcript, pg. 13.

[20] Therefore, the Commissioner failed in the sense that he made an error of fact with regards to the first charge levelled against the Third Respondent. The First Respondent found that there was no written policy that required the Third Respondent to make use of the same route when returning from a delivery.[13]

[21] I beg to differ. The issue here is not whether there was a written rule regarding the exact route to follow. It is a failure to follow a reasonable instruction of the employer and that was what the Third Respondent was charged with. The instruction from the Applicant is clear, take a prescribed route and if the prescribed route is no longer capable of being followed, one needs to get permission from the controller or management for a detour. I see no problem with the fairness of this instruction and the Third Respondent was quite capable of following the instruction, but he chose not to do so.

[22] The next leg of the query would be whether there was a lawful or reasonable excuse for the refusal to carry out the instruction. The reason provided by the Third Respondent for failing to follow the instruction is related to avoiding potholes. This Court rejects this reason as either a lawful or reasonable excuse for the refusal to carry out the instruction.

[23] The fact that the First Respondent then goes on to accept that the Applicant "*testified unopposed that he was actually trying to avoid potholes that could result in the damages to the truck*"[14] and then goes on to say "*there is no concrete proof to show that the truck was damaged as the Applicant travelled back*"[15] shows that the Commissioner completely misconceived the issue at hand.

[24] In addition, the First Respondent submits that "*....there is no concrete proof to show that the truck was damaged as the Applicant travelled back.*"[16] There was a complete failure on the part of the Commissioner to consider the actual loss,

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[13] Index to Pleadings pg. 17, para 37.
[14] Transcript, pg. 17.
[15] Transcript, pg. 17.
[16] Arbitration Award, pg., 17, para 39.

damages, to the employer in terms of the extra 80 kilometres in mileage and that this factor is one of the considerations that must be taken into account in determining the conduct of the Third Respondent.

[25] In this case, there is a clear conduct of refusing to obey a lawful and reasonable instruction of the employer and which constitutes insubordination. However not all cases of insubordination and or the refusal to obey a lawful and reasonable instruction of an employer should lead to summary dismissal. One needs to look at the facts of each case.

[26] The Court in *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[17] said:

> 'The employer/employee relationship dynamic is premised on instructions being obeyed. It is intolerable that an employer is forced to negotiate day to day organisational arrangements with employees.'[18]

[27] Regarding whether or not dismissal was an appropriate sanction herein, the testimony of Govender remains undisputed i.e., "*[D]uring inspection of Benedict's file, it was also noted that on three previous occasions, he had taken the incorrect routes as well for which he got final written warnings.*"[19] He confirms this further on in the Transcript.[20] However the Commissioner finds that *"[It] is strange that within five months the Applicant had received several warnings that led to a final written warning……. The Respondent could not even produce proof of a final written warning*".[21] Once again the First Respondent misconstrues the evidence before him.

[28] From the evidence it is clear that this was not the first instance of misconduct and that there was undisputed evidence of the testimony of Govender that the Third Respondent had received several warnings as well as a final written for

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[17] [2018] ZALAC 36 at para 22.
[18] Ibid, at 22.
[19] Transcript, pg. 7.
[20] Transcript, pg. 15.
[21] Arbitration Award, pg. 17, paras 40-41.

the same misconduct. This does constitute an aggravating factor in terms of determining the sanction.

[29] In the case of *TMT Services and Supplies*[22] the Courts stated:

> 'The framework of the Labour Relations Act 66 of 1995 (LRA) accords to different decision-makers authority to make certain decisions. Adjudging the severity of misconduct in context, is a power conferred on an arbitrator. It is partly, at least, a value judgement. The choice made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion.'

[30] Taking into account the applicable legal principles above, I have no hesitation in concluding that in this case the First Respondent arrived at conclusions and made findings that no reasonable commissioner in the position of the First Respondent could have arrived at.

Conclusion

[31] On the basis of the abovementioned grounds the Commissioner's decision that the dismissal was substantively unfair falls outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by him.

[32] In the premise the following order is made:

Order

1. The review application is upheld.
2. The dismissal of the First Respondent is substantively fair.

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[22] [2018] ZALAC 36.

3. There is no order as to costs.

T. Deane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: C Higgs

For the Respondent: None