THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR64/18

In the matter between:

HENDRIK VAN WYK VERVOER (PTY) LIMITED **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

COMMISSIONER STEPHENS SHEMA MOLAPO (NO) **Second Respondent**

SANDILE CHRISTOPHER MKHWANAZI **Third Respondent**

Heard: **8 July 2021**

Delivered: **16 August 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 16 August 2021)**

JUDGMENT

REDDING, AJ

[1] The applicant is a transport company. Among other types of vehicles, it uses trucks which it calls “Tautliners” which have canvass or tarpaulin sides and usually travel long distances. It also employs vehicles termed “*side tipper trucks*”. This vehicle carries bins which may tipped to remove their contents. These vehicles are generally, but not exclusively, employed for local trips.

[2] Mr Mkhwanazi (the third respondent) was employed by the applicant as a driver. Prior to his dismissal on 6 March 2017 he was engaged to drive Tautliner vehicles on long distance trips. On 6 March 2017 Mr Mkhwanazi was required to attend a disciplinary hearing at the applicant’s premises. He was found guilty on a charge of reckless driving and given a written warning.

[3] There is a dispute about what happened next. It is clear, however, that he was asked to either drive or accompany a driver of a side tipper truck. It is common cause that he refused to do so and stated that he did not have his driver’s licence with him because he had not expected to drive on the day of his hearing. It is alleged that he left the premises without permission and failed to return on that day. Mr Mkhwanazi says that he was given permission to leave and this version was supported by one of the applicant’s witnesses.

[4] In any event the main issue concerns what happened the following day. Again, there is a dispute about exactly what occurred. What is clear is that Mr Mkhwanazi was asked again to become familiar with the driving and operation of a side tipper truck. It is also clear that he refused. His refusal led to a charge of insubordination and his dismissal for misconduct.

[5] He referred the fairness of his dismissal to the National Bargaining Council for the Road Freight and Logistics Industry. After hearing evidence the second

respondent (the commissioner) issued an award in which he held that the applicant's dismissal of Mr Mkhwanazi was substantively unfair. He also ordered the applicant to pay him compensation in the sum of R56 280,00, being equivalent to seven months wages. He further ordered the applicant to pay Mr Mkhwanazi R18 610,43 which comprised outstanding salary for January and February, and three weeks annual leave. The applicant has applied to review and set aside this award.

[6] A review of an arbitration award is permissible if there is a defect in the proceedings as set out in section 145(2)(a) of the Labour Relations Act[1] (LRA). For a defect in the conduct of the proceedings to amount to a gross irregularity contemplated by section 145(2)(a)(ii), the arbitrator or commissioner must have misconceived the nature of the enquiry or arrived at an unreasonable result. An unreasonable result is one that a reasonable arbitrator could not reach on all the material that was before him or her.[2]

[7] The fundamental reason for the commissioner concluding that the dismissal was substantively unfair, notwithstanding Mr Mkhwanazi's refusal to comply with an instruction, is that the instruction delivered by his employer was unreasonable and his failure to comply with it was concomitantly reasonable. This is the focus of the dispute in these review proceedings.

[8] Mr Mkhwanazi conducted his own defence both in the disciplinary enquiry proceedings and in the Bargaining Council arbitration. On his version he was engaged as a Tautliner driver, driving long distance trips. He alleged that this job was different to that of a driver of a side tipper truck. The differences were:

8.1. The Tautliner drivers received remuneration monthly, while side tipper drivers were paid weekly;

8.2. Tautliner drivers received higher remuneration than side tipper drivers;

[1] No. 66 of 1995, as amended.
[2] See: *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 25; *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) at para 25.

8.3. Tautliner drivers spent days and nights away from the applicant's base and in terms of the Bargaining Council's main agreement were paid an additional allowance for this which was not payable to side tipper drivers who drove locally.

[9] Mr Mkhwanazi alleged that the instruction he received after his hearing on 6 March 2017 and on the following day to move from being a Tautliner driver to a side tipper driver was an unreasonable change to his conditions of employment to which he did not agree and he was accordingly entitled to refuse the instruction to change.

[10] The applicant disputed this. Mr Harmse, the applicant's operations manager testified that he could not understand Mr Mkhwanazi's refusal. He said that Mr Mkhwanazi's concerns were unfounded and that the company's intention was not to alter his employment from a long distance driver to a local driver (with the reductions in income that might be involved). Mr Harmse said that after a few days of training Mr Mkhwanazi would have returned to long distance driving but on a side tipper vehicle.

[11] I am not convinced that Mr Harmse's evidence in this respect can be accepted. First, he does not appear to have made any real effort to explain the motive for requiring Mr Mkhwanazi to change from being a long distance Tautliner driver to a side tipper driver. It was never explained why Mr Mkhwanazi could not go back to driving the Tautliner trucks. He had been absent for a morning while attending the hearing. Mr Harmse gave the unhelpful explanation that Mr Mkhwanazi had been changed from Tautliner vehicles for "ope*rational reasons*", although what those reasons were was not explained.

[12] The factor, however, which weighs most heavily against Mr Harmse's version that Mr Mkhwanazi would continue to be a long distance driver but in a side tipper is the version which Mr Mkhwanazi put to Mr Harmse.

[13] Referring to the owner of the applicant, only called Henk in the arbitration, Mr Mkhwanazi referred to an exchange which occurred near the door to the room

in which his disciplinary hearing had taken place. Mr Mkhwanazi stated his version as follows:

> "Do you still remember what he [Henk] had said there? Can I remind you? What he told me, he said I will be driving that, the local truck, and he even talk he, he said words that I am afraid to say here in front of you, Commissioner. He said by force you will drive that local truck. You think you know better."

[14] Later, Mr Mkhwanazi explained:

> "The moment we were entering the disciplinary room and what he told me is I will not sleep in his truck. I will go load, come back and off load everything, pack the stock in the yard, then go home… I will be driving the local truck and I am not allowed to sleep in his truck. I will come, park the truck in the yard in the afternoon and go home, come back in the morning. Because he knew that I stay far. He knew it I will not afford to go up and down, up and down…"

[15] Mr Harmse said he did not know anything about this exchange. Significantly, Henk, the applicant's owner, was never called to deal with this version. What is therefore unrebutted is that the owner of the business intended that Mr Mkhwanazi would transfer to and remain on the side tipper truck which would operate locally and Mr Mkwanazi would not receive the sleep out allowances. Indeed, he appeared to threaten the applicant with work and working hours which he knew Mr Mkhwanazi would find too onerous. It is difficult to avoid the conclusion that the instruction to change to a local side tipper truck was intended to be punitive. It is not irrelevant that the instruction to change roles occurred in the context of the disciplinary hearing which preceded the alleged insubordination.

[16] It is indisputable on the evidence before the commissioner that there was a significant difference between the work and remuneration for long distance drivers and local drivers. This significant change did not appear to have a business rationale. Mr Harmse described the reason as "*operational*", without elaborating on what the operational requirements were. The instruction, far from being reasonable, appeared to have an element of abuse of power about it.

[17] In the light of these facts I cannot find that the commissioner was wrong in concluding that the instruction was unreasonable and that the refusal of Mr Mkhwanazi was reasonable. There is certainly no basis upon which his finding that the dismissal was substantively unfair can be reviewed and set aside. The commissioner did not commit an irregularity as contemplated by s 145(2) of the LRA and his award is not defective.

[18] Mr Coetzee, who represented the applicant, argued further that the award of salary and annual leave was beyond the jurisdiction of the commissioner. He submitted that at least the award of the payment of R18 610,43 in respect of outstanding salary and leave should be reviewed and set aside.

[19] At the commencement of the arbitration the commissioner recorded certain facts and issues that he had elicited from the parties prior to the recording commencing. The salary and leave claim was referred to. The applicant's representative is not recorded as raising a defence to it. The merits of the claim do not appear to have been contested. Mr Coetzee's objection was that the commissioner had no power to make an order for payment of outstanding salary and leave in an unfair dismissal dispute. A commissioner hearing an unfair dismissal dispute is empowered to grant one of the remedies provided at section 193(1) of the LRA. These are an order for reinstatement, an order for reemployment and an order for compensation.

[20] The order for payment made by the commissioner is not compensation. That much is clear because at paragraph 25 of his award he sets out that the applicant must pay compensation to Mr Mkhwanazi in the sum of R56 280,00. In the following paragraph 26 he says that the applicant is "*also*" ordered to pay an amount comprising salary and annual leave. On the face of it these amounts are over and above compensation.

[21] Section 74(2) of the Basic Conditions of Employment Act[3] (BCEA) provides that if an employee institutes proceedings for unfair dismissal, an arbitrator hearing

[3] No. 75 of 1997.

the matter may also determine any claim for an amount that is owing to that employee in terms of the BCEA provided that claim has been referred in compliance with section 191 of the LRA, the amount has not been owing by the employer to the employee for a period longer than one year prior to the dismissal, no compliance order has been made, and no other legal proceedings have been instituted to recover the amount. From the record there is no indication that these conditions have not been met.

[22] Accordingly, although the award does not constitute compensation but an amount owing under the contract of employment the award is competent[4]. It is authorised by section 74(2) of the BCEA. The review on this ground too must therefore fail.

[23] In my view while costs do not follow the result in labour cases as a general rule, I consider that in this case the third respondent should be awarded his costs of suit in defending the matter. He is not a man of means. The award of the commissioner was reasonable and set right a manifest injustice. The compensation awarded is not substantial and to the extent he has had to incur legal costs in defending the award against an attack clearly without merit he should not have to be burdened by them.

[24] In the premises the following order is made:

Order

1. The application is dismissed;
2. The applicant is ordered to pay the third respondent's costs.

_____

A Redding

Acting Judge of the Labour Court of South Africa

[4] See: *Motuang and Issa* (2007) 28 ILJ 1351 (CCMA))

Appearances:

On behalf of the Applicant:
Instructed by:

On behalf Respondent:
Instructed by: