IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D955/14

In the matter between:

CECIL FANANA VEZI **Applicant**

And

TOYOTA SA MOTORS (PTY) LTD **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

NONHLANHLA DUBUZANE N O **Third Respondent**

Heard: **6 June 2018**

Delivered: **15 August 2018**

Summary: Review

JUDGMENT

GUSH. J

Introduction

[1] The applicant in this matter applies to review the arbitration award handed down by the third respondent on 14 September 2014 in which the respondent concluded that the applicant's dismissal was substantively fair and dismissed his application.

Background

[2] The applicant was initially employed by the first respondent initially as a production welder on 4 October 1994, and subsequently as a team leader. The applicant received a salary at the time of his dismissal of R13 056-00.

[3] Following an incident that occurred on 1 July 2013, in which the applicant was the driver of a tow motor, the applicant was charged with misconduct namely:

3.1 DISHONESTY: in that you did not give a correct report of the incident when questioned by management; and

3.2 GROSS NEGLIGENCE: in that you did not follow company safety procedures thereby endangering yourself and others and damaging company property.

[4] The incident took place on 1 July 2013, the applicant was subsequently suspended on 17 July 2013 The disciplinary proceedings commenced on 9 October 2013 and were completed on 26 November 2013. At the conclusion of the disciplinary enquiry the chairperson of the enquiry found the applicant guilty of misconduct with which he was charged and imposed a sanction of dismissal.

[5] The applicant referred a dispute regarding his dismissal to the second respondent on 27 January 2014 together with an application for condonation for the late referral. On 24 February 2014 the second respondent condoned the late filing of the referral and conciliated the dispute. As the dispute was not resolved a certificate of non-resolution was issued.

[6] The applicant then referred the dispute to arbitration and after an inspection *in loco* was conducted at the first respondent's premises on 16 May 2013, the arbitration took place on 20 June 2014 and 25 August 2014. On 14

September 2014 the third respondent issued the award that is the subject of this review.

[7] At the arbitration and during these proceedings the applicant challenged only the substantive fairness of his dismissal.

[8] On the day of the incident the applicant was driving a “tow motor” that was pulling three trolleys. The “tow motor” is a single seater vehicle designed to pull trolleys containing items for delivery to the various sections of the factory.

[9] It is common cause that the applicant had driven the vehicle on a road not designated for “tow motors”. In the course of passing an area where trucks offloaded their cargo, the third trolley being pulled by the applicant collided with the left front of one of the trucks.

[10] The door of the trolley was damaged and the applicant removed the damaged door place it inside the trolley and completed his deliveries. The applicant then returned to the depot where the “tow motors” are parked.

[11] Two employees of the first respondent, one Chabilal: the central store manager and one Govender: the manager of the central store operation and service parts operation, were standing chatting close to the area where the “tow motors” are parked.

[12] Having parked the “tow motor” the applicant approached Chabilal and Govender. At this point the versions of the applicant on the one hand and Chabilal and Govender differ. Chabilal and Govender’s version is that when asked as to what had happened, the applicant simply advised them in response, that the door was weak and had fallen off. Whereas the applicant maintained that he had told Chabilal and Govender about the incident with the truck and why he had removed the door.

[13] According to Chabilal and Govender’s evidence when they saw the damage they immediately approached the applicant and the “tow motor” to ascertain what had happened. Govender’s evidence was that he had *“walked around to get a better look at the trolley…”*[1]. He then asked the applicant what had

[1] Record page 37

happened and the applicant had replied that *"the trolley doors are very weak and the trolley door fell off".*[2] He had then instructed Chabilal to investigate further.

[14] Chabilal's evidence was that he had been instructed by Govender *"to go with [the applicant] to the place of the incident."* Chabilal, too, suggested that the applicant had claimed that the door had simply fallen off. Under cross examination Chabilal, however, conceded that in his statement he had recorded that the applicant *"parked the tow motor, jumped off the tow motor and started explaining what happened whilst he was doing a delivery"*[3]

[15] The applicant's version was that he had on stopping the "tow motor" he approached Chabilal and Govender and explained to them what had happened. His explanation was not that the door had simply fallen off but that the trolley had collided with a truck. In reply, Govender had asked three questions: why is the door in the trolley? ; was anyone hurt? ; and was the truck damaged?

[16] The applicant's evidence was that his responses had been that he had removed the door and placed it in the trolley as it was hanging from the trolley; that no one had been hurt; and that there were scratches on the truck. Govender had then instructed Chabilal to accompany him to the place where the incident had occurred.

[17] Apart from these different versions as to what had transpired at the time immediately following the applicant's parking of the w tow motor, what happened thereafter is again largely common cause. Specifically that Govender had instructed Chabilal to accompany the applicant to the scene of the collision to investigate it.

[18] Chabilal's evidence was that *en route* to the place where the accident had occurred he had not spoken to the applicant nor had he discussed the incident with the applicant. On arrival at the scene the applicant had

[2] Record page 37.
[3] Record page 16.

immediately made enquiries as to the whereabouts of the truck and the driver. In his evidence in chief, Chabilal explained:

> "Firstly, as I said before, we went to a truck location, where trucks move. Secondly [the applicant] himself was looking for a damaged truck and a driver, a specific driver. At that point looking at the damaged trolley and the way the door was badly damaged, you could clearly see that there was some collision between the trolley and the truck."[4]

[19] Chabilal and the applicant had at that time attempted to obtain CCTV footage of the incident. Chabilal asked the applicant to make a statement, which he did immediately, and explained therein that a trolley he was towing had collided with a truck.

Grounds of review

[20] The applicant pleaded and argued three grounds of review:

1.1 The first ground relates to the conclusion by the third respondent that the first respondent had established on a balance of probabilities that the applicant was dishonest in reporting the accident: "*DISHONESTY: in that you did not give a correct report of the incident when questioned by management*"[5]; and

1.2 The second ground is in respect of the third respondent's conclusion that the first respondent has established that the applicant was grossly negligent: *"GROSS NEGLIGENCE: in that you did not follow company safety procedures thereby endangering yourself and others and damaging company property."*[6]*;* and

1.3 Thirdly that the third respondent's conclusions that the applicant's conduct breached the trust relationship and that dismissal in the circumstances was an appropriate sanction was unreasonable.

[21] Dealing firstly with the charge of "gross negligence" there is nothing in the evidence that suggests that the applicant's conduct amounted to gross

[4] Record page 7 and 8.
[5] CCMA record Respondent's bundle page 13.
[6] CCMA record Respondent's bundle page 13.

negligence. The third respondent's finding as to what constituted "gross" negligence is particularly illuminating:

> " With regards to the second charge, namely, gross negligence in that the applicant did not follow company safety procedures therefore endangering himself, others and damaging company property, I'm satisfied with the respondent's evidence that the applicant did not stop the tow motor when the truck was reversing into the dock as it is the rule of the company to do so. It is the evidence that no-one must drive past the truck when it is reversing. I have no reason to reject the respondent's evidence that the trolley was badly damaged… It is the evidence that the respondent suffered financial loss as a result of the applicant's conduct. In the circumstances that led to conclude that the respondent's version of the applicant committed gross negligence is more probable than that of the applicant that he did not."[7]

[22] This assessment of the applicant's conduct does not suggest gross negligence nor does it accord with details of the charge. Neither the evidence of Govender nor Chabilal establishes that the applicant was grossly negligent. There can be no doubt that the applicant was negligent with regard to the driving of the "tow motor" as is evidenced by the fact of the collision. It is also so that the applicant should not have driven on that route. Neither fact however justifies the conclusion that the applicant was **grossly** negligent. The third respondent's conclusion in regard to this charge is not one that a reasonable arbitrator could come to on the evidence presented at the arbitration.

[23] It is clear from the third respondent's award that the third respondent was satisfied on the evidence that the applicant was dishonest. The applicant challenges the reasonableness of this conclusion; namely that on a balance of probabilities that the applicant was dishonest.

[24] To summarise the evidence relating to the alleged dishonesty:

24.1 Chabilal and Govender suggested that the applicant told them no more than the door was weak and had simply fell off;

[7] Arbitration award para 5.5pages 30/1.

24.2 In response Govender instructed Chabilal to accompany the applicant to the scene of the incident;

24.3 Chabilal's evidence was he then accompanied the applicant to the scene of the incident without discussing anything with the applicant;

24.4 It is common course that Chabilal and the applicant went directly to the scene of the incident where the applicant immediately commenced looking for the damaged truck;

24.5 They both attempted to obtain CCTV footage of the area;

24.6 Shortly after arriving at the scene Chabilal instructed the applicant to prepare a statement which he did. The statement prepared by the applicant deals with the collision with the truck and makes no mention of the door having fallen off of its own accord.

[25] A careful reading of the evidence of Govender, Chabilal and the applicant does not in any way support their conclusion that the applicant was in any way dishonest. Neither Govender nor Chabilal attempt to explain why the applicant, if he had in fact given them the explanation that the door simply fell off, without any instruction or discussion led Chabilal directly to the scene and immediately started looking for the driver and the truck with which he had collided.

[26] Apart from the dispute as to what explanation the applicant offered, a simple assessment of the probabilities suggests that any attempt by the applicant to mislead Govender and Chabilal would have been futile. The applicant's evidence was that as soon as he had parked the tow motor he approached Govender and Chabilal. This explanation is corroborated by Chabilal under cross examination when he was referred to his statement. The evidence clearly established that on being instructed to accompany Chabilal to the scene, the applicant without further ado took Chabilal directly to the scene of the collision to find the truck and the driver.

[27] The sequence of events suggests that at best for Govender and Chabilal they misunderstood the extent of the applicant's explanation. It is also apparent from the record of the arbitration that the applicant gave evidence through an interpreter.

[28] I am not persuaded that on the evidence and material placed before the third respondent that the conclusion that the applicant was dishonest is a conclusion to which a reasonable arbitrator could come.

[29] The addition, the "conclusions" in the charge sheet characterising the misconduct as "DISHONESTY" and "GROSS NEGLIGENCE" when describing the nature of the misconduct with which the applicant was charged appear to be nothing more than an attempt to render the charges more serious than they actually were. The issue in question for decision by the arbitrator was to decide whether the evidence established that the misconduct constituted dishonesty or gross negligence. The arbitrator simply and unreasonably concluded that the applicant was guilty of the misconduct and that therefor he was dishonest and grossly negligent.

[30] Likewise, it was incumbent upon the third respondent to consider whether the evidence of Govender and Chabilal, regarding their allegation that the trust relationship had broken down, was probable in light of the evidence surrounding the misconduct. Given that the dispute regarding the applicant's explanation of the damage to the trolley and the evidence regarding the so-called gross negligence, it is difficult to conclude on a balance of probabilities, that the trust relationship between the first respondent and the applicant had broken down.

[31] I am satisfied in concluding that, the third respondent reached a decision that another decision-maker could not reasonably have arrived at based on the evidence before him.

[32] As far as the sanction is concerned it is clear that the sanction of dismissal was based on the suggestion that the applicant's misconduct was firstly dishonest and secondly, amounted to gross negligence. The third respondent in fact discounts the applicants nineteen years service and clean disciplinary

record on the strength of the conclusion that the applicant was dishonest and grossly negligent.

[33] Applying the test on review as set out in the *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [8], I am satisfied that the award of the third respondent dismissing the applicants application and concluding that the dismissal was fair is reviewable and should be set aside. The applicant is therefore entitled to be reinstated.

[34] It is clear from the surrounding facts of this matter that the applicant was indeed guilty of negligence surrounding the conclusion between the trolley he was towing and the truck. It is also so that the first respondent suffered damages.

[35] Given the age of the matter and the fact that neither party addressed what would be an appropriate sanction should the sanction of dismissal be found to be unfair, it is necessary that this court imposes an appropriate sanction.

[36] As far as costs are concerned I am of the view that in the interests of fairness no order should be made.

[37] The applicant having filed his review 4 days late applied for condonation for the late filing of his application. The application for condonation was not opposed. Condonation is granted.

[38] Taking all the circumstances into account the following order is made:

Order

1. The award of the third respondent under case number KNDB 1140/14 dated 14 September 2014 is reviewed and set aside and substituted with an order that the applicant was unfairly dismissed;
2. The first respondent is ordered to reinstate the applicant on the same terms and conditions as he enjoyed at the time of his dismissal but that such reinstatement is limited is to take effect from the date of the arbitration award namely 14 September 2014;

[8](2014) 35 ILJ 943 (LAC) at para 20.

3. The applicant is to return to work within fourteen days of the date of this award;
4. There is no order as to costs.

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D. H. Gush

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. C van Reenen

Instructed by: N M Sithole & Associates

For the Respondent: B. McGregor of McGregor and Erasmus Inc.