



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

**C654/2021**

**Not Reportable**

In the matter between

BOYCE SITYEBI

**Applicant**

and

**KIRDROGEN (PTY) LTD**

**First Respondent**

**SOUTH AFRICAN ROAD PASSENGER**

**BARGAINING COUNCIL**

**Second Respondent**

**I A MACUN N.O.**

**Third Respondent**

**Dates Heard: 19 July 2023**

**Date Delivered: 23 October 2024 by means of email; deemed received at 10.00hr on 24 October 2024**

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**JUDGMENT**

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**RABKIN-NAICKER J**

- [1] This is an opposed application to review an award under case number RPNT6501, dated 7 October 2021. In terms of the award, the third respondent (the Arbitrator) found the dismissal of Mr Sityebi (the employee) to be substantively and procedurally fair.

[2] The background to the dispute is set out in the Award as follows:

“6. The Respondent, Kidrogen, is a vehicle operating company (VOC) that operates the City of Cape Town My Citi bus service on contract to the city. It operates on particular routes in the greater Cape Town area.

7. The Applicant, Boyce Sityebi, was employed as a driver by the Respondent. He commenced employment with the Respondent on 1 February 2019 until his services were terminated on 28 June 2021. He was earning a monthly salary of R12053.00.

8. In his opening statements, Mr Sityebi indicated that he was given an unreasonable instruction that his supervisor refused to write down. The Applicant further claimed that he was not on duty at the time that he was given the instruction. According to the Applicant, he disagreed with the Chairperson of the disciplinary procedure but is not disputing the fairness of the procedure. The Applicant disputes the fairness of the dismissal and is seeking reinstatement.

9. In his opening statement for the Respondent, Mr van Vuuren indicated that the Applicant was given a reasonable instruction while on duty which he refused to follow. According to Mr van Vuuren, the Applicant has a pattern of behaviour of failing to follow instructions that led to his dismissal. According to Mr van Vuuren, the Respondent will argue that the dismissal was both procedurally and substantively fair.”

[3] The grounds of review are stated broadly in the founding and supplementary founding papers. It is submitted that the Arbitrator’s findings “did not accord with the material properly before him and the Third Respondent therefore committed a gross irregularity in the conduct of the proceedings which vitiates the award.” It is also suggested that in concluding that the instructions given to the employee by one Masango was reasonable and lawful in the peculiar circumstances of the matter, is indicative that the Arbitrator misconstrued the issue in dispute. This conduct vitiates the award according to the applicant. It is also suggested that the arbitrator’s his decision was not one that a reasonable decision-maker could make.

- [4] in his analysis of the evidence and argument before him the Arbitrator noted that the applicant had two previous final written warnings, dated the 2nd February and 31 March 2021 respectively. The previous warnings issued to the applicant were for gross misconduct in that he failed to follow company policy and procedure and insubordination in that he refused to follow an instruction. The incident that led to his dismissal and the charge arising from it, was gross insubordination in that he refused to follow an instruction. The arbitrator noted that the disciplinary code and procedure of the second respondent (the company) makes provision for the sanction of dismissal for repeated refusal and/or failure to follow a reasonable verbal or written instruction.
- [5] In his founding affidavit before court, the applicant stated that the company is strict in enforcing its policies and that: "My first final written warning for example was for failing to follow company policy and procedures by failing to complete the waybill allocated to me, and for deserting my work premises and failing to inform management prior to any of the actions or decision taken above."
- [6] The transcribed record reflects that on the 30 May 2021, the employee was required to report at Stables for a scheduled departure time of 13h20 from Stables to Tableview. The purpose of reporting at Stables was for the drivers to conduct certain security procedures such as doing a breathalyzer test, covid test and doing a biometric sign on. A driver would then be required to go to dispatch and be issued with the day's waybill by the Supervisor one Mr. Masango. According to the waybill the employee arrived at 13h16 to conduct the required security checks. He was due at Tableview at 13h48 for the first trip scheduled to leave at 13h52.
- [7] Masango testified that at around 13h30 while he did the dispatching, he saw that the employee was still around and he realized that he may be late to arrive at Table View as it appeared that the bus with which the employee was to travel as a passenger was running late. He testified that he went to the employee and asked him to get an Optare bus and to travel to Table View. According to him the employee responded by saying that his supervisor

should go and get a bus and drive him as a passenger to Tableview, otherwise he will not take a bus. Masango denied that the employee had asked him to write down the instruction on the waybill. Given the employee's refusal to follow his instruction, it was Masango's testimony that he made alternative arrangements and asked a regulator to start the duty for the employee.

[8] In his founding affidavit before me, the employee stated as follows:

"I agree that Masango instructed me to take the Optare bus at approximately 13 hours 30 on the 30th of May 2021. I was immediately suspicious when I received the instruction as I had never before been instructed to do so as usually the spare driver would take me with the bus or with a private vehicle to the departure point.

I was not on good terms with the first respondent at the time. We had tensions due to ongoing disputes concerning overtime and the rule about being hands on wheel and the warnings I had received. I felt that the first respondent had branded me as a troublemaker."

[9] The employee claims in his affidavit that he requested his supervisor to write the instruction on his waybill so that they would be covered if any questions were later asked. At the arbitration, he testified that he asked for the instruction in writing and would have followed it had it been in writing. He denied that he was insolent to his superior. Essentially it appears that the employee's case was that the company had previously stated that a driver's duty only started when the driver's hands were on the wheel, and that the instruction given to him was not lawful in that he was not yet on duty. In his analysis of the evidence before him, the Arbitrator found as follows:

"37. Was the instruction to take a bus to Tableview a reasonable instruction? On the basis of the evidence led by the respondent, it was given in good faith and was indeed reasonable. Mr Masango wanted to ensure that the Respondent operated its bus service on time and therefore made an effort to ensure that a driver would be at the scheduled departure point on time. The evidence led by the Applicant about the time required to reach Table View

was not convincing. It is also probable that this was an attempt at justifying his insubordination after the fact. According to Mr Masango, who was a credible witness, the initial response by the Applicant was to tell Mr Masango to drive him (the Applicant) to his scheduled departure point. This was an insolent and inappropriate response. The report on the disciplinary inquiry into the conduct of the Applicant is consistent with the evidence led by Mr Masango but not with that of the Applicant...”

- [10] The submissions on behalf of the applicant in this application include that the parties were not on good terms at the time of the alleged insubordination “due to ongoing disputes concerning overtime and the rule about being hands on wheel and the warnings he had received.” It is further submitted that the Arbitrator did not assess whether the instruction was neither reasonable nor lawful. This is patently incorrect given the content of paragraph 37 of the Award above.
- [11] In the Court’s view, both the Award and transcript of the proceedings reflect that the arbitrator carefully considered the evidence before him, made credibility findings, took into account that the applicant was on two final written warnings at the time of the incident, and reasonably concluded that the dismissal was fair. His decision is in fact fortified by the applicant’s own submissions and averments in this application, which reflect that he was refusing an instruction in the context of ongoing tension between him and his employer on the question of overtime pay. This is a matter in which spurious grounds of review have been relied on by the applicant.
- [12] In my view, the application stands to be dismissed. I make the following order, with the *Zungu* principles on costs in mind.

Order

1. The application is dismissed.
  2. There is no order as to costs.
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H.Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: BDP Attorneys

Respondent: Coen De Kock instructed by Carelse Khan Inc

LABOUR COURT

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