



Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 819 / 13

In the matter between:

**CITY OF CAPE TOWN
MUNICIPALITY**

Applicant

and

SAMWU

First Respondent

SULEIMAN CASSIEM

Second Respondent

SALGBC

Third Respondent

ELWYN NASH N.O.

Fourth Respondent

Heard: 23 April 2015

Delivered: 6 May 2015

Summary: Review – dismissal for unauthorised use of Council vehicle.

JUDGMENT

STEENKAMP J

Introduction

- [1] Suleiman Cassiem has worked for the City of Cape Town for 17 years. He is also a long-standing shopsteward of the South African Municipal Workers' Union (SAMWU). He was dismissed for the unauthorised use of a Council vehicle. After an internal appeal, he was reinstated, coupled with a final written warning and a period of unpaid suspension. He expressed remorse. Two years later, he was again disciplined and dismissed for the same misconduct. He referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the third respondent). The arbitrator (the fourth respondent) found that he had used the vehicle without authorisation while on leave, but that the City had not proven the misconduct on the other days when he used the vehicle outside of working hours. The arbitrator found that the sanction of dismissal was unfair. He ordered the City to reinstate Cassiem, but did not make the backpay retrospective for more than 12 months, effectively meaning that Cassiem forfeited two months' pay. The City seeks to have the award reviewed and set aside.

Background facts

- [2] Although Cassiem faced 113 counts of misconduct, they can be conveniently categorised under two headings:
- 2.1 Unauthorised use of a City vehicle outside working hours; and
 - 2.2 Unauthorised use of a City vehicle while on leave.
- [3] Cassiem worked at the City's Vaalfontein solid waste depot in the Helderberg area (Strand / Somerset West / Gordon's Bay). He was a senior foreman. The Helderberg was also the area in which he worked. He was assigned a Council vehicle (a bakkie) for work purposes. His working hours were 11:30-20:00, Mondays to Fridays. He lived in Bonteheuwel, some 40 km away from the Vaalfontein depot. As an indulgence, he was allowed to use the bakkie to travel to and from work. To facilitate this, the City gave him permission to park the vehicle overnight at the City Police

depot in Juniper Street, Bonteheuwel. Instead, he parked it closer to his home in Heideveld, at the Heideveld roads depot.

- [4] At the arbitration, the City led extensive evidence gained from Tracker reports (a vehicle tracking device installed in the bakkie) that Cassiem regularly used the bakkie outside of working hours, i.e. long before his shift started at 11:30, during December 2011 and January 2012. He regularly used the vehicle from as early as 06:15. And he used it on the weekends of 4 December and 10-11 December, when he was not on duty; and over a period of three days in January when he was on leave.
- [5] Cassiem could not and did not dispute that he used the vehicle outside of working hours and while he was on leave. He justified by saying that he used it for work purposes (or, at worst, for trade union purposes), such as picking up casual workers; dropping keys off at a fellow worker's house; picking up and delivering medical aid claims to the SAMWU offices; and taking "braaibakke" to Gordon's Bay for the annual staff braai.

The award

- [6] The arbitrator considered each group of charges relating to each date. I will summarise each of his conclusions.

Charge 1 (1 December 2011)

- [7] Cassiem use the vehicle outside working hours from 06:18 to 11:17. His version was that he gets a lift in the morning with his wife to the Heideveld roads depot to collect the vehicle. The arbitrator found that the evidence on the parking authorisation was relevant to his findings on this charge. He found:

"In my view, the most important significance of the authorisation document is not the location where the vehicle is parked but rather that authorisation was granted to park the vehicle at a depot other than Vaalfontein." And:

"Endorsing the inflexible view the [City] adopted would be onerous on Cassiem. He parked the vehicle at a depot of the [City] and even though he did not strictly comply with authorisation document in terms of location, he complied with the material purpose thereof, namely to park it at a depot."

“Based on the above, I cannot find that Cassiem breached rule by parking the vehicle at the Heideveld depot and as such I cannot find that he breached the rule by starting up the vehicle at 0618 as he had reason to do so.”

- [8] With regard to Cassiem’s further evidence that he went to the union offices to drop medical aid documents, the arbitrator accepted that Cassiem had “a reason to be at the union offices”. He concluded:

“Based on the evidence I find that the [City] failed to prove that Cassiem contravened the rule.”

- [9] The arbitrator applied the same conclusion to deal with the other charges.

Charge 2: 2 December 2011

- [10] Cassiem used the vehicle outside of working hours from 06:17 to 08:05. The arbitrator simply found that:

“My findings above also apply to this charge thus Cassiem has not contravened the rule.”

Charges 3 to 11: Using vehicle on a Sunday

- [11] It is common cause that Cassiem use the vehicle on Sunday, 3 December 2011 when he was not working.
- [12] The arbitrator accepted Cassiem’s version that he travelled to Blue Downs to go to the homes of fellow workers Van Willingh or Daniels. He also accepted that “transporting casuals was part of his duties”. The City led evidence that Van Willingh was already clocked in when Cassiem said he went to his house, or that he was sick on that day. Yet the arbitrator found that “I have to place more weight on Cassiem’s version as it was more detailed than the [City]’s was.” He then accepted “that Cassiem was not scheduled to work that day [but] the version he presented of notifying and fetching a casual and delivering keys to Van Willingh was a probable version.”

Charges 12 to 19: 5 December 2011

- [13] Cassiem use the vehicle outside of his working hours from 06:39 to 11:29.

[14] The arbitrator again accepted Cassiem's general evidence relating to fetching the vehicle from Heideveld; and the trips to Blue Downs [i.e. visiting Van Willingham or picking up casualties].

[15] Cassiem further testified that he was a diabetic and that "he either attended at his house to collect medication or lunch". The arbitrator also accepted this; as well as Cassiem's reason for going to Claremont [outside of his duty area], because "there was a sub depot in Claremont."

Charges 20 to 29: 6 December 2011

[16] Once again it is common cause that Cassiem used the vehicle outside of his working hours from 06:27 onwards. He went to Epping and Tuscany Glen outside of his work area.

[17] The arbitrator again accepted Cassiem's reason for going to his house (i.e. to collect medication or lunch). He also accepted that there is an agency in Epping and that that would be a valid reason to visit Epping.

Charges 30 to 33: 7 December 2011

[18] Cassiem again used the vehicle from 06:13 onwards. He went to the Bargaining Council offices in Parow to attend "a process". The arbitrator accepted that he was allowed to do so.

Charges 34 to 38: 8 December 2011

[19] The arbitrator accepted Cassiem's version that he used the vehicle outside of working hours to pick up a sick certificate from a union member and to take in medical forms to the union offices. Although the City's witnesses testified that there was no authorisation for such trips, the arbitrator accepted that "the version of Cassiem and other senior foremen suggest this was a practice and it is common for supervisors to pay these kinds of visits to staff."

Charges 39 to 44: 9 December 2011

[20] Cassiem used the City vehicle to collect "braaibakke" and deliver them for a staff party in Strand.

Charges 49 to 50: 10 December 2011

- [21] Cassiem used the vehicle before working hours to collect a colleague from a rehabilitation centre in Hout Bay. The arbitrator accepted that he was “designated to fetch the colleague”.

Charges 51 to 54: 11 December 2011

- [22] It is common cause that Cassiem again used the vehicle on a Sunday when he was not scheduled to work. The arbitrator simply accepted that he was required to go to Von Willingh “to drop keys or the like”.

Charges 55 to 65: 12 December 2011

- [23] The City’s records show that Cassiem was not working on this day. Yet the arbitrator accepted Cassiem’s version that he did go to work; and that his use of the vehicle from 06:36 onwards was work-related.

Charges 66 to 68: 13 December 2011

- [24] Cassiem used the vehicle before working hours to drive to Epping. The arbitrator accepted Cassiem’s version of “an operational need to undertake these trips to Epping”.

Charges 69 to 70: 14 December 2011

- [25] The arbitrator accepted Cassiem’s version that he used the vehicle before working hours to pick up “Van Willingh and or Daniels”. He found that Cassiem did not contravene a rule.

Charges 74 and 76: 3 January 2012

- [26] Cassiem used the vehicle to deliver medical aid documents to the union offices. The arbitrator found that it did not contravene a rule.

Charges 80 to 82: 7 January 2012

- [27] Cassiem used the vehicle on a Saturday when he was not on duty. The arbitrator accepted that he “may have delivered bags” to a certain Sam at a depot in Philippi. He found that Cassiem did not contravene a rule.

Charges 83 to 86: 11 January 2012

[28] Cassiem used the vehicle before working hours. The arbitrator accepted that he went to Epping for work purposes.

Charges 87 to 113: unauthorised use whilst on leave

[29] Cassiem used the vehicle whilst he was on leave from 4 to 6 January 2012. The arbitrator accepted that he was on leave. He therefore found that Cassiem's use of the vehicle was unauthorised.

Sanction

[30] Despite his finding that Cassiem had committed misconduct in the form of unauthorised use of the vehicle while he was on leave, the arbitrator was not convinced that the trust relationship had been broken down. He reasoned:

"One needs to consider that Cassiem is a shop steward and he has practically been one for the entire duration of his employment. In this regard, he has probably been at odds with the employer on more than one occasion. The nature of the employer and trade union relationship is by its nature adversarial. In my view the lines as being adversaries and not having trust in one another should not be blurred."

[31] Whilst accepting that Cassiem had committed misconduct the arbitrator further reasoned that "one should consider that perhaps he did not necessarily commit the conduct wilfully." He found:

"Whilst his conduct is not exemplary to his subordinates, he probably committed the misconduct based on the exercise of discretion or perception that he was entitled to undertake the trips he did, as the likelihood exists that some of the unauthorised trips were related to his functions as a shop steward and by implication, to the advancement of employees' interest."

[32] The arbitrator also accepted that Cassiem had a history of unauthorised use of the vehicle. However, he found that a period of more than two years had elapsed before the latest transgressions; and:

"Some context to this is also required in that the first transgression occurred in a different environment. When he arrived at Vaalfontein, he was

introduced to a different culture where he perhaps had a mistaken impression of what he was or was not authorised to do.”

[33] The arbitrator concluded that dismissal was “not the appropriate sanction” and that the dismissal was substantively unfair. He ordered the City to reinstate Cassiem with 12 months’ backpay. That had the effect of a period of two months’ unpaid suspension.

Review grounds

[34] The City argues that the award is vitiated by a number of defects amounting to misconduct and that, as a result, the arbitrator arrived at an award that is so unreasonable that no reasonable arbitrator could have reached the conclusion that he did.¹

Evaluation / Analysis

[35] At first blush, the award is detailed and comprehensive, comprising no less than 283 paragraphs over 56 pages. However, the Court has to consider whether the award is sustainable in the light of the evidence before the arbitrator and the complaints of misconduct against the employee. I shall consider each of the grounds raised by the City.

Contravention of a rule

[36] The arbitrator correctly stated that he had to consider whether the employee contravened a rule, as required by item 7 of the Code of Good Practice: Dismissal. He also accepted that there was a rule or standard prohibiting Cassiem from using a City vehicle outside of working hours without authorisation. It is against that background that his further findings must be evaluated.

Parking the vehicle at Heideveld

[37] It is common cause that Cassiem got authorisation to park the vehicle overnight at the City Police’s Juniper Street depot in Bonteheuwel, close to

¹ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014 1 BLLR 20 (LAC)]; (2014) 35 ILJ 943 (LAC) paras 14 and 20.

his home in Heideveld, rather than at the Vaalfontein solid waste depot in the Helderberg where he worked, some 40km away. He was also authorised to drive the vehicle to and from Vaalfontein. What he was not authorised to do, was to park at the Heideveld depot, even closer to his home. And he had no discretion to decide off his own bat that he could do so as it was more convenient for him.

- [38] The arbitrator misinterpreted this authorisation and, in doing so, asked the wrong question, i.e. whether Cassiem was allowed to park in Heideveld. He clearly wasn't; he was only authorised to park at the City Police depot in Juniper Street, Bonteheuwel. Yet the arbitrator found that "the most important significance of the authorisation document is not the location where the vehicle is parked but rather that authorisation was granted to park the vehicle at a depot other than the Vaalfontein (depot)." And flowing from that finding, which is contrary to the evidence, he found that Cassiem "was not charged with parking the City's vehicle at an unauthorised depot". In doing so, he yet again asks the wrong question. The question was whether Cassiem contravened the rule that he was not allowed to use the vehicle outside working hours without authorisation. By using the vehicle before he went to work at 11:30 and parking it in Heideveld, or retrieving it from the depot where he was not authorised to park, Cassiem contravened the rule and committed misconduct.
- [39] The arbitrator went further and found that he had not been presented with any evidence "why it was critical that the vehicle must be parked at the City Police depot in preference to the Heideveld roads depot... Further, I was not presented with evidence from the [City] that authorisation to park at Heideveld would not have been granted had such a request been made." Once again, he misconstrues the nature of the enquiry and asks the wrong question. The fact is that Cassiem was not authorised to park in Heideveld. He never requested it and authorisation was never granted.
- [40] The arbitrator also disregarded the unchallenged evidence of Claire McKinnon, the manager of the Cleansing branch in Solid Waste, that the City had legal duties to comply with in keeping control where its vehicles are parked, also for insurance purposes. And, as Mr *Conradie* argued, the

City's duties and powers are rooted in s 152(1)(b) of the Constitution, stating that one of the objects of local government is "to ensure the provision of services to communities in a sustainable manner". Section 4(2) of the Local Government: Municipal Systems Act then places a duty on municipalities to "exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community". And to this raft of legislation s 63(1) of the Local Government: Municipal Finance Management Act (MFMA) adds that the accounting officer of a municipality is responsible for, amongst other things, "the management of ... the assets of the municipality, including the safeguarding and the maintenance of those assets."

[41] The Municipality is entitled to exercise this legislated responsibility by ensuring that its rules relating to the use of municipal assets are enforced. Yet the arbitrator accepted that Cassiem could simply park where he chose to, despite the clear evidence that he was only authorised to park at the City Police depot. That led to him reaching an unreasonable conclusion. In that regard, Mr *Conradie* referred to the decision of the Labour Appeal Court in *Hendricks v Overstrand Municipality*² where that court endorsed the finding of the court *a quo* holding that the sanction imposed by [in that case] the finding of a disciplinary chairperson was irrational and unreasonable, continuing:

"The mitigating factors that he took into account do not remove the operational need of the municipality to ensure that senior officials in those positions are exemplary in their conduct and can be trusted by the municipality and by the public. There is also a constitutional obligation on the municipality imposed by s 152 of the Constitution to provide accountable government for local communities; to ensure the provision of services to those communities; and to promote a safe and healthy environment. If the employee were to remain in the employ of the municipality, it would be failing in its duties to its ratepayers."

[42] By finding that the City's rule requiring the bakkie entrusted to Cassiem to be parked at the City Police depot to be "not critical" and effectively invalid

² (2015) 36 *ILJ* 163 (LAC).

or unenforceable, the arbitrator exceeded his powers. It renders his ultimate conclusion unreasonable and reviewable.

Did the City condone the unauthorised use?

[43] It is clear from the evidence that Cassiem did not have authorisation or permission to use the vehicle outside of working hours; nor did the City condone it. When the unauthorised use was brought to its attention, it took the disciplinary steps that led to Cassiem's dismissal.

[44] With regard to trade union activities, the Main Agreement provides:

"Should a shopsteward (other than a full-time shopsteward) be required to leave his or her workplace in order to carry out any duties as a shopsteward, the shopsteward shall first obtain the permission of his or her senior/supervisor, which permission shall not be unreasonably withheld."

[45] Cassiem could not have had permission to "leave his workplace" to fulfil trade union activities (such as dropping off medical aid forms) outside of his working hours. Quite simply, he had no permission to use the Council vehicle outside of his working hours for any purpose other than travelling from the City Police depot where he had permission to park, to his workplace at the Vaalfontein depot. The arbitrator's conclusion that Cassiem did not breach a rule is patently unreasonable.

Did Cassiem have a discretion?

[46] The arbitrator reasoned that Cassiem "probably committed the misconduct based on the exercise of discretion or perception that he was entitled to undertake the trips he did." He also found that Cassiem "perhaps had a mistaken impression of what he was or was not authorised to do."

[47] This is not a reasonable finding. It is not borne out by the evidence. For example, Ms McKinnon was specifically asked:

"In terms of this authorisation has an employee any discretion to park the vehicle at a different location?"

McKinnon: no, if anything should happen like the employee for any reason can no longer park at that location or if the situation should change in any way whatsoever whether it be a vehicle change, place change, change in

the working scenario, any change whatsoever, such a form has to be submitted with the new information on which then has to be signed by me and perhaps I need to just verify that the council has a formalised delegated authorities the sting of whom a sign for what and this is particularly under my delegated authority, nobody else is allowed to sign.”

[48] McKinnon continued to testify that Cassiem did not have consent to park at the Heideveld roads depot and that he was parking there unlawfully.

[49] This testimony is confirmed by Mr Jaegers; Ms Meyer; and by Cassiem’s own witness, Mr Brown. The union representative, Mr Hearne, suggested to Brown in his evidence in chief that Cassiem had permission to park at the Heideveld roads depot. Brown’s response was:

“No, I don’t know about that at all. I know about that I got permission to park the vehicle and Cassiem had permission to park the vehicle and the vehicle is supposed to be parked at the Bonteheuwel [depot] near Mr Cassiem’s house by the Metro police station.”

[50] Cassiem’s other witness, Mr Nordien, could only mention one instance where he had to go into work on request when he was off duty. There was no basis for the arbitrator to find that employees had a general discretion to use work vehicles while off duty. And in any event, Nordien made it clear that, if an employee had to visit a colleague outside of working hours, he would have to get permission to do so. Cassiem had no such authorisation or permission; yet the arbitrator found that he did not contravene a rule.

Was Cassiem aware of the rule?

[51] There is no doubt that Cassiem was aware of the rule against unauthorised use of the City’s vehicle. In fact, he had been dismissed for the very same transgression previously. He was reinstated after an appeal, but that was coupled with a final written warning and a period of unpaid suspension. Yet he committed the very same misconduct again. The arbitrator did not take this into account; instead he simply accepted that two years had lapsed since the previous transgression. Therefore, he simply disregarded the previous infraction, contrary to the finding of the

LAC in *Selemela v Northern Platinum Ltd*³ that “an employee’s written warnings, even after they had lapsed, may be taken into account in determining the fairness of his or her dismissal where the employee concerned is found to have a propensity to commit acts of misconduct at convenient intervals falling outside the period of applicability of the written warnings.”

- [52] The arbitrator also did not take into account that Cassiem showed no remorse and instead offered a dishonest explanation with regard to his use of the vehicle whilst on leave. And despite Cassiem’s dishonesty, the arbitrator unreasonably found that the trust relationship had not been broken down.

Conclusion

- [53] The arbitrator simply disregarded all of the evidence about a clear rule; the contravention of the rule; and the fact that Cassiem had no discretion. All of the arbitrator’s conclusions are based on his finding that Cassiem did not breach the rule. On the evidence before him, that conclusion is so unreasonable that no other arbitrator could have come to the same conclusion. The arbitrator embarked from the wrong premise, leading to an unreasonable conclusion.

Remit or substitute?

- [54] Mr *Whyte* argued that, should I find in the City’s favour, I should remit the matter for a fresh arbitration. One reason for this submission is that the City’s notice of motion was phrased as follows:

“That the arbitration award handed down by the [arbitrator] under case number WCM 111208 be reviewed and corrected or set aside and referred back to the [Bargaining Council] for arbitration by a Commissioner other than the fourth respondent.”

- [55] The argument is that the City did not ask for the award to be substituted. However, it did ask for the award to be “corrected” and for “further and/or alternative relief.”

³ (2013) 34 *ILJ* 3118 (LAC).

[56] In my view, it would only lead to further unnecessary costs and delays to remit the dispute. Both parties led lengthy evidence at arbitration. The record comprises more than 1800 pages. All of the evidence is before this court. The Court is in a position to substitute the award with a finding that the dismissal was fair.

Costs

[57] The union and the City have an ongoing relationship. The union obtained an arbitration award in favour of its members. It had little option but to defend these proceedings. In law and fairness, I do not consider a costs award to be appropriate.

Order

The arbitration award handed down by the fourth respondent (the arbitrator) under case number WCM 111208 is reviewed and set aside. It is substituted with an award that the dismissal of the second respondent, Mr Sulaiman Cassiem, was substantively and procedurally fair.

Anton Steenkamp

Judge of the Labour Court

APPEARANCES

APPLICANT:

Bradley Conradie
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FIRST and SECOND RESPONDENTS:

Jason Whyte of Cheadle Thompson & Haysom.

LABOUR COURT