IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C241/19

In the matter between:

RAM TRANSPORT (SOUTH AFRICA) (PTY) LTD Applicant

and

THE NATIONAL BARGAINING COUNCIL FOR

THE ROAD, FREIGHT AND LOGISTICS INDUSTRY First Respondent

COMMISSIONER GAIL McEWAN N.O. Second Respondent

ESTATE LATE HENRY DENVER SMITH Third Respondent

Date heard: 27 May 2021 by virtual hearing.

Delivered: 7 September 2021 by email. Deemed delivery time and date: 10.00hr on 8 September 2021.

JUDGMENT

RABKIN-NAICKER J

[1] Since I heard this review application, the third respondent (Smith) has sadly died. An application was made by the executor of his estate, Mrs Anjohine Neleen Smith, for a substitution of the third respondent. The application is granted.

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[2] The review application had been opposed by Smith's union but no papers were filed on his behalf. The applicant made submissions in a virtual hearing. The second respondent (the Commissioner) found the dismissal of Smith to have been procedurally fair, but substantively unfair. He was reinstated with effect from 25 March 2019, with back pay payable in the amount of R37 798.20. He earned R7 559.64 a month.

[3] Smith worked for the applicant for 9 years before his dismissal. He was employed as a Code 8 driver. He was dismissed on 28 September 2018 on the following charge:

"Gross insubordination, making an unauthorized stop or alternatively requesting an unauthorized stop and gross failure to follow company policy and procedure in that on/or about 31 August 2018 you were specifically instructed by the courier support agent, Fathima Mbheli, to make your first stop in Cape Town to deliver priority parcels. After receiving the instruction you failed to adhere to the instruction and requested to make an unauthorized stop in Voortrekker Road to buy a cool drink and/or go to the toilet without having the authorization to do so and without following the company policy and procedure to first radio the control room to obtain permission to make the stop or alternatively to be guided to where you are permitted to stop. On 31 August 2018 the company vehicle was robbed and/or hijacked which could have been prevented if you had followed the direct instruction to make your first stop in Cape Town and not in Voortrekker Road."

[4] At the disciplinary hearing, Smith was found guilty of gross insubordination; requesting an unauthorized stop; and gross failure to follow company policy and procedure. After considering the evidence before her at the arbitration proceedings that Commissioner found in Paragraph 23 of her award as follows:

"(23) …..I have found that the instruction from Claasen emailed to Mbheli was intended for the driver who on the day was Petersen and not Smith. Mbheli failed to ensure that the message on first stops was conveyed to the driver (Petersen). It was agreed that when a radio message came through all in the vehicle would be able to hear what was being said. Smith is in the circumstances found not

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guilty of gross insubordination. It was Petersen who allowed the request and failed to follow the instruction of first stop in Cape Town CBD. Smith conceded he requested a toilet stop. His request was granted by Petersen. This in the circumstances as a first offence in nine years is not a dismissible offence and a sanction such as a written warning would have been more appropriate and fair. In terms of the third charge for which Smith was found guilty for not following the company policy and procedure to first radio the control room to obtain permission to make the stop or alternatively to be guided where you are permitted to stop, Petersen was in control of the vehicle and Smith in the circumstances is found not guilty of the third charge. In the circumstances I find on a balance of probabilities that the dismissal of Smith is substantively unfair as he is not guilty of any of the charges against him.

[5] It was common cause that Petersen was driving the vehicle that day, with Smith sitting in the middle, and one Williams at the passenger door. Smith had an urgent call of nature which he explained at the arbitration meant he had to get to a toilet without delay:

"MR HENRY SMITH: In that instance it has nothing to do with disobeying the law, the code of conduct, it just a human nature I needed to, because what must I do must I wet myself, and then I must go back to the hub and go back home."

[6] He admitted that Petersen passed him 20 rand to buy him a cold drink when the vehicle stopped to let him out. The evidence at arbitration by Williams who was called by the employer, was that he did not lock the passenger door when Smith got out. Moreover Petersen, the driver, had his window open. This was against company policy and meant that the vehicle was vulnerable to being high-jacked. However, Williams had not been charged for any offence.

[7] The respondent's representative at arbitration, quite properly, clarified that there was no evidence that Smith or his fellow employees had any involvement in the high-jacking which had resulted in substantial financial loss to the employer. The case against Smith was premised on his failure to get permission from the employer's hub to stop to go to the toilet or press the panic button, and an

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assumption that if he had done so, he would not have been given permission to stop where he did, and the high-jacking would not have taken place.

[8] The grounds of review set out in the founding affidavit and in lengthy heads of argument on behalf of the applicant, include misconduct by the Commissioner, incorrect factual findings, acting 'in an ultra vires manner', failing to rationally apply her mind to the law and the facts, and failing to reasonably and justifiably determine and assess the evidence before her. This recitation of possible grounds of review is not supported on my consideration of the Award and the record.

[9] Having read the transcribed record and the Award, I find no merit whatsoever in the applicant's submissions. There is no substantiation, with reference to the record, for these grounds. As far as the Court is concerned, the Arbitrator recorded the evidence in detail in her Award, and her ultimate Award on substantive unfairness of the dismissal was well within the bounds of reasonableness. The following questions, on a reading of the record and Award, must be answered in the affirmative:

"The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"[1]

[10] In all the facts and circumstances before her, I find that the Commissioner's decision that the sanction of dismissal was not warranted, to have been entirely reasonable. The employer appears to have been of the view that given that Smith was a worker's representative, and knew the policies of the company, that this

[1] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at paragraph 20.

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should have been treated as an aggravating factor. The Commissioner however was reasonable in emphasizing that Smith was not the driver of the vehicle and that his conduct in asking the driver to stop was occasioned by his urgent need to relieve himself. His long employment and clean disciplinary record militated against dismissal and a warning would have been a suitable sanction.

[11] The review application must therefore fail and the remedy of reinstatement with five month's back-pay now stands to be substituted by this Court. In the Court's view an award equivalent to ten month's salary would be equitable compensation. I therefore make the following order:

Order

1. The application to review the Award under case number RFBC53206 is dismissed.

2. Given the substitution of the third respondent, the applicant is ordered to pay an amount of 10 x 7559.64 =R 75 596.40 (Seventy-five thousand five hundred and ninety six Rand and 40 cents) to the Estate of Late Henry Denver Smith.

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H.Rabkin-Naicker

Judge of the Labour Court

Representation

Applicant: Du Randt Du Toit Pelser Attorneys

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