THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D758/16

In the matter between**:**

IMPERIAL GROUP (PTY) LTD T/A EUROPCAR **Applicant**

and

SOUTH AFRICAN TRANSPORT & ALLIED
WORKERS UNION OBO N MAPHUMULO **First Respondent**

THE COMMISSION FOR MEDIATION,
CONCILIATION ARBITRATION **Second Respondent**

COMMISSIONER M KHUBONE **Third Respondent**

Heard: **31 October 2018**

Delivered: **8 November 2018**

Summary: **Review application – nature of a business is a serious consideration when determining the appropriateness of the sanction – remorse not helpful where trust is broken.**

JUDGMENT

NKUTHA - NKONTWANA. J

Introduction

[1] The applicant (Europcar) seeks an order reviewing and setting aside the arbitration award issued by the third respondent (commissioner) under case number KNDB2667-16, dated 30 June 2016. The commissioner found that the dismissal of Ms Nokukhanya Maphumulo (Ms Maphumulo), a member of the first respondent (SATAWU), was procedurally and substantively unfair.

[2] Europcar's main impugn is that the commissioner patently misconceived the nature of the enquiry and rendered an unreasonable arbitration award. SATAWU is defending the award.

Review test

[3] In *Shoprite Checkers v Commission for Conciliation, Mediation And Arbitration and Others*,[1] the court succinctly affirmed the review test as follows:

> '[8] Following the SCA's judgment in *Herholdt* and the LAC's judgment in *Gold Fields*, the LAC handed down a very important judgment in *Mofokeng*. In this judgment, Murphy AJA provided the following (with respect, typically insightful) exposition of the review test:
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> > "[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*

[1] [2015] ZALCJHB 229; [2015] 10 BLLR 1052 (LC); (2015) 36 ILJ 2908 (LC) at paras 8 - 10.

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 would point to at least a prima facie unreasonable result.* The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination." (Emphasis added.)

[9] This dictum in *Mofokeng* says many important things about the review test. But for present purposes, consideration need only be given to the guidance that it provides for determining when the failure by a commissioner to consider facts will be reviewable. The dictum provides for the following mode of analysis:

a. the first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;

b. if this is established, the (objectively wrong) result arrived at by the commissioner is prima facie unreasonable;

c. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the prima facie case of unreasonableness; and

d. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and vice versa).

[10] The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable.'

Pertinent facts and evaluation

[4] The facts in the present case are mostly common cause. Europcar is in the vehicle rental business. The vehicles are revenue generating assets for its business. Given the exposure to risk when every vehicle is driven on the roads, Europcar's core business tenet is that drivers must be authorised. This rule is applicable to employees as well.

[5] The employees are allowed from time to time to use the vehicles that are not rented out to customers to generate revenue known as 'non-revenue' vehicles. However, the usage of non-revenue vehicles is subject to approval by a manager.

[6] Ms Maphumulo was employed as a sales agent at King Shaka Airport. She was charged and dismissed for using a non-revenue vehicle without authorisation. The incident took place on 4 February 2016.

[7] Ms Maphumulo conceded that she knew the rule. However, it was her case that the practice at that time was that employees were allowed to book non-revenue vehicles without authorisation when there was no public transport for them to use. On the day of the incident, she had knocked off at 22:30 and went to the bus stop to wait for the 23:00 bus. She found a number of

commuters as the 21:00 bus that did not arrive. At about 23:10, some commuters called the diver of the 23:00 bus and he informed them that the bus had a tyre puncture. Seeing that the bus would not come, Ms Maphumulo decided to use the non-revenue vehicle. She did not inform her manager but she did make an entry on the system that she took the non-revenue vehicle home.

[8] Europcar was adamant that the rule that employees must seek permission before using the non-revenue vehicles was crucial for effective and efficient running of its business. The vehicles are its revenue generating assets. On the day in question they were fully booked and could have used the non-revenue vehicle to generate income.

[9] Strangely the commissioner found that Ms Maphumulo was not guilty as charged simply because when she logged the vehicle on the system she partially compiled with the rule. Ms Rene Anderson, the branch manager, testified that the rule was peremptory and even herself was bound. She could not use a non-revenue vehicle without authority. However, there are employees who drive the non-revenue vehicles without seeking prior authorisation because that is covered in their contracts of employment.

[10] Ms Maphumulo's main defence was that it was a practice to book out non-revenue vehicles without authority. Ms Nobuhle Mtemu, SATAWU's witness, corroborated this evidence. She testified that under 'compelling circumstances of transport shortages' employee used the non-revenue vehicles without authorisation. Ms Anderson denied that there was such a practice. However, she conceded that it was not easy to pick up unauthorised use of non-revenue vehicles from the system, hence she had to confront the applicant in this instance. Counsel for Europcar submitted that Europcar depend on the *bona fides* of its employees to manage its fleet of vehicles. Ms Maphumulo did not present any evidence to show that Ms Anderson was aware of the usage of non-revenue vehicles without authorisation and that she condoned the contravention, notwithstanding.

[11] On procedure, the commissioner correctly dismissed SATAWU's challenge that Ms Maphumulo was a shop-steward and that her representative was not allowed to act for her during the disciplinary hearing. The essence of a disciplinary hearing is to afford the employee an opportunity to challenge the case of the employer in her/his defence. In this instance, Ms Maphumulo was indeed afforded an opportunity to be heard.

[12] Where the commissioner missed the point is in relation to the mitigating circumstances. Even if the chairperson did not apply his mind to the mitigating circumstances as alleged, that misdirection could not have supported a finding of procedural unfairness. Counsel for Eurpcar correctly submitted that conduct of the chairperson in ignoring the mitigating circumstances goes to the appropriateness of the sanction, if at all.

[13] The mitigating circumstances could not have helped Ms Maphumulo in this regard as the nature of the offence goes to the trust relationship. Even though she showed remorse and offered to compensate Eurpcar for the loss suffered, she breached the trust to deal reliably with the assets of Eurpcar. She clearly took a risk of driving the non-revenue vehicle home without authorisation when it could have taken her a single call to get same.

Conclusion

[14] In all the circumstances, I am conceived that the commissioner committed a reviewable irregularity in that he embarked on the inquiry in a misconceived manner. Clearly, the distorting effect of the commissioner's failure to consider the material evidence before him was of such a nature as to cause an unreasonable award.

Relief

[15] It would be imprudent to remit the matter back to the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) given the prejudice to the parties as a result of further delay in finalising the matter. In

any evet, it is practice in this Court to deal with the matter to finality, where possible, as is the case in this instance.

[16] Since it is common cause that the applicant breached of the rule, the issues for determination are whether the rule was consistently applied and whether the sanction of dismissal is appropriate. Ms Anderson was adamant that there was no practice that the non-revenue vehicles could be booked without authorisation, as stated above. Ms Maphumulo failed to adduce any evidence to prove that management was aware of the practice and condoned it. Also, it is mind boggling that Ms Maphumulo was willing to compensate Europcar for the losses it suffered when she was allegedly acting in accordance with practice. Put differently, her defence that there was a practice that was inconsistent with the rule negates her remorse.

[17] Nonetheless, on the issue of the breakdown in the trust relationship occasioned by an employee's dishonest misconduct, the LAC in *Impala Platinum Ltd v Jansen and Others,*[2] referring to *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* with approval, stated:

> '[19] …an 'employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management"'. (Emphasis added)

[18] Pertinently, with regard to remorse, the LAC also endorsed the judgment of *Schwartz v Sasol Polymers & Others*,[3] where it was stated:

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[2] (2017) 38 ILJ 896 (LAC) at para 19.
[3] *Supra*, reported at (2017) 38 ILJ 915 (LAC).

> 'While I agree … that the lack of remorse shown by appellant is relevant, even if genuine remorse had been shown by him, this would only have been a factor to be considered in his favour in determining sanction and would not have barred his dismissal, remorseful or not, having regard to the seriousness of the misconduct committed.' (Emphasis added)

[19] In the premises, I am convinced that the dismissal of Ms Maphumulo was both procedurally and substantively fair.

Costs

[20] I am disinclined to award costs against SATAWU as the parties have a persisting relationship.

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

Order

1. The arbitration award issued by the third respondent under case number KNDB2667-16, dated 30 June 2016 is reviewed and set aside.

2. The arbitration award is replaced with the following order:

> 'The dismissal of Ms Maphumulo is substantively and procedurally fair'

3. 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: Ms Kellie Hennessy from Farrell Inc Attorneys

For the first respondent: Mr France Dubula, SATAWU legal officer