REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 295/15

In the matter between:

JOHN TAOLO GAETSWE Applicant

DISTRICT MUNICIPALITY

and

SALGBC First respondent

Suria VAN WYK N.O. Second respondent

Heard: 27 October 2016

Delivered: 30 November 2016

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Mr Mmoloki Ikaneng (the employee) was dismissed by the applicant (the Municipality) for unauthorised use of a municipal vehicle and failing to report an accident involving the same vehicle. He referred an unfair dismissal dispute to the first respondent (the South African Local Government Bargaining Council). Conciliation failed. The arbitrator, Ms Suria van Wyk (the second respondent) found that the dismissal was procedurally fair but substantively unfair. She ordered the Municipality to reinstate the employee retrospectively to his date of dismissal, one month short of a year earlier. The Municipality seeks to have the award reviewed and set aside in terms of s 145(2)(a)(ii) of the LRA.[1]

Condonation

[2] At the outset of the hearing, I granted condonation for the late filing of the answering and replying affidavits. The reasons need not be repeated here. This judgment deals with the merits.

Background facts

[3] Mr Ikaneng was employed as a rural development officer. His job entails visiting rural areas in the Northern Cape. (The Municipality is based in Kuruman). On Thursday 10 July 2014 he signed out a municipal vehicle (a Toyota bakkie) from the municipal car pool. He had to visit a farm near Van Zylsrus where he was supervising a fencing project. He signed a trip authorisation form that states, amongst other things:

> 'I hereby confirm that I hold a valid driver's license and acknowledge that I have read and understood my responsibilities as the driver of this official vehicle set out in the Handbook for Drivers of Official Vehicles.'
>
> 'The trip authority will be subject to the following conditions:
>
> - The contents of the Transport and the Drivers of Official Vehicles Handbooks are understood and adhered to at all times.

[1] Labour Relations Act 66 of 1995.

- That the vehicle may not be refuelled unnecessarily.
- That authority is obtained to keep the vehicle overnight.'

[4] The employee returned to Kuruman on Friday 11 July. He did not return the bakkie, taking it home and keeping it overnight instead. On Saturday 12 July he kept it at home. That evening he attempted to return the bakkie but left the road and wrote it off. He claimed to have swerved for stray horses in the road. The bakkie was insured, but the excess on the vehicle (worth some R300 000) was about R14 000.

[5] The employee did not report the accident. He went home. The next day he went to hospital. On the way he passed the accident scene and saw Mr Lebogang Buffel, the Municipality's logistics clerk and fleet assistant, at the scene. He did not stop and speak to Mr Buffel; neither did he report the accident.

[6] The employee only filed an accident report four days after the accident, on 16 July. The report was signed by a Mr Lebogang Modise on his behalf.

[7] The Municipality called the employee to a disciplinary hearing on 1 October 2014. It was postponed to 24 October. The complaint was set out as follows:[2]

> '**Irregular, improper and unauthorised use:** Director and Manager (Mr Klaas Teise and Thabo Mathabathe) did not put two signatures on the vehicle requisition form to authorise the vehicle for Mr Mmoleki Ikaneng to use, on the 12th July 2014 day of accident.
>
> And it was also unofficial trip.
>
> **Reporting of accident and incidents**
>
> When the vehicle was involved in an accident the driver did not report to the immediate supervisor and transport officer.'

[8] The chairperson found that the employee had committed the misconduct complained of. He imposed a sanction of a final written warning for failure to report the accident; and summary dismissal for the unauthorised use of the vehicle. He lodged an internal appeal. It was unsuccessful. He was eventually dismissed on 28 February 2015.

[2] Grammar as in the original.

[9] The employee referred an unfair dismissal dispute to the Bargaining Council. The arbitration was conducted on 12 and 13 January 2016 in Kimberley. The arbitrator gave her award on 22 January 2016. (It is not clear from the papers why it took almost a year to be heard).

Arbitration award

[10] At the arbitration, both parties were legally represented – the employee by his attorney of record, Mr Neville Cloete; and the Municipality by its attorneys of record and counsel who appeared in this hearing, Mr J Eastes. The arbitrator heard the evidence of the following witnesses for the Municipality:

10.1 Mr Lebogang Buffel, the logistics clerk and fleet assistant;

10.2 Mr Klaas Teise, Director: Economic Development;

10.3 Mr Gert van der Westhuizen, Performance Management Manager and chairperson of the disciplinary hearing;

10.4 Mr Moses Eilard, Director: Corporate Services and chairperson of the appeal hearing.

[11] The employee testified on his own behalf and he called one other witness, Mr Lesego Christopher Modise. Mr Modise testified about alleged inconsistency pertaining to accidents in which two other employees were involved.

[12] The arbitrator found that the dismissal was procedurally fair. There is no cross-review.

[13] On the substance of the complaint, the arbitrator reasoned as follows:

13.1 The ‘pivotal question’ was whether the employee was aware of the Fleet Management Policy ‘and the contents thereof’.

13.2 There was a process of authorisation forms from the time the employee was employed in 2009. The Fleet Management Policy was introduced in 2013. ‘From the evidence it was clear that after the implementation of the Fleet Management Policy in 2013 there were no significant changes to this process and only the authorisation forms looked slightly different. These authorisation forms were then

also given to the [employee] to complete and he was not tasked with retracting [*sic*] it personally from the Fleet Management Policy.'

13.3 'One can therefore not accept that merely because the [employee] knew that he needed to complete a trip authorisation form prior to using a vehicle that he therefore also knew about the contents of the new Fleet Management Policy that was adopted.'

13.4 The trip authorisation forms made no mention of the Fleet Management Policy.

13.5 The employee had taken the vehicle home on more than one occasion in the preceding two weeks and no control had been implemented.

13.6 The only part of the Fleet Management Policy that the employee was aware of was that authorisation had to be obtained; and he only knew this because the authorisation process had not been altered.

[14] Despite having found that the employee was aware of the fact that he needed authorisation to keep the vehicle overnight, the arbitrator found:

> 'In the light of the above I cannot find that the [Municipality] has discharged the onus of proof that the '[employee] was aware of the rules that he was charged for [*sic*] contravening.'
>
> 'In the absence of proof that the [employee] was aware of the rule he allegedly contravened, the remaining elements of substantive fairness need not be discussed.'
>
> 'The same argument applies to the charge of not reporting the accident within 12 hours.'
>
> 'The [employee's] dismissal is therefore found to be substantively unfair on the basis that the [Municipality] failed to discharge the onus of proof that the [employee] was aware of the contents of the Fleet Management Policy and that charge was not drafted to reflect the true contravention the [employee] was found guilty on.'

[15] The arbitrator ordered the Municipality to reinstate the employee retrospectively to his date of dismissal.

Grounds of review

[16] Mr *Ackermann*, for the Municipality, summarised the grounds of review under three headings:

16.1 The employee knew the rule.

16.2 He did not report the accident. The arbitrator does not deal with this complaint.

16.3 The finding that the Municipality imposed no controls despite the fact that the employee had taken a vehicle home overnight during the preceding two weeks, is not sustained by the facts.

Evaluation

[17] The Municipality's case is that, given the facts and the evidence before her, the arbitrator's conclusion is one that no reasonable arbitrator could reach.[3] I shall consider that argument in the light of each of the three contentions raised by Mr *Ackermann*.

Was the employee aware of the rule?

[18] The complaint makes no mention of the Fleet Management Policy (FMP). It merely complains about 'unauthorised use' of the bakkie on 12 July 2014.

[19] In any event, though, both Buffel and Teise testified that the employee knew about the FMP. In contrast, the employee baldly denied it.

[20] The procedure for signing out an official vehicle is set out in the trip authorisation form that the employee signed. He set out the date, the starting point, odometer reading, end point, and reason for the official trip. He also confirmed that he had read and understood his responsibilities as set out in the handbook for drivers of official vehicles; and that authority had to be obtained to keep the vehicle overnight.

[21] These conditions are similar to those contained in the FMP. That policy states the rather obvious proposition that a driver may only use an official

[3] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

vehicle for official purposes; and that, after the trip, it must be parked at the municipal building:

> "This applies even if a vehicle is used for more than one day and such vehicle may under no circumstances be parked on the street or anywhere other than its allocated parking."

[22] Having signed the trip authorisation form and acknowledged the conditions for the trip, the employee was well aware that he needed authorisation to keep the vehicle overnight. He did not get authorisation. Contrary to what the arbitrator found, he was aware of the rule and he breached it. In fact, the arbitrator found that the employee was aware of the rule "that authorisation had to be obtained"; yet she finds that he was not guilty of the unauthorised use of the vehicle.

[23] This conclusion is both illogical and unreasonable. The misconduct complained of was unauthorised use of the vehicle. The employee was aware of the rule that he needed to obtain authorisation to keep the vehicle overnight, and that he needed fresh authorisation – in the form of the two signatures needed – if he wanted to keep it an extra day. He did not get such authorisation. He breached the rule. The Municipality did discharge the onus of showing that he committed the misconduct set out in the complaint. The arbitrator's finding to the contrary is so unreasonable that no reasonable arbitrator could have come to the same conclusion on the facts and the evidence before her.

Failure to report the accident

[24] It is common cause that the employee did not report the accident until four days after the fact, even when he saw Buffel at the accident scene. This was the second major component of the complaint. Yet the arbitrator does not deal with it at all.

[25] The arbitrator dismisses the complaint in one line, saying:

> 'The same argument applies to the charge of not reporting the accident within 12 hours.'

[26] That was not the "charge" or complaint. The complaint makes no mention of 12 hours. And in any event, it cannot seriously be contended that an

employee would not be aware of the fact that he had to report an accident involving an official vehicle as soon as possible.

[27] Be that as it may, the employee testified that he could not report the accident within 12 hours because he was in hospital. His case was not that he was not aware of the fact that he had to report it within 12 hours or any other reasonable period. His counsel, Mr *Eastes*, set out his case as follows in the arbitration:

> "He will testify to the effect that he could not have reported the accident within the 12 hour period because he was in hospital and he was sick, he was in shock, it was an accident. But on his way the 13th of July to the hospital, he drove past that scene again and he saw you [Buffel] there at the scene…"

[28] Despite this, he did not report the accident. And only a day before he booked out the bakkie, he had hit a guinea fowl in another official vehicle. He did report that upon its return to the car pool within 24 hours.

[29] On a balance of probabilities, the employee knew that it was his duty to report the accident. He did not do so. He wrote off the bakkie while he was on an unauthorised trip. Yet the arbitrator does not deal with this complaint at all. That is a reviewable irregularity. Had she done so, the only reasonable conclusion would have been that the employee did commit the misconduct; and that dismissal was a fair sanction.

The two weeks before the incident

[30] The employee kept an official vehicle overnight before in the course of the preceding two weeks. The arbitrator found that, therefore, if the Municipality 'was serious about the rule of returning the vehicles the same day, some form of control would have been implemented to check whether all vehicles were returned every day. Had that been done, the [Municipality] would have realised that the [employee] was not aware of the rule and he could have been informed.'

[31] The problem with this line of reasoning is that the evidence did not show that the Municipality was aware of the fact that the employee had previously breached the rule. The employee testified that he would simply

park the car and leave the key with one of the officials on duty, without signing off any documents.

[32] The arbitrator's conclusion, given this evidence, is not reasonable.

Conclusion

[33] This is one of those rare cases where, despite the stringent test on review, the conclusion reached by the arbitrator is so unreasonable that the award must be reviewed and set aside.

[34] The Court had the benefit of a comprehensive transcript of the arbitration proceedings, as well as the arguments by the same attorneys that appeared at arbitration. It is unnecessary for the parties to incur further costs and delays by remitting the dispute. This Court is in a position to substitute its finding for that of the arbitrator. And in the light of the facts set out above, the sanction of dismissal was fair.

[35] With regard to costs, I take into account that the employee has already incurred significant legal costs, both at arbitration and in these proceedings. He had an arbitration award in his favour. He had little choice but to defend it. He is an individual who has lost his job. On the other hand, he is represented by his trade union; but there is an ongoing relationship between that union (SAMWU) and the Municipality. In law and fairness, I do not consider a costs award to be appropriate.

Order

The arbitration award under case number NCD 051504 dated 22 January 2016 is reviewed and set aside. It is replaced with an award that the dismissal of the employee, Mr Mmoleki Ikaneng, was procedurally and substantively fair.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	L W Ackermann
Instructed by	Neville Cloete (Kimberley).
THIRD AND FOURTH RESPONDENTS:	J Eastes
Instructed by	Maenetja attorneys (Pretoria).