THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR06/16

In the matter between**:**

NATIONAL UNION OF METALWORKERS OF SA **First Applicant**

LUXABISO SOZWE **Second Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

GERALDINE MASUNUNGERE *N.O.* **Second Respondent**

TRANSNET RAIL ENGINEERING SOC **Third Respondent**

Heard: **13 September 2017**

Delivered: **3 November 2017**

Summary: **Substantive fairness – charge of misuse of company vehicle - dishonesty improperly thrown in order to justify a sanction of dismissal – progressive approach in enforcement of disciplined is inherent in the company Policy – dismissal unfair.**

JUDGMENT

NKUTHA- NKONTWANA J

Introduction

[1] This is an application in terms of s145 of the Labour Relations Act[1] (the LRA) for an order reviewing and setting aside the award issued on 10 December 2015 by the second respondent (the commissioner), acting under the auspices of the first respondent (the CCMA). The basis of the challenge is that the award that found the dismissal of the second applicant (Mr Sozwe) substantively and procedurally fair was unreasonable. The Third Respondent (Transnet) is defending the arbitration award.

[2] Mr Sozwe was dismissed on 28 October 2014 after being found guilty of dishonesty arising from the alleged misuse of a company vehicle on four occasions between 28 March 2014 (the award incorrectly reflects 25 March 2014) and 11 April 2014. He was charged as follows:

1. Gross misconduct: Dishonesty and or misuse of Company Vehicle in that on 28 March 2014 you misused the company vehicle for purposes not related to work in that, you went to SAPS in Mount Road Port Elizabeth which had nothing to do with work.

2. That on 31 March 2014, you misused the company vehicle under the pretence that you are visiting a family of a deceased employee in Motherwell and instead travelled to various destinations not in line with your initial purpose, thereby abusing the company vehicle.

3. That on 2 April at approximately 10:30 until 12:30 you misused the company vehicle under the pretence that you were visiting a colleague for unclear reasons that has no business with Transnet operations thereby abusing the vehicle.

4. That on 11 April 2014 at approximately 11:00 until 14:41 you misused the company vehicle under false pretence that you were

[1] Act 66 of 1995 as amended.

visiting SATAWU offices in Port Elizabeth whereas from the data obtained from the Vehicle Event Data you never visited or reached your destination (SATAWU Offices) but instead you went other places.

5. That during the trips mentioned above on many occasions you were speeding with the company vehicle violating Transnet Fleet Management Policy.

[3] The applicants' main ground of review is that the commissioner's finding that Mr Sozwe was guilty of misconduct is not supported by evidence led during the arbitration proceedings. They argued that the commissioner misconstrued the issues in dispute and ignored the material evidence concerning the purpose and authorisation of the trips; fleet management policy; Mr Sozwe's knowledge of the policy and the consistent application of discipline. Mr Sozwe was exonerated of the first charge. The commissioner's finding on procedure is not challenged.

[4] It is common cause that Mr Sozwe was a SATAWU shop steward and his fellow shop stewards were passengers in one or more of the impugned trips.

Review test

[5] The Labour Appeal Court (LAC) handed down an important judgment in *Head of the Department of Education v Mofokeng*,[2] in which Murphy AJA relied on both of the aforesaid judgments in finding as follows:

> '[30] The failure by an arbitrator to apply his or her mind to issue which are material to the determination of a case will usually be an irregularity. However, the [SCA] in *Herholdt* … and this court in *Gold Fields* … have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true

[2] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); Subsequent to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

[31] … Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] … To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result …

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order'

[6] In summary, on *Mofokeng's* pronouncement:

6.1. commissioners commit a gross irregularity where they produce a substantively unreasonable[3] award or misconceive the nature of the enquiry or the true enquiry;

6.2. where a commissioner fails to consider material facts (i.e. facts the consideration of which would have produced a different result), this is *prima facie* proof of an unreasonable result, but the applicant must ultimately establish that the distorting effect of the misdirection caused an unreasonable result; and

6.3. the failure to consider facts and issues may also result in the commissioner misconceiving the nature of the enquiry or the true enquiry, leading to there being no fair trial of the issues a classic gross irregularity.[4]

[7] Before *Mofokeng*, and consistent with it, the LAC had often held that the failure to consider material facts will typically give rise to an unreasonable award. By way of example, as the LAC has put it:

7.1. 'Failure to properly consider the relevant material facts placed before the [commissioner] invariably leads to a conclusion that the decision of the [commissioner] cannot be one which a reasonable decision-maker would make in that proper account had not been taken of the relevant evidence.'[5]

[3] The test for substantive unreasonableness is, of course, that set in *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC) at para 110: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[4] As the LAC found in *Mofokeng* at para: 'He [i.e. the commissioner's] failure to properly apply his mind to these issues which were material to the determination of the dispute, and then to apply the provisions of the applicable collective agreement to them, led him to misconceive the nature of the inquiry and failing to address the question raised for determination.'

[5] *First National Bank – A division of First Bank Ltd v Language and others* (2013) 34 ILJ 3103 (LAC) at para 17 (per Davis JA).

7.2. 'If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable.'[6]

7.3. 'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision.' (own emphasis)

[8] A commissioner shall be liable of misconceiving the nature of the enquiry or true enquiry if he/she fails to address a question that is raised for determination. As the LAC has found, this constitutes a reviewable irregularity.[7]

Arbitration proceedings

Was Mr Sozwe aware of the policy?

[9] Transnet led evidence of Mr Manfred Louw, Corporate Employee Relations Manager, who testified that in terms of the Fleet Management Policy (the Policy) a driver who requests to use a company vehicle must ensure that he/she completes the logbooks/sheets. Any apparent misuse of the company vehicle must be investigated. The trip authorization form contains a disclaimer that a person appending a signature acknowledges that he is precisely familiar with the Policy and guidelines and agrees to abide by them.

[10] Employees requesting to use the company vehicle must familiarise themselves with the contents of the Policy before signing the trip authorisation form. The Policy prohibits the use of the company vehicle for personal use. Mr Sozwe, by signing the trip authorisation form, had acknowledged that he was aware of the Policy.

[6] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) at para 21 (per Waglay JP).
[7] *Mofokeng* at para 34; *Mkhonto v Ford NO and others* [2000] 7 BLLR 768 (LAC) at para 6.

[11] Mr Sozwe denied that he was aware of the details of the Policy. He testified that on 25 March 2014 he was assisted by Mr Jonas to fill the trip authorisation form because it was his first experience to request the company vehicle.

[12] The commissioner rejected Mr Sozwe's evidence that he was unaware of the Policy. She, in turn, accepted Transnet's evidence that Mr Sozwe had a duty to familiarise himself with the Policy before appending his signature on the trip authorisation form. The commissioner relied also on the disclaimer printed at the bottom of the trip authorisation form.

[13] In my view, Mr Sozwe ought to have known, at least, that a company vehicle should not be used for personal reasons or for any purpose other than the one authorised for. This, in fact, is also commonsensical. The commissioner's finding in this regard cannot be faulted.

Was Mr Sozwe guilty of dishonest or misuse of company vehicle?

[14] In relation to the second charge, on 31 March 2004 Mr Sozwe and his colleagues were authorised to visit the two bereaved families of the deceased employees of Transnet. Mr Sozwe made two stops during the trip to purchase food; firstly, for Mr Myburgh who is diabetic and secondly, for all the shop steward colleagues. Mr Louw testified that the trip to purchase food was unauthorised as they ought to have used the canteen in the plant.

[15] The commissioner found that by stopping to enable a diabetic colleague (Mr Myburgh) to buy food, Mr Sozwe breached the policy and stated that:

> "Thus one cannot argue that they used the vehicle for their own private use in such circumstances. It might seem very trivial to the applicant to state that all other stops made which were two others in total was because they were hungry. However, one must take into account that there were [sic] an employee utilises the vehicle for personal use that is not in line with the main purpose of seeking authorisation such an act had nothing to do with the respondent and where they have a canteen with food and an employee

> deems it fit to elect to purchase food in company time without authority it is clear on charge 2 there was a breach of the rule."[8]

[16] The Applicants took issue with the commissioner's deviation from the logic she had applied to exonerate Mr Sozwe of the first charge, arguing that a stop for a meal on an authorised trip cannot conceivably be regarded as "misuse" of the company vehicle or departure from the Policy. The commissioner's finding in relation to the first charge is that:

> "Though it [the visit to the police station] was not captured in the trip authority the applicant's actions cannot be construed as 'misusing' the vehicle when you contextualize the circumstances surrounding charge 1 ... I take into account that one cannot overlook or misconstrue the meaning of the word 'misuse'. 'Misuse' means using something incorrectly, mistreating or abusing an improper or excessive use. The applicant's action with regard to charge 1 I am of the opinion that they do not fall within that definition."[9]

[17] Applicants' counsel submitted that, having correctly identified "misuse" of the company vehicle as the sting of the charges and defining her understanding of that concept, the commissioner applied it in a completely different way when considering the remaining charges.

[18] Certainly, the commissioner ignored the evidence of Mr Sozwe, as corroborated by Mr Myburgh, that the stops were en route to the destination, a fact conceded by counsel for Transnet during his submissions in court. Consistent with the logic used by the commissioner to exonerate Mr Sozwe on the first charge, the two stops in this regard did not amount to misuse of company vehicle. It would be unreasonable to expect a person using company vehicle to seek permission for a stop to refill petrol or to use bathrooms or, as in this case, to buy food during an authorised trip.

[8] Award, page 18 at para 50.
[9] Award, page 18, para 49.

[19] With regard to the third charge, the applicants argued, similarly, that the purpose of the trip on 2 April 2014 was to find Mr Myburgh. The visit to the police station and the Magistrates' court were logically connected to the main purpose of the trip which was to find Mr Myburgh. Mr Sozwe was found guilty of dishonesty merely because he failed to report that he had made another trip to the magistrates' court and later to Mr Myburgh's house. The commissioner stated that:

> "One can infer from the applicant's conduct that there was an element of dishonest intention in the way that he handled things. The intention (or one can say motive) that can be inferred from such conduct is that there was an intention to deceive but there was no genuine attempt by the applicant to act with integrity. The cumulative effect of such conduct can be construed as illustrating that the applicant was dishonest in that he knowingly utilised the company vehicle for his own personal use at the expense of the respondent."[10] [Emphasis added].

[20] The applicants correctly argued that the above finding is not supported by the premise it is based upon as the commissioner blended the notion of "personal use" and "dishonesty". Indeed, there was nothing personal about the task to assist Mr Myburgh as Mr Sozwe had been given authority to find him. Also, the commissioner misdirected herself in finding that Mr Sozwe's conduct constitutes dishonesty.

[21] Nonetheless, I am of the view that Mr Sozwe did misuse the company vehicle when he undertook the second trip to the Magistrates' court to post the bail bond for the release of Mr Myburgh and thereafter accompanying him to his house. It is common cause that after locating Mr Myburgh, Mr Sozwe and his colleagues drove back to the plant and packed outside. One of the passengers, Mr Leeu, went inside the plant and came back with the money which they used as a bail bond. They drove back to the Magistrate's court and upon the release of Mr Myburgh, they accompanied him to his house. In that instance, the company vehicle was clearly used for purposes not authorised and in breach of the Policy.

[10] Award, para 52 (Pleadings, 19).

[22] In relation to the fourth charge, the purpose of the trip on 11 April 2014 was to deliver documents to the SATAWU offices. Sozwe testified that it was an authorised trip but they took a detour and drove to Zwide to track Mr Fanayo, an employee of Transnet, who had been absent without leave (AWOL) as requested by Ms Annedine Van Brochen Rhode. It is common cause that Sozwe never reached the SATAWU offices. He testified that the SATAWU official they were supposed to see telephoned to say that she had left the office. The commissioner rejected Mr Sozwe's version and accepted Mr Louw's evidence that he had no intention to visit SATAWU offices when he requested the motor vehicle. However, Ms Jawa testified that she had been waiting for Mr Sozwe and his colleagues to deliver some documents.

[23] The commissioner found that, since Mr Sozwe was not authorised to use the company vehicle for a trip to look for an AWOL employee, as such he acted in his own volition when he misused the motor vehicle for his own purpose. However, the commissioner ignored Mr Sozwe's evidence that he had been requested to undertake the second trip to Port Elizabeth. This evidence was corroborated by Mr Myburgh. At worst, Mr Sozwe misused the company vehicle in breach of the Policy. The applicants correctly argued that Mr Sozwe's conduct could not have led to the conclusion that he was dishonest.

[24] In respect of the fifth charge, Mr Sozwe pleaded guilty of exceeding the speed limit during the said trips. In essence he was guilty of violating the Policy.

Consistent application of discipline

[25] Mr Sozwe testified that the decision to request the company vehicle in relation to the first and second charges was taken by the shop steward council. In all the impugned trips he was in the company of fellow shop stewards as passengers. Ms Gotyana, Mr Leeu and Myburgh were amongst the passengers in one or more of the trips. It is common cause that only Mr Myburgh had been disciplined and dismissed on similar charges. Mr Louw conceded under cross-examination that the other passengers were not disciplined. According to Mr Louw, Mr Sozwe was responsible as he had

refused to assist Transnet in charging the other passengers. However, he did not explain the type of help that was expected and in what way Mr Sozwe impeded Transnet's efforts to charge his other passenger colleagues when it managed to charge Mr Myburgh.

[26] It is trite that the disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards.[11] Transnet clearly believed that all the shop stewards who had been passengers during the challenged trips were also guilty of misconduct. In fact, in Mr Myburgh's matter, Transnet argued in its written submissions that he was charged and dismissed, firstly, because the Policy applies to all Transnet employees including passengers; and secondly, that he was the chairperson of the shop steward council at that time and had to take responsibility for the actions of the other shop stewards. However, this argument was prudently abandoned by its counsel in court.

[27] Transnet was enjoined to treat "like cases alike".[12] In the absence of evidence justifying differentiation between employees who had committed similar transgressions on any material basis, the inconsistency claim ought to have been upheld.[13]

[28] Certainly, the commissioner misconstrued the applicable legal principles.

Appropriateness of the sanction

[29] In *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others,*[14] the LAC reinvigorated the principle of progressive discipline. It is stated that:

[11] See *SACCAWU and Others v Irvin & Johnson* (1999) 20 ILJ 1957(LAC) at para 29; *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC) 1961A-F paras 13 and 14; *Chemical Energy Paper Printing Wood and Allied Workers Union and others v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) paras 42 and 57-59; *Gcwensha v CCMA and Others* (2006) 3 BLLR 234 (LAC) at par 37-38*; Greater Letaba Local Municipality v Mankgabe NO and others* [2008] 3 BLLR 220 (LC); *CEPPWAWU v NBCCI and Others* [2011] 2 BLLR 137 (LAC).

[12] *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC).

[13] *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* [2009] 11 BLLR 1128 (LC) at para 10.

[14] [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC) ; (2015) 36 ILJ 2273 (LAC) at para 18.

> "[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees." [Emphasis added].

[30] In this case, the commissioner commenced her reasoning with an observation that 'the situation is far from ideal, and that there cannot be a functional relationship between the applicant and the respondent taking into account the strained relationship.[15] There is no basis, on objective facts on record, to support this finding other that the commissioners' fixation with his view that Mr Sozwe was guilty of dishonesty. I agree with the applicants' submission that once dishonesty is discounted, the commissioner's finding that the trust relationship had been destroyed cannot withstand scrutiny.

[31] In my view the commissioner took a shotgun approach in her analysis of evidence. Mr Sozwe was charged with misuse of company vehicle, an offence in terms of the Policy. It is clear from the content of the Policy that a progressive approach in enforcement of disciplined is inherent.

31.1. In terms of clause 5.9.6. Transnet may suspend or revoke an employee's vehicle use privileges where there is evidence that an employee is operating in an inappropriate, dangerous, or negligent manner in breach of the Policy.

31.2. Whilst, clause 5.12.1 provides that 'employees operating Transnet vehicles are expected to know and comply with road traffic regulatory requirements. That Transnet, in terms of clause 5.12.2,

[15] Award, page 18, para 50.

> reserves a right to permanently revoke an employee's motor use privileges and may take necessary action, in line with the relevant HR Policies, for any repeated or deliberate violations of the provisions of the Policy.

[32] According to *Grogan*, dishonesty is not a term that can be thrown at an employee in any circumstances in order to justify a sanction of dismissal.[16] In *Nedcor Nedcor Bank Ltd v Frank and Others*,[17] the LAC referring to a Canadian case with approval stated that:

> ''Dishonesty' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning.'

[33] In my view, the true essence of the charges is not dishonesty as described above but rather the failure by Mr Sozwe to strictly comply with the Policy. There was no intention to steal, cheat, lie or act fraudulently evident to support the commissioner's finding that due to Mr Sozwe's conduct, the relation of trust has been broken irretrievably.

[34] The applicants correctly argued that the commissioner misdirected herself in concluding that the employment relationship could not be restored due to Mr Sozwe's *bona fide* attempt to defend himself against the charges, not on the gravity of his misconduct.

[35] Even though the commissioner took notice of the fact that Mr Sozwe was a first time offender, she ignored the fact that he was not employed as a driver and that Transnet's evidence was limited to the charges of misuse of the company vehicle and the breach of the Policy.

[36] In my view, in line with the Policy, this is a typical case where suspension or revocation of Mr Sozwe's vehicle use privileges would have sufficed as a punishment for the breach of the Policy.

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[16] Grogan, Dismissal, 2nd edition, page 229
[17] [2002] ZALAC 11 at para 15.

Conclusion

[37] In all the circumstances, I find the commissioner to have misconceived the true nature of the enquiry in that she failed to address a question that was raised for determination and to properly consider the relevant material facts placed before her. The award accordingly stands to be reviewed and set aside.

[38] In the interest of justice and in line with the tenet of this Court to be hesitant to remit a dispute back to the CCMA because of the resultant delays, I deem it appropriate not to remit this matter back to the CCMA. Having had the benefit of reading the record, pleadings and hearing oral argument; I am in a position to decide the matter to finality. For all the reasons alluded to above, I am persuaded that the dismissal of Mr Sozwe was substantively unfair.

[39] On costs, it is practice not to award costs when parties are involved in persisting collective bargaining relationship. In this case, Mr Sozwe was a SATAWU shop steward when dismissed but subsequently joined NUMSA. I was not addressed also on the current status of the relationship between the parties. Since both parties did not persist on this issue, I am disinclined to award costs.

[40] In the premises, I make the following order:

Order

1. The arbitration award is reviewed and set aside and replaced with the following order:

   1.1 The dismissal of Mr Sozwe is substantively unfair.

   1.2 Transnet is ordered reinstate Mr Sozwe retrospectively on the same terms and conditions; and without loss of remuneration and benefits.

1.3 The order in paragraph 1.2 must be effected within a month from the date of this judgment."

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate G Grogan
Instructed by:	Gray Moodliar Attorneys
For the respondent:	Advocate M Simoyi
Instructed by:	Siya Cokile Inc. Attorneys