Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C598/2018

In the matter between:

CULLINAN HOLDINGS LTD **Applicant**

and

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL **First Respondent**

TARIQ JAMODIEN (*N.O.)* **Second Respondent**

ANDRIES WATERBOER **Third Respondent**

Date of Set down: 20 August 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 4 September 2020.

Summary: (Review – Sanction and Remedy – Findings on Sanction not one that no reasonable arbitrator could have arrived at on the evidence – outcome on sanction one on which reasonable arbitrators might differ – Arbitrator nonetheless failing to consider competing interests when determining whether it would be tolerable to reinstate employee as the preferred remedy – Bundles handed up in arbitration hearings are not evidence *per se*)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the dismissal of the third respondent, Mr A Waterboer ('Waterboer'), was procedurally fair but substantively unfair.

[2] There is also an application for condonation for the late filing of an answering affidavit by Waterboer. In terms of clause 11.4.2 of the labour court practice manual, since the applicant ('Cullinan') did not object to the late filing of the answering affidavit, no condonation is necessary for the late filing of the answering affidavit.

[3] Shortly before the matter was set down, Waterboer also raised an objection to the founding affidavit of the company on the basis that it did not contain the normal preamble of the department at the beginning of the affidavit, even though it was properly attested to as a declaration under oath by the Commissioner. The fact that the commissioner of oaths confirmed the administration of the deponent's oath that the contents of the declaration were true, was probably sufficient to constitute compliance with the provisions of s 8(2) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. In any event, the truth of the contents of affidavit was also confirmed in the affidavit of service, signed on the same date as the founding document. Consequently, I am satisfied that the contents of the founding affidavit were declared true by the same deponent and, accordingly, the founding papers were not defective.

Background

[4] Waterboer had been a driver of tour buses of Cullinan for four years at the time of his dismissal. The incident which gave rise to his dismissal occurred around 22H00 on 14 February 2018, which also happened to be Valentine's Day night. Waterboer was required to collect a tour guide at a hotel in Mill Street in the Gardens area of Cape Town and then proceed with her to the airport to collect a tour party. There are two entrances to Mill Street, one from Upper Orange Street, at the south end and the other from Annandale Road. At the first-mentioned entrance Mill Street is a two-way street, but at the Annandale end, the only access to the street is a one-way slip-road exit coming off Annandale. Annandale is a dual carriageway, with two lanes in each direction and connects directly with Phillip Kgosana Drive, which ultimately leads to Cape Town Airport.

[5] After collecting the tour guide at the hotel, Waterboer proceeded down Mill Street in the direction of Annandale Road. Before Mill Street reaches the one-way entrance from Annandale Road, vehicles can turn to the right into St Quintons Road, which provides a way out of Mill street before it becomes a one-way exit off Annandale Road. At the junction of St Quintons Road and Mill Street, Mill Street becomes a one-way street. Waterboer claimed that he could not turn into St Quinton's road because of overhanging trees and parked cars. He also said he could not reverse because there was a vehicle behind him. He therefore chose to drive into Annandale Road using the one-way exit into Mill Street as a way of entering Annandale Road. Consequently, when he entered Annandale Road he was driving against the direction of the traffic in the curbside lane. Further along Annandale, there is a traffic light controlled intersection. At that intersection, Waterboer drove the bus from the curbside to the middle of the intersection and turned into the eastbound lanes of Annandale heading towards the airport.

[6] There was some dispute whether the traffic lights at the intersection were red or not when he executed this manoeuvre. The arbitrator found that they probably were red. In any event, if the lights were green in favour of the traffic traveling along Annandale, Waterboer would have been crossing

the intersection directly in the face of any oncoming traffic traveling in the city bound lanes of Annandale. If the lights were red for traffic traveling in Annandale, he would have been crossing the path of traffic crossing Annandale at the intersection. Waterboer and the employer saw the issue of the traffic light being red or green as important and Waterboer was adamant it was green when he crossed the intersection. However, if that were the case, it might well have been more dangerous than if it was red as he would have been crossing the path of any oncoming traffic, whereas if he entered the intersection when it was red he would have been entering the same lane as traffic that was crossing the intersection and moving in the same direction. Even so that would still have entailed moving a tour bus into the traffic from a direction it should not have been facing, and was a move fraught with the risk of an accident.

[7] A big issue in contention at the arbitration was what Waterboer ought to have done in the circumstances. It was not disputed that there was a vehicle behind him waiting to turn, nor was it disputed that St Quintons Road was somewhat obstructed by overhanging trees and parked cars, which meant he could not leave Mill Street that way. The tour guide had said he could have reversed with some difficulty, but she had not suggested this to him. Waterboer did concede however that he could have approached the driver of the car behind him and asked him to reverse so that he could reverse the bus out of Mill Street. It was also not disputed that the problem would not have arisen if Waterboer had entered Mill Street from the other end, which he would have done if he had planned his trip in advance as he was supposed to.

[8] In the tour guide's statement, which she confirmed at the arbitration, she stated that Waterboer had proceeded in the wrong direction down Annandale Road 'as cautious(ly) as he could possibly be in the circumstances' and had waited until the traffic had stopped before crossing at the robot to the airport bound side of the street.

[9] Even towards the end of the arbitration, Waterboer was clearly of the view that he had no real choice but to drive against the traffic at the end of Mill Street into Annandale. It was only after vigorous prompting by the

arbitrator that he conceded it was reckless, and not merely wrong, to act as he did even if he had proceeded cautiously. Likewise, he only volunteered that he would follow procedures strictly in future, in response to more questioning by the arbitrator.

[10] During the review hearing, held on Zoom, Waterboer argued the company was exaggerating the distance he drove in the wrong direction. On consulting the Google map which was part of the bundle, it would appear it was about 70 to 80 metres from the intersection of Mill Street with St Quinton's road to the robot where he crossed the lane which is a significant distance to be travelling in the wrong direction, at least half of which was in a main thoroughfare.

[11] It is clear from the evidence that the only reason Cullinan came to know of the incident was that a member of the public who witnessed it sent an email to the company. By the time the matter came to the arbitration the events described above were essentially common cause, save for the disputed issues mentioned.

[12] Waterboer was charged with gross negligence in driving recklessly and dangerously in a Springbok Atlas branded vehicle down a one-way street into oncoming traffic and across a red traffic lights, in full view of a number of motorists waiting at a red traffic light.

[13] Waterboer did not have a previous warning for negligence but did have a warning for misconduct involving an element of dishonesty and a warning for insubordination.

The arbitrator's award

[14] The arbitrator dismissed Waterboer's claim that his inquiry was procedurally unfair. This review which is only concerned with the arbitrator's finding of substantive fairness.

[15] In summing up the arbitrator found that Waterboer, had committed a 'grievous traffic violation by driving the bus down a one-way road in the face of oncoming traffic, regardless of how cautious he was in doing so'. He also found on the probabilities that the robot at the intersection where he had crossed lanes to get into the airport bound side of Annandale Road

were most probably red at the time he drove through it. Had it not been the case, he would not have been able to cross the road. The arbitrator also concluded that Waterboer's actions had caused the company reputational harm, alluding to the email from the member of the public who had seen the incident and reported it to Cullinan. Accordingly, the arbitrator found Waterboer guilty of the offense.

[16] However, when it came to the matter of whether his dismissal was justified, after considering the authorities, the arbitrator held as follows:

> '14. I was somewhat flabbergasted by the sheer audacity that the applicant had to attempts to drive in the manner that the applicant had been. It had the potential to be catastrophic. I accept that the applicant had used his discretion in a misguided manner and was simply lucky that no harm was caused. On the other hand, I accept that this was his first offense for negligent driving. There was no actual harm caused. The applicant had shown remorse at arbitration had realized the folly of his ways and had undertaken to walk the straight and narrow path if he should be reinstated. The applicant also stated he was 49 years old, breadwinner to his wife children and grandchildren and said that he had learned a grave lesson. He lamented that at his age he may not be able to find another job.
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> 15. When I consider the totality of circumstances is sketched above, and why the mitigating and aggravation factors I am of the view that dismissal was too harsh I do not believe that this one moment of misguidance should necessarily sound the death knell upon the applicant's employment. I am of the view that he wants another chance and am persuaded that he had learnt a grave lesson which I am confident will not be repeated. I am also not convinced that the relationship of trust is broken down to such an extent he cannot be trusted to drive a bus anymore. The reputational harm suffered was also not severely prejudicial nature.
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> 16. Reinstatement is the primary remedy which I shall order. There was no evidence that such an order shall be impracticable. However given the fact the applicant has perpetrated a serious act of misconduct, which cannot be diminished, I shall reinstate him prospectively. Hence the period between his dismissal and his resumption of duty shall remain unpaid, akin to an unpaid suspension. He should also each be issued with a final written

warning for negligent driving, valid for 12 months from his resumption of duty.'

(*sic)*

Grounds of review and evaluation

[17] Many of the grounds of review are articulated as if Cullinan is pursuing an appeal. For example, it is claimed *inter alia* that the arbitrator failed to properly analyse evidence, apply his mind or consider all the evidence. It has been said more than once by the Labour appeal court that a failure of an arbitrator to consider certain evidence is not necessarily a material flaw that entitles a party to have the award set aside on review. In *Head of Department of Education v Mofokeng & Others*[1], the LAC stated:

> '[32] … Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
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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 enquiry. 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 enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error 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

[1] (2015) 36 *ILJ* 2802 (LAC) at 2813-4.

> 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)

Consequently, a successful case of review is not built by listing as many mistakes in the reasoning of the arbitrator that the applicant can come up with. The applicant party must demonstrate how the errors in question had such a distorting impact on the arbitrator's reasoning that the arbitrator ended up addressing the wrong issue was prevented from reaching a conclusion which a reasonable arbitrator might have reached on the evidence. For this reason, I will only consider those grounds of review raised by Cullinan which could have such a result. Principally, they seek to impugn the arbitrator's findings on sanction, or alternatively, remedy.

[18] The more significant criticisms raised of the arbitrator's reasoning are the following:

18.1 In determining the seriousness of the misconduct, the arbitrator failed to take account these factors, which resulted in him deciding that dismissal was not an appropriate sanction:

18.1.1 Waterboer was not alone on the bus as the tour guide was a passenger and he endangered her life as well;

18.1.2 the misconduct of which Waterboer for which he was charged and dismissed was gross negligence and not merely negligence;

18.1.3 throughout the arbitration, Waterboer only conceded that he was wrong in driving down a one-way street in the face of oncoming traffic and did not admit that he had driven recklessly and defended what he did on the basis that he had no other choice in the circumstances, and

18.1.4 the real significance of the harm suffered by the company.

18.2 It was also broadly claimed the arbitrator failed to comply with the CCMA Guidelines on Misconduct Arbitration[2], but other than referring to the test for substantive fairness referred to in the guidelines this was pleaded without any factual specificity.

18.3 On the question of appropriate relief, in deciding that Waterboer should be reinstated with a final written warning, albeit without any back pay, the arbitrator concluded that the trust relationship had not been destroyed to such an extent that he could not resume his duties as a driver. Cullinan claimed this was a finding no reasonable arbitrator could reach on the evidence. In this regard it was argued that there was oral testimony 'and evidence submitted in the Bundle of Evidence that the trust relationship between the Employer and Employee is broken beyond repair and that he cannot be trusted to drive a bus anymore.'

18.4 Cullinan also claimed that the arbitrator did not consider section 193(2) of the LRA when deciding on appropriate relief.

[19] On the question of the fairness of the dismissal, the factors clearly swaying the arbitrator were that: fortunately, an accident did not occur; Waterboer had shown remorse; his personal circumstances; the limited extent of reputational harm suffered by Cullinan, and a belief that Waterboer was unlikely to repeat the misconduct. Even so, the arbitrator clearly felt that his misconduct was serious enough to deny him three months back pay and impose a final written warning.

[20] Turning to the factors which Cullinan claims the arbitrator did not pay enough consideration to, it is true that he did not specifically mention the

[2] GN R224 in GG 38573 of 17 March 2015

danger to the tour guide. The fact that the arbitrator said that Waterboer did not have a previous warning for negligence does not necessarily mean that he did not believe his behaviour was an instance of gross negligence. In his award, he had found Waterboer guilty of the offense for which he had been dismissed, which was gross negligence. The arbitrator also expressly acknowledged that the seriousness of the misconduct could not be diminished. On evaluating the harm to the company, the arbitrator might be criticized for considering that merely because no accident occurred as a result of Waterboer taking a chance the harm suffered by the company was not so serious. It also does not follow that only because one member of the public took the trouble to complain of the incident does not mean it was not seen by occupants of the stationary cars waiting at the traffic lights. It is highly unlikely such an event would have gone unnoticed by them. Moreover, even if it did not suffer the actual harm of an accident, Waterboer exposed it to the unnecessary and significant risk of an accident occurring, even if he had been proceeding cautiously in the wrong direction.

[21] Should these factors *necessarily* have swayed the arbitrator to conclude that there was no alternative to dismissal? It is quite possible another arbitrator might have found they tipped the balance in favour of upholding the fairness of the dismissal. In the court's own view Waterboer's dismissal could be justified as fair because the arbitrator attached too much weight to the prospect of future misconduct of this nature, the impact of the dismissal on Waterboer, and not did not place enough weight on the seriousness of the misconduct and its implications for Cullinan. But the court's view of the correct decision is not the test on review.[3]

[22] On the evidence, the court cannot confidently say that no reasonable arbitrator could have come to the conclusion that the employment relationship was not irredeemable and that there was no justification for believing Waterboer was unlikely to do something so reckless next time he found himself in a difficult position to manoeuvre, or that hea would not plan his trips in advance more carefully in future. In the end, it cannot be

[3] *Duncanmec (Pty) Ltd v Gaylard NO & others* (2018) 39 ILJ 2633 (CC) at 2643, para [42].

said that Cullinan has demonstrated that the arbitrator was compelled to conclude that dismissal was the only appropriate sanction even if the factors it accuses him of ignoring had been considered by him (assuming in Cullinan's favour that he had not done so when he wrote the award). In passing, it needs to be pointed out that the mere fact that an arbitrator does not mention every factor they considered, does not mean the court must assume anything not expressly mentioned was not considered, unless the factor was of great significance or critical to the to one of the issues to be decided.[4]

[23] However, even if the court is wrong in finding that the arbitrator's finding on sanction is not reviewable, it does not follow inexorably that the relief of reinstatement was justifiable. The arbitrator must still consider whether anything contemplated in s 193(2) of the LRA militates against reinstatement as a remedy. s 193(2) of the Labour Relations Act, 66 of 1995, reads:

> '193 (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—
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> (a) the employee does not wish to be reinstated or re-employed;
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> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[24] In this instance, Cullinan argued that Ms J Uys ('Uys'), its Ethics Manager, led evidence of the breakdown in the relationship and there was evidence in the bundle of documents which the arbitrator ignored. The first point which needs to be made is that the mere fact that there might have been information in the bundle of documents used in the arbitration does not mean that information constituted part of the evidence before the arbitrator. The only portion of the internal inquiry records that was directly

[4] See *County Fair Foods (Pty) Ltd v CCMA & others* (1999) 20 *ILJ* 1701 (LAC) at 1717C-E and *Maepe v Commission for Conciliation, Mediation & Arbitration & another* (2008) 29 *ILJ* 2189 (LAC) at 2197, para [7].

alluded to in evidence the arbitration proceedings was the statement by the tour guide. If the employer wanted to rely on other portions of those records it had a duty to raise those in the course of leading evidence at the arbitration. An arbitrator is not at liberty to trawl through documents parties hand in during arbitration proceedings, to consider evidence the parties might have dealt with but did not.

[25] Insofar as the evidence of Uys is concerned, she did make some remarks indicating the difficulty the company would have in continuing to employ Waterboer. Firstly, she asked rhetorically how the company could entrust passengers to him if he was capable of making the kind of judgment call he did in the circumstances of the night in question. Secondly, when Waterboer put to her that it was the first time he had ever been found guilty of misconduct of that nature, her response was that because he did not report the incident himself she could not be confident that that was the first time something like that had taken place. Though limited, this evidence highlighted the dilemma of an employer who cannot directly oversee the conduct of an employee because of the nature of their work. Secondly, it brings to the fore the company's duty to ensure the safety of passengers.

[26] Although the direct evidence on the breakdown of trust which was actually adduced was limited, the court is aware, despite the judgment in *Edcon Ltd v Pillemer NO & others*[5], that it is not always necessary for an employer to lead evidence of a breakdown in the trust relationship if that flows from the nature of the misconduct itself.[6]

[27] Even if it was not wholly implausible for the arbitrator to have found that Waterboer probably would not act in a similarly reckless way again, could a reasonable arbitrator have expected the employer to tolerate the risk to its passengers that Waterboer might not do so? Given the extent to which Waterboer had deviated from the standard of care expected of him and

[5] (2009) 30 ILJ 2642 (SCA)

[6] See *Impala Platinum Ltd v Jansen & others* (2017) 38 ILJ 896 (LAC) at 901, para [12]. See also *Autozone v Dispute Resolution Centre of Motor Industry & others* (2019) 40 ILJ 1501 (LAC) and *Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 *ILJ* 1419 (LC)

the fact that he had chosen an unlawful, high-risk way out of the dilemma he faced, rather than consider a legal, though not risk-free alternative, such as an assisted reverse, the arbitrator was asking the employer to accept his view that a similar incident would not re-occur. In so doing, the arbitrator was also asking the employer to assume the significant risk such poor judgment on the part of a driver posed to third parties, given the nature of its business and Waterboer's job.

[28] Whatever the merits of the arbitrator's decision on substantive fairness, it appears to me that he collapsed his consideration of whether it would be fair to uphold his dismissal with the question of whether the relief of reinstatement was appropriate. In considering the latter, he did not attach any weight to the impact of the decision on the employer and considered the issue almost entirely from the perspective of the impact of his decision on Waterboer, in isolation from the implications for Cullinan. In the light of this *prima facie* lack of balance in his reasoning and having regard to what the LAC said in Mofokeng's case, the court must consider the nature of the competing interests impacted by the arbitrator's decision and whether a reasonable equilibrium has been struck by it. Taking these factors into account, the arbitrator's failure to weigh the nature and potential severity of the risk posed to the company is one that ought to have led him to decline to reinstate Waterboer, even if he thought it unlikely he would transgress so egregiously again.

[29] In the circumstances, I am satisfied that notwithstanding the arbitrator's finding that dismissal was too severe a sanction, he ought to have realised in considering s 193(2)(b) that it was not tenable to require the employer to reinstate Waterboer. Accordingly, it is necessary to substitute the relief awarded. In my view, in the light of his length of service and the fact that it was only the severity of the sanction which was overturned by the arbitrator, without detracting from the seriousness of Waterboer's misconduct, five months' remuneration is adequate compensation.

Order

[1] The arbitration award of the second respondent dated 30 May 2018 and issued under case number RPNT4655 is reviewed and set aside only to

the extent of his finding on the appropriate alternative sanction to be imposed and the consequential the relief awarded in paragraphs 17.2 to 17.4, inclusive, of the award.

[2] Paragraph 17.2 of the award is replaced with the following:

> ’17.2 The Respondent must pay the Applicant compensation amounting to five months’ remuneration amounting to R 51,297.04.’

[3] The Applicant must comply with the amended relief in the arbitration award within 14 days of receipt of this judgment.

Order

[1] The founding affidavit of the applicant as confirmed in the service affidavit is admitted.

[2] The review application is dismissed.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Appearances -

For the Applicant:	**A H MacKenzie of Cullinan Holdings Ltd**
For the Third Respondent:	**In person.**