**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

CASE NO: D1127/19

In the matter between:

NUMSA obo SONWABISO SKHOSANA Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

NONTITHUZELO MLABA, *N O* Second Respondent

TOYOTA SA MOTORS (PTY) LTD Third Respondent

**Heard: 21 April 2022**

**Delivered: 21 April 2022**

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***EX-TEMPO* JUDGMENT**

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**MHLANGA AJ:**

This is an application, where the applicant, Mr Skhosana seeks to review and set aside an arbitration award issued by the second respondent under case number KNDB13653/ 2018 dated 30th June 2019.

Ancillary to that belief, is also an order sought to substitute a finding that the applicant, applicant's dismissal was substantively unfair with an order in the alternative referring this matter for a *de novo* hearing to another arbitrator, other than the second respondent.

Central to this review, is the attack on the second respondent's award on the grounds that the third respondent applied discipline inconsistently. The main issue therefore is whether the third respondent in similar cases has applied its discipline inconsistently and if so, should the applicant benefit from it. This invokes the so-called parity principle.

The brief facts of this case are that on two dates, being the 24th of May 2017 and the 26th of May 2017, the applicant utilising the company's vehicle which was otherwise available to him for use, left the company's premises and attended to various activities for his personal benefit.

An anonymous tip off was received by the employer, which resulted in an extensive investigation being conducted, which involved that the applicant's vehicle was tracked by the investigator at various intervals and photographed where necessary. It also involved that the applicant's clocking at the plant was also followed.

It is as a result of the investigation that the charges against the applicant were then pursued.

The applicant faced four charges. He was found not guilty of the two and only guilty of two, with the result that he was dismissed.

The evidence of the investigator, as contained in the investigation report is admitted. In other words there is no dispute that the applicant did indeed on those particular days and times used the company vehicle for purposes other than those of the union or the employer.

Now looking at the parity principle as it is the main ground of attack of the arbitration award, the evidence of the two witnesses is instructive:

One; the evidence of the applicant's witness, Mr Mabida appears on the transcript at page 252, line 7 to line 19 and it reads:

> "MR MABIDA He should have done that long time ago. That is why he wants to know which one is the date when he left without permission. That is why you cannot say now it is too old. It is too old. Ja, it is too old, you cannot remember. Maybe plenty[?] is for that. Maybe plenty is for union activities but you cannot point and say this is where I was doing this. This is where I was doing what but from all these times, honestly some are personal, I think some are union activities, so we do that. We cannot lie[?]. It is practice. It has been there for years and the company knows. Sometimes we will meet with them in the mall"

Mr Mabida also talked to this issue of the other shop stewards

being able to use the company vehicle and clocking in and out. In page 48 of the transcript, line 1 to 16, where it reads: I quote:

> "APPLICANT REP Now is the company aware or was the company aware of this clocking pattern by shop stewards?
>
> I want to say they are aware because especially because there is a gate pass when I am going out. There is a car, a company car that I am using. So they are aware.
>
> Maluleka gave evidence that he is not aware that you were – or the shop stewards were clocking in at that pattern. What is your comment to that?
>
> I will say he is lying because then if he is not aware, he should have called me and especially before because before I get paid, there is a gate pass like I said and there is a TLA[?] time and attendance. I am not getting paid through a pass. I am getting paid through time and attendance. So I was never called for questioning to say where were you, what were you doing? So he is aware, also – like, also I am mentioning there the car, the company car, all got trackers. He is aware."

From the passage that I have read, the sum total of the evidence that the applicant relies on to indicate that the other shop

stewards were using the company vehicle for private use and that the company was aware of this, finds itself in the two passages that I have read. What comes about clear from those passages, is that nowhere does it indicate that the company was in fact aware that when the shop stewards left the company premises with the vehicles, they were attending to private activities like they became aware in the case of the applicant.

When you compare that to the evidence of Mr Maluleka which appears on page 46 of the transcript, Mr Maluleka appears to deny flat out that the company was aware that shop stewards were using company vehicles in these times when they left the plant for personal purposes. On page 46 of the transcript, line 1 to 25 as well as page 47, line 1 to 5, deals with this aspect succinctly and I will read from line 14 on page 46 where it reads:

> "RESPONDENT REP: Then there will be cross-examination an allegation put to you, as I was saying that all the shop stewards act as the applicant has done in these proceedings and therefore your attempt to take disciplinary action against the applicant alone is inconsistent and for that basis, it is unfair. Can you comment on that?
>
> Well, I do not know because unless if the applicant can furnish me with cases where he feels that I am being inconsistent, as I said from the outset, that

it was a tip off anonymous that led us to where we are today and since then, we have been taking measures to try and bring more control in place.

And so, as you sit here today, are you aware of any other shop stewards that has left Toyota premises without clocking out and claiming or that times spent outside of Toyota as a paid time? - No.

If the information does come to your attention, what will you do? - I will act."

It is conceded by the applicant that there was an ongoing investigation at the plant relating to the clocking in and clocking out of the shop stewards. It is similarly conceded that the employer has had to change its clocking in system.

It was further conceded that the tip off which is said to be anonymous, was specific to the applicant. It is again conceded that as a result of the tip off, that the investigation was pursued and revealed Mr Skhosana attending to his private affairs.

It is finally conceded that there was no legitimate reason for Mr Skhosana to be outside of the work station on both the 24th of May and the 26th of May 2017.

The law on the parity principle is trite but it is well put in the ***Bidserv Industrial Product (Pty) Ltd*** decision. It is a LAC decision. The citation is contained in the applicant's heads of arguments and the quotation that comes from that case and I read from the page. It says:

> "A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly."

Effectively what the law requires when we invoke the parity principle, is that we compare apples with apples. Do not compare pears with apples. In other words it is required that the person with whom we are comparing ourselves, must be identified. In addition to identifying the persons with whom we are comparing ourselves, we must be able to indicate with some degree of certainty how they were treated differently and that the employer was aware of that conduct by the other comparatives.

Counsel for the applicant, in an attempt to illustrate to the Court that the other persons to whom the applicant compares, were identifiable and are identifiable as far back as at the disciplinary inquiry, referred the Court to page 167 of Volume 2. There is a couple of paragraphs that the Court was referred to but for purposes of this judgment, I will read the paragraph below what appears as charge 2, the second paragraph, after that. It reads:

> "He (meaning Mr Skhosana, the applicant) testified that in terms of the TSAM rules governing pool vehicle, he was not allowed to use the pool vehicle to attend to his personal business during working

hours but in terms of practice it is different. Shop stewards can use, go anywhere with the pool vehicle. This has been the case since he started as a shop steward ten years ago."

And I will read paragraph – two paragraphs after that, which reads:

"He further stated that shop stewards are allowed to go out at lunch time to buy food and also at other times when there are no meeting scheduled. Shop stewards also go out during working hours to buy whatever else they need, provided they are no meetings or anything urgent to attend to. This is done by all shop stewards."

What comes out of those two paragraphs, is different to what we are dealing with in this case. The applicant indicates movement of shop stewards in and out of the plant to buy food but also to buy whatever else they needed to buy. It does not talk to shop stewards going out of the plant for, as I counted, the entire day, as was the case on the 24th of May 2017.

On that day, the applicant left at about 09:00 in the morning and returned at about 19:00. Which is a good – plus-minus ten hours. There can be no argument that one could be out of the work station for that long simply to buy food or buy whatever else that one may need to buy.

On the other day, the 26th of May 2017, the applicant was away from the work station from about eight hours in the evening and returned at

about 21:14, which is over an hour again.

Now what we are dealing with in terms of the applicant's case, this is the example of his comparators on page 167 of volume 2, the two simply do not compare.

Now coming to deal with the award issued by the second respondent. The award seems to be attacked also by the use of the phrase private business. The second respondent used the phrase private business when referring to the activities that were undertaken by the applicant in his absence from work using the company vehicle.

The second respondent nowhere in her arbitration award indicates private business to mean an enterprise that involves some form of profit making scheme as suggested by the applicant's representative. Private business as used by the second respondent in my view, is no different to private business as used by the applicant in his testimony during the disciplinary hearing in the passage I read on page 167 of volume 2.

But even if I am wronged in that regard, in paragraph 6 of the arbitration award, the second responded seems to grasp the issues that she had to deal with as she writes, and I quote:

> "The applicant was charged for gross misconduct in that he had during working hours used the respondent's vehicle for conducting his own private affairs."

" The second respondent was clearly alive to the fact that the wording of the charge is that of private affairs which in my view was

used interchangeably with the word private business.

There is no real line that could be drawn between those two phrases.

The commissioner clearly understood the issues before her. In terms of the overall reasoning on the arbitration award, the commissioner in paragraphs 71 to 74 of her award on page 17 of volume 2, catches the gravity of the applicant's conduct and I quote this paragraph: It says:

> "The applicant was a shop steward and in a position of trust. His actions were not monitored closely by the respondent as he was trusted to use his time and resources afforded to him by the respondent to further the interest of the union and the respondent. It was however demonstrated that he had taken advantage of the resources and the entitlement he had as a shop steward and had used them to further his own business interest and still got to be paid by the respondent for that. The applicant could not explain as to what the union or respondent business was he doing there at the places where he was during the time that he was being paid by the respondent to conducting union business. I find this to be grossly unfair. The applicant knew that if he clocked out, he will not

be paid. Therefore he did not clock out when he left the respondent's premises to ensure that he was paid for the time that he had used for his own personal benefit when he was supposed to be at work."

As indicated earlier that the counsel for the applicant conceded that there was no legitimate reason for the applicant to be outside of the working station at that extended long period and therefore makes his conduct gross.

It is my finding that the situation does not compare to those of the other comparators that are identified with some difficulty from the record[?]. I also find that if it does, the company is well within its rights to investigate those instances and including changing systems whilst investigating those, which again was conceded by counsel for the applicant.

In conclusion therefore, I find that the arbitration award is well reasoned, coherent and it is unassailable. It falls within the band of decisions which a reasonable decision maker could reach.

In the circumstances, I make the following order:

The review application is DISMISSED. No order as to cost.

Sithembelo Ralph Mhlanga

Acting Judge of the Labour Court of South Africa

For the Applicant: Adv L K Siyo instructed by C N Phukubje Attorneys INC.

For the Respondent: Mr M G Maeso of Shepstone & Wylie