



**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**Not Reportable**

**Case no: C435/2019**

In the matter between:

**IMPERIAL CARGO A DIVISION OF IMPERIAL  
LOGISTICS SOUTH AFRICA GROUP (PTY) LTD**

**Applicant**

and

**NUMSA obo B A DZAKWA  
NATIONAL BARGAINING COUNCIL FOR THE  
ROAD FREIGHT AND LOGISTICS INDUSTRY  
MICHAEL MARAWU N.O.**

**First Respondent**

**Second Respondent**

**Third Respondent**

**Date heard: 17 March 2021 by virtual hearing**

**Delivered: 14 June 2021 to Court by means of email**

---

**JUDGMENT**

---

**RABKIN-NAICKER J**

- [1] This is an unopposed application to review an arbitration award under case number WCRFBC 54575. NUMSA originally opposed the matter but withdrew its opposition on the 25 February 2021.

- [2] The first respondent's member (the employee) was employed as a truck driver. He was dismissed by the applicant for misconduct, namely operating a hand-held cell phone while driving on duty. At the time he was on a final written warning for the same offence, which had been issued 4 months previously.
- [3] The employee did not dispute that he was aware of the rule prohibiting driving while holding a cell phone. In August to September 2018 he contravened this rule on three separate occasions during August and September. He was issued with a final written warning valid for 12 months until 24 September 2019. Less than 4 months later he was observed on 'Drivecam' footage committing the same offence again. The employee did not dispute that he committed the offence but raised inconsistency as a defence at the commencement of the arbitration..
- [4] Despite the above, the third respondent (the Arbitrator) found the dismissal to have been substantively unfair and ordered reinstatement as a remedy. The basis for the finding in this respect appears from the following paragraphs of the Award:

"[18] ....[Dzakwa] did not deny that he answered a call from the controller's office while he was driving, but stated that his Bluetooth speaker device's battery was off, whereas the truck's hands free kit had a faulty speaker As {Dzakwa} could not hear the controller on the other side clearly from the truck hands free kit's speaker, they had to transfer conversation (sic) to his cell phone due to the controller's insistence.

.....

[20] [Dzakwa's] version that the controller tried to speak with him on the hand free kit speaker and could not hear each other (sic) clearly thus (sic) he was told by the controller to speak on his cell phone, even though his truck was in motion, was not denied by the Respondent It is also common cause that the company controller are able to detect (sic)/ see when the vehicle is in motion from their operational end.

[21] It is therefore my view that, if indeed [Dzaka] did try to respond to the controller to speak on his cell phone for the sole purpose of providing kilometres, it could not be deemed to be fair to charge [Dzakwa] for same."

[5] It is submitted on behalf of the applicant that there was no material before the arbitrator capable of justifying the conclusion that a controller had instructed the employee to make use of a hand-held device. The issue placed in dispute at the start of the arbitration were simply that there had been inconsistency in the disciplinary sanctions imposed by the Company for similar offences and the Arbitrator confirmed same.

[6] A reading of the transcript reveals that the issue of the instruction being given by the controller was raised through a series of leading questions by the employee's trade union representative. The employee was duly led thus:

**INTERPRETER:** He's saying he couldn't stop there because it was a high risk zone, there are a lot of hijackings there on that R49 road.

**MR. KWADISO:** Did you tell the controller that you cannot stop there.

**INTERPRETER:** He says he did alert the controller but then the controller said he only wanted the kilometres nothing more.

**MR. KWADISO:** So are you telling us that controller insisted you give him these kilos, while he knows that you're driving?

**MR. DZAKWA:** Yes.

**MR. KWADISO:** So what that instructed from the controller?

**INTERPRETER:** Yes that was what was instructed to give him the kilometres.

**MR. KWADISO:** Okay the other question I want to ask, after you report that the truck speaker or Bluetooth doesn't work properly, did the company fix that?

**INTERPRETER:** He said no.

**MR. KWADISO:** So this instruction of the controller is that the instruction that led to your dismissal?

**INTERPRETER:** Yes it was.

**MR. KWADISO:** Okay, tell me if the controller didn't instruct you to talk on the phone, will you still talk on the phone, even if you were not instructed?

**INTERPRETER:** He's saying no, he would not."

[7] The arbitrator made no effort to prevent the leading questions which elicited the evidence that the controller had given the instruction. In any event, this issue had not been put to the applicant's witness which highlights the unreasonable finding by the Arbitrator that the applicant did not deny the allegation. In addition, given that the issues were narrowed at the start of the arbitration with the applicant unequivocally informed on the record that the only case it had to meet was one of alleged inconsistency, its evidence was limited to this. As the applicant correctly submits before me, if the arbitrator intended to make adverse findings on issues that fell beyond the ambit of the dispute then it was incumbent on him to alert the applicant and give it a fair opportunity to deal with new issues. His failure to do so amounted to a gross irregularity in the proceedings.<sup>1</sup>

[8] In all the circumstances, I am of the view that the ultimate Award in this matter cannot be considered to be within the bounds of reasonableness. The employee had broken this rule on a number of occasions and was on a final written warning at the time he committed the offence (which also amounts to a criminal infraction). I am of the view that the Award must be set aside and substituted. In relation to costs, I am cognizant of the ongoing relationship between the applicant and NUMSA and despite the union's withdrawal of opposition at the 11<sup>th</sup> hour, I do not consider a costs order to be apposite. I make the following order:

Order

1. The Award under case number WCRFBC 54575 is reviewed and set aside and substituted as follows:

---

<sup>1</sup> See Nkomati Joint Venture v CCMA (2019) 40 ILJ 819 (LAC)

1.1 The dismissal of Mr B.A. Dzakwa was procedurally and substantively fair.

2. There is no order as to costs.

---

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: GA Leslie SC instructed by Harmse Kriel Attorneys