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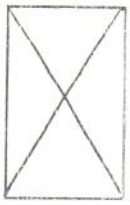

INDUSTRIAL COURT VERDICT

HELD AT **PRETORIA**

CASE NUMBER **NH11/2/19366**

LABOUR APPEAL COURT VERDICT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

HELD AT PRETORIA

CASE NO: NH 11/2/19366

In the matter between

JOHN NDALA Applicant

and

VALUE TRUCK RENTAL Respondent

CONSTITUTION OF THE COURT:

ADV M H MARCUS
ADV A SINGH Additional Members

FOR APPLICANT:

MR MAIBELA

Of:

Tshidi Maibela & Associates

FOR RESPONDENT:

MR E TRUEBODY

Of:

Bowman Gilfillan Hayman Godfrey Inc

DATE AND PLACE OF PROCEEDINGS:

31 March 1995, 6, 7, 8, 9 JUNE 1995 PRETORIA

TRANSCRIBERS
SECRETARIAL SERVICES

JUDGMENT

The applicant was a K14 driver who was employed by the respondent until 7 July 1994, when he was dismissed pursuant to a disciplinary hearing after being find guilty on the following charges, namely:

1) Failing to keep to trips standards, times and distances (that is off-route);
2) Unauthorised use of company property;
3) Transport of unauthorised person;
4) Allowing a non-company employee to enter a company vehicle.

The four charges arose from two incidents which occurred during the applicant's return trip from Pietersburg to respondent's Pretoria depot on 24 June 1994 after delivering fridges for a customer in Pietersburg. These incidents formed the subject of a report by respondent's security officer, Mr Charl Du Preez to respondent's director, Mr Marais dated 28 June 1994, which report formed the basis of applicant's conviction at the disciplinary hearing on these charges.

Mr Du Preez was not called by the chairman of the hearing, Mr Cronje, to give evidence, his report forming the basis of the finding of guilt against the applicant. The reasons why Mr du Preez was not called to give evidence I shall deal with presently.

Du Preez did, however, give evidence for respondent in

/these proceedings

these proceedings in which he stated that on the instructions of Mr Cronje he staked out a house in Kwandabele situated just off the Quagga Road from Pietersburg. This was done on the basis of information that had been received by management from an informant to the effect that applicant was alleged to have stolen a fridge from the respondent during his previous week's trip to or from Pietersburg, (which trip, the applicant denied undertaking the previous week). The allegation was that applicant had off-loaded the fridge the previous week at a house in the Kwandabele area and this was the house that was then staked out by Mr du Preez on 24 June on Mr Cronje's instructions. The correctness of the information on the basis of which Mr du Preez staked out the house received some corroboration inasmuch as applicant was observed to have stopped at the very house which was alleged by respondent to be applicant's brother's house and du Preez states he saw applicant enter the house with a bag of oranges. Du Preez then photographed the house and the respondent's truck driven by the applicant which photographs appear in Exhibit C, photographs 4 and 5. Du Preez then states that after applicant left the house, he stopped applicant's truck on the road and accompanied applicant and his crew back to the house to search for the fridge. The search was fruitless. The only occupant in the house at the time was a little girl who appeared to know the applicant. Subsequently, at du Preez's request, applicant led du Preez to his father's house, which was nearby, and which was identified to du Preez by the applicant. At this

/house

house again the search for the missing fridge proved fruitless. Du Preez also discovered an unauthorised passenger or hitch-hiker in the applicant's vehicle who identified himself as one Nkhumise who, according to du Preez, did not claim to be an employee of the respondent as applicant claims to be the case, but rather stated that he was charged R30 for the trip by the applicant, which the applicant has persistently denied. Du Preez then filed his aforementioned report which formed the basis of the charges brought against the applicant.

What is significant is that during the disciplinary hearing none of the above facts were placed in issue by the applicant, other than du Preez's allegation that Nkhumise had admitted to him that he was not an employee of respondent but rather a hitch-hiker who had paid applicant for the trip.

The correctness of the disciplinary record, which was not a verbatim minute, was admitted by the applicant's representative, Mr Maibela of Labour Consultants, Tshidi Maibela and Associates at the pre-trial meeting which agreement formed part of the pre-trial minutes. Subsequently, the court gave Mr Maibela a further opportunity specifically to take instructions on the correctness of the record from his client and to confirm what was stated to this effect in the pre-trial minutes, namely, that the correctness of the disciplinary minutes was not disputed. As I understood Mr Maibela, although certain items may have been disputed, the admissions

/in regard

in regard to the first and second charges, specifically applicant's admissions that he stopped at his brother's house in order to give his brother money, were not disputed as having been made by applicant at the hearing.

During yesterday's proceedings Mr Maibela made, for the first time, the astonishing submission that applicant had not agreed that the minutes were correct on these aspects during consultation, but that he, Mr Maibela had taken it upon himself not to dispute the minutes, notwithstanding his client's denial of their correctness. The Court duly pointed out to Mr Maibela that this was a serious admission on his part and advised him to give the matter serious consideration. I want to say that for a practitioner whether lay or otherwise who represents parties in this court, to reply to this court's query as whether or to what extent his client disputes the correctness of the minutes of a disciplinary hearing in a manner which, on his own admission, he knows to be contrary to his client's instructions, and this after the court specifically adjourned to afford such practitioner a further opportunity to take further instructions on this aspect, notwithstanding that he had already admitted the correctness of the record in the pre-trial minutes, is unacceptable conduct which will not be tolerated by this court. This is the kind of conduct that is referred to by the President of this court in United Peoples' Union of South Africa obo Mokala & Others v Frazer v Frazer & Alexander Trailings 1994 (15) ILJ 1123 (IC) which might place in question such person's right to

represent parties in this court. Nevertheless, some allowance must be made for the fact that practitioners in this court are often not legally trained or qualified and we have decided in this instance to over-look Mr Maibela's aforementioned conduct and not to entertain Mr Truebody's application for costs de bonis propriius against Mr Maibela's firm. Nevertheless, Mr Maibela would do well to have heed to the remarks of the President in the Alexander Trailings case, (particulary at 1129 I to 1130 E) which remarks perhaps bear repeating:

> "The right which a representative of the nature under discussion acquires to appear in the Industrial Court and to represent a party has this in common with the right of an advocate or an attorney, namely that an abuse of that right by engaging in misconduct or dishonourable practice may result in his or her forfeiting that right to appear in a particular case. The right of a practitioner, whether an advocate, attorney or a representative of some other kind, is not in fact a personal right which cleaves to the representative. Rather the LRA confers in certain cases as indicated above, the right of a party to have a representative. That representative cannot, in my view exert the right to represent clients in this court either pro amico or on a professional basis.

> Advocates or attorneys who are guilty of misconduct or dishonourable practice may be reported to the Society for Advocates or the Law Society, as the case may be. Similar reports may be made in regard to officials of trade unions and employers organisations who make themselves guilty of similar conduct or dishonourable practice to their organisations. The same may be said for consultants who belong to a professional organisation. This court has no power to bar such a representative from appearing in this court in other cases; however it is clear law that in a particular case where a representative is guilty of misconduct or dishonourable practice of the nature outlined above, that this court may and will, where necessary, refuse to hear that representative and postpone the case in order to enable the party concerned to engage the services of another representative."

If this court goes to the extent of adjourning a hearing for a representative, be he lay or otherwise, to take instructions on the correctness of the minutes of the disciplinary hearing and further goes to the trouble of explaining to the representative that the court requires confirmation of a previous admission that the record was correct, it expects the representative to do just that, that is to take the necessary instructions and to inform the court in accordance with those instructions. The

/statement

statement by Mr Maibela during yesterday's proceedings is quite unacceptable. However, as I have stated, we have decided to overlook the matter and not to make an order for costs de bonis propriius on this occasion, although such order may well have been merited.

For the purposes of these proceedings, we do however, accept as a fact that the applicant, through his representative, must have be taken to have admitted to the correctness of the record on the aspects mentioned. It follows that applicant's denial in this court that he stopped at his brother's house or the house photographed by Mr du Preez in Kwandabele must be rejected as inconsistent with his contrary admission in the disciplinary proceedings where he stated that he stopped there to give his brother money. He is also contradicted by Mr du Preez's evidence, who incidently we found to be an excellent and consistent witness. It is somewhat far-fetched to imagine that Mr du Preez would concoct such a version and photograph the applicant's truck after du Preez had already instructed the applicant to return to the house to look for the fridge as was claimed or suggested on behalf of the applicant, nor was this suggested to Mr du Preez by Mr Maibela in cross-examination.

Applicant claimed in this court that he was stopped on the main Quagga Road by Mr du Preez which applicant described as an alternative route he was taking as a result of not having had the necessary toll money to

/return

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return to Pretoria via the N1 toll road which applicant concedes was the official route he would normally be required to take. Applicant claims that in the absence of sufficient toll money he was entitled to take any alternative route although he also concedes that he was not even certain of the way and was relying on the hitch hiker which he picked up, Mr Nkhumesi for directions in this regard.

Respondent's witnesses disputed applicant's claim that if a driver did not have the necessary toll money he was entitled to use any route. The evidence from the respondent's side in this regard is that drivers know that should they not have the necessary toll money, they are obliged to use the official alternative route indicated by the sign posts, (in this case the route going through Nylstroom and Warmbaths). Respondent's witnesses suggested that applicant well knew this to be the case since he had access to the company rules and codes and these were also pinned up in the driver's tearoom on the notice board, and he had also received a final warning for making an unauthorised stop in 1992 after an agreement had been reached in this regard between respondent and the applicant's union TAWU to the effect that applicant and certain other like offenders would not be dismissed on that occasion, as they would have been in terms of the Disciplinary Code, but that they would receive final warnings and that there would then be a motivational period of rebriefing and reacquaintance with the rules and practices which drivers

/were

It was not disputed from applicant's side that the offence of unauthorised use of the company's property was dismissable in terms of the company code. Indeed, the property in question was a valuable truck. I believe the value was in the region of half a million Rand and it is quite understandable, from a commercial point of view, that respondent wants to know at all times where that truck is, on which route it is travelling and to ensure that it travels on the authorised routes at all times. The consequences of it not doing so could be disastrous for the respondent. In the circumstances there is no basis to find that the dismissal of the applicant was substantively unfair nor do we find any merit in the applicant's claim that he did not know the nature of the charges which he had to face or that he was not given a right to representation at the hearing. There is ample authority that an employer is not obliged to extend such right to outside representatives. As to Mr Maibela's complaint that applicant was found guilty at the hearing on the strength of a statement by Mr du Preez, who was not called to give <u>viva voce</u> evidence at the hearing, it is apparent from Cronje's evidence and from the minutes of the hearing that the contents of du Preez's report were not disputed by the applicant apart from du Preez's allegation that Nkhumise had admitted to Mr du Preez that he was not an employee and was charged for the trip. On the latter score the applicant expressly, according to the minutes, declined Cronje's invitation to call du Preez as a witness in the absence of Nkhumise being called also. The other aspects of du Preez's report

/were not

were not placed in issue at the hearing and there was thus no need to call du Preez to give evidence on these aspects. Cronje then very properly and reasonably, in our view, postponed the hearing in order to attempt to get hold of Nkhumise as requested by the applicant but was unsuccessful in doing so. In the circumstances the claim of procedural unfairness is also dismissed.

Finally, in regard to the question of the prayer for costs against the applicant made by Mr Truebody on behalf of the respondent, on the basis of applicant having attempted to mislead the court, which prayer was persisted in by Mr Truebody notwithstanding his concession that such a costs order would likely be an empty one inasmuch as applicant is unemployed and apparently without a present source of income, we feel that such an order is justified in the circumstances of this case.

Whilst we sympathise with applicant's plight, we believe that it is high time that this court spelled out to dismissed applicants in no uncertain terms, that the mere fact they have been dismissed and face hardship or even little prospect of further employment in the current depressed economic circumstances in which this country finds itself cannot and does not justify their bringing their erstwhile employers to this court to face unfair dismissal claims which are frivolous and without substance; still less can they be justified in doing so in a manner which is calculated to mislead this court as

the present applicant has sought to do by withdrawing the admissions made by him during the disciplinary hearing.

The President (in the Alexander Trailings case) earlier has endorsed this approach. It must be borne in mind by would be applicants that whilst they often enjoy the benefits of representation by legal aid organisations or trade unions in this court free of charge (although this is not the situation of the present applicant) respondents, on the other hand, are often put to enormous cost and expense and inconvenience in defending these claims, costs which, in the present case, respondent is unlikely to recover, even if an order for costs is made in its favour. This fact notwithstanding, Mr Truebody has asked for such an order and we believe that he is entitled to it.

The determination we make is:

1. The applicant's dismissal was not an unfair labour practice
2. The application is dismissed with costs on the higher magistrate's scale.

DATED AND SIGNED AT PRETORIA ON THIS THE 9th DAY OF JUNE 1995

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ADV M H MARCUS

Additional Member

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ADV A SINGH

Additional Member