



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 913/2014

In the matter between:

CITY OF CAPE TOWN

Applicant

and

NOMFUNDO NKOMO

First Respondent

SALGBC

Second Respondent

I DE VLIAGER-SEYNHAVE N.O.

Third Respondent

Heard: 11 June 2015

Delivered: 18 June 2015

Summary: Review – misconduct – insubordination.

JUDGMENT

STEENKAMP J

Introduction

- [1] A traffic officer is told by her superior to return car keys to the owner. The owner does not have a driver's license and the car is not roadworthy. She refuses the instruction. Should she be dismissed for insubordination?
- [2] This question served before the arbitrator, Ms I de Vlieger-Seynhave. The further question was whether the employee had brought the City's name into disrepute because she refused the instruction in front of two members of the public, being the unlicensed car owner and his wife. And thirdly, the question was whether the City had followed a fair procedure.
- [3] The arbitrator found that the dismissal was substantively and procedurally unfair. She ordered the City to reinstate the employee. The City seeks to review the award.

Background facts

- [4] The employee, Ms Nomfundo Nkomo, is a traffic officer. She was part of a vehicle checkpoint that had been set up to do spot checks on car licences, drivers' licenses and the like. One of the vehicles stopped was being driven by a Mr Khan who claimed to have forgotten his driver's license. He told Nkomo that he had to go and buy airtime for his phone in order for someone to bring his licence, never to return. The passenger, Mr Malgas, then told Nkomo that he was the owner of the vehicle and that he had given Khan permission to drive it. Nkomo gave Malgas a fine for permitting an unlicensed driver to drive his vehicle. Malgas has admitted that he did not have a driver's license either. Nor could he prove that he was the registered owner of the vehicle.
- [5] Nkomo told Malgas to go with her to the Goodwood traffic department. She drove his vehicle. When they got to the station, she kept the car keys.¹ She refused to give him the keys in circumstances where he did not have a driver's license. She told him to return the next day with a licensed driver and proof of ownership of the vehicle.

¹ There is some dispute as to whether she put it in a secure locker or not. Not much turns on this.

- [6] Malgas and his wife returned the next day. He spoke to Nkomo's superior, principal officer Opperman. Opperman called Nkomo to his office. The two of them went into an adjacent office. Opperman instructed her to hand over the keys to Malgas. She refused.
- [7] Nkomo testified that she had asked Opperman to sit down so that she could explain to him why she would not hand over the keys. The arbitrator accepted this testimony. Nkomo's intention was to explain that she could not hand over the keys to an unlicensed driver and allow him to drive a car on a public road. She never got an opportunity to do this, as Opperman simply made what he termed "a ruling" and instructed her to return the keys. Opperman then opened the door and told Malgas to come inside. He repeated the instruction in the presence of Malgas. Nkomo refused again.
- [8] Nkomo then attempted to contact the traffic chief (Gordon) and, when she could not get hold of him, the assistant chief (Heckrath). She testified that the latter supported her but did not take the matter up with Opperman. However, Heckrath did not testify at the arbitration.
- [9] Nkomo then asked for a roadworthy inspection of the vehicle. It was found not to be roadworthy.
- [10] It appears that Malgas made a complaint to the SA Police Services. Members of the SAPS arrived and instructed Nkomo to return the keys to Malgas. She did so. He drove away in the unroadworthy car without a driver's license in the presence of the SAPS.
- [11] Instead of pursuing Malgas's transgressions, the City called Nkomo to a disciplinary hearing. It formulated the "alleged charge" [sic] as follows:

Charge 1

Gross insubordination

On or about [sic] 10 October 2013 you grossly misconducted yourself in that you blatantly ignoring [sic] several instructions from your superior officer, namely Principal Inspector Stanley Opperman by stating that you will disobey his instruction and further state [sic] that Principal Inspector Opperman can do what he want [sic].

Charge 2

Bringing the City's name in disrepute

On or about [sic] 10 October 2013 you grossly misconducted yourself when you acted in a manner in front of members of the public, in that you disregard [sic] several instructions of Principal Inspector Opperman to hand over Mr Malgas [sic] vehicle keys, you blatantly refuse [sic] the instruction to hand over the keys in front of Mr and Ms Malgas and their child, resulting in the fact that Mr Malgas laid a criminal case at Parow Saps, for theft.”

[12] The chairperson found her “guilty” on both charges and she was summarily dismissed.

The arbitration award

[13] At the arbitration, Opperman and Malgas, as well as the Principal Inspector, Mr Solomons, testified for the City. Apart from her own testimony, Nkomo called two senior traffic officers, Messrs Knipe and Jacobi; and a Metro Police officer, Mr Sefake. The tenor of their testimony was that there is a difference between impounding and safekeeping; and that it was common practice to keep a vehicle for safekeeping when the driver has no license and the vehicle cannot be handed over to a licensed driver.

[14] In considering whether Nkomo had been guilty of gross insubordination, the arbitrator referred to Grogan² and noted that the gravity of the insubordination depends on a number of factors, including the actions of the employer before the alleged insubordination; the wilfulness of the employee's defiance; and the reasonableness of the order that was defied. And refusal to obey an instruction to do work that was illegal or that the employee legitimately felt he/she was not qualified to perform has been held not to constitute insubordination (referring to *NUM v Western Platinum Mines Ltd t/a Western Platinum Mine*³).

[15] The arbitrator found the employees' witnesses, all of whom were traffic officials with 12 to 24 years' service, to be credible. She noted that Nkomo

² *Dismissal, discrimination and unfair labour practices.*

³ [1996] 6 BLLR 771 (LC).

had not received training on impoundment procedures and that, in any event, she had not been charged for not following procedures. The arbitrator accepted the practice of safekeeping a car in certain situations. She questioned Opperman's actions of instructing Nkomo to hand over the keys to an unlicensed driver. She concluded:

"It was the [employee's] opinion that it would be illegal to follow her superior's instruction. And this was a correct observation. If she would have obeyed she would have given the key to an unlicensed driver who could endanger many more road users which is against the National Road Traffic Act, 1996 (Act No 93 of 1996). It was confirmed in *Ellerines Holdings v CCMA & Others* (1999) 8 LC 8.9.1 that employees are not obliged to obey unlawful instructions. If they knowingly act illegally, they do so at their own risk... [T]he outcome of the inspection was that the vehicle was not roadworthy. To simply ignore this and let Mr Malgas drive away with the vehicle is incomprehensible to me."

- [16] The arbitrator concluded that Nkomo had a clear reason why she refused Opperman's instruction. The instruction was unreasonable and illegal in her opinion. If Opperman had known all the details he probably would not have given the instruction in the first place. However, he did not give the employee a full opportunity to explain, nor did he establish the legal requirements himself. Based on these factors, the arbitrator found that the employee was not guilty of gross insubordination.
- [17] Turning to the second charge of bringing the City's name into disrepute, the arbitrator noted that the employee refused the instruction privately. It was Opperman who decided to open the door and repeat the instruction in front of Mr and Mrs Malgas. She found that Nkomo was not guilty of this charge.
- [18] There was also a procedural defect in that the chairperson of the disciplinary hearing refused Nkomo's request for a postponement, with the result that she could not properly cross-examine Malgas.
- [19] Having found the dismissal to have been substantively and procedurally unfair, the arbitrator ordered the City to reinstate Nkomo retrospectively.

Evaluation / Analysis

[20] The conclusion that the arbitrator reached is, in my view, not unreasonable.

[21] Malgas did not have a driver's license. He acted with impunity. It is indeed incomprehensible that Opperman would instruct Nkomo to hand over the keys to him without giving her an opportunity to explain why she wouldn't. The consequence of Opperman's – and later, the police's – instructions were that Malgas was allowed to break the law with impunity. He was allowed to drive away an unroadworthy car without a driver's license. And, to add insult to injury, he had the *chutzpah* to arrive at Nkomo's disciplinary hearing driving the same car without a license. It was the equivalent of showing a middle finger to the City's law enforcement authorities. On the other hand we have Nkomo, a rare traffic officer who tries to keep an unlicensed driver in an unroadworthy vehicle off the road, rather than sitting behind a camera under a tree and generating revenue from motorists who may be exceeding the speed limit in sophisticated and safe cars on double lane highways designed for high speeds. Yet she is the one who is disciplined.

[22] It is so that Nkomo refused to obey Opperman's instruction. But even if it constituted insubordination, it was not gross. She had a good reason for refusing: the consequence was that Malgas was allowed to break the law with impunity. As the Labour Appeal Court recently stated in *Palluci*:⁴

“A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. ... The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross

⁴ *Palluci Home Depot (Pty) Ltd v Herskowitz & Ors* [2014] ZALAC 81 (12 December 2014) para [22].

nature, an employer must issue a prior warning before having recourse to the final act of dismissal.”

[23] Mr *Conradie* argued that there is nothing in the Road Traffic Act to render the instruction unlawful. In my view, that is too narrow a view of the arbitrator’s finding. She clearly had in mind that the *consequence* of obeying the instruction was to lead to an unlawful act. That makes the instruction itself at the very least unreasonable, and the refusal to obey reasonable. Even if the employee was insubordinate, it was not of a gross nature and it did not warrant dismissal.

[24] The arbitrator’s finding that Nkomo did not bring the City’s name into disrepute is also reasonable. As she noted, it is Opperman who put the dispute in the public domain by involving Malgas. If anything, it is Opperman who has brought the City into disrepute by allowing its ratepayer, Malgas, to break the law with impunity.

Conclusion

[25] The conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have reached the same conclusion. The award is not reviewable.

Costs

[26] Although SAMWU was not cited as a party to the proceedings, Mr *Whyte* quite properly brought it to the Court’s attention that the employee was being assisted by the union in these proceedings, as she was at arbitration. There is an ongoing relationship between the employee and the City, and also between the union and the City. I do not believe a costs order is appropriate.

Order

The application for review is dismissed.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Bradley Conradie of
Bradley Conradie Halton Cheadle attorneys.

FIRST RESPONDENT: Jason Whyte of
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LABOUR COURT