THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Not Reportable/Of interest to other judges

Case no: C 696/2021

In the matter between:

NATIONAL LOTTERIES COMMISSION	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**First Respondent**
GAIL McEWAN (*N.O.*)	**Second Respondent**
SHOWUSA obo YANGA MVAKA	**Third Respondent**

LABOUR COURT

Heard: 12 June 2024

Delivered: 18 December 2024

Summary: (Review application – unfair dismissal – reasonableness – misdirection and unreasonable finding significantly affecting evaluation of appropriate remedy – award set aside – dismissal substantively fair)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an opposed review of an arbitration award handed down on 21 November 2021. The arbitrator found the dismissal of Mr Y Mvaka ('Mvaka') was substantively unfair. It was common cause that the procedural fairness of the dismissal was not in issue. The review application was initially enrolled in August 2023 but was postponed and only re-enrolled in June 2024.

Background

[2] Mvaka, a grant officer, was dismissed on 13 December 2020 for three different acts of misconduct relating to his use of a vehicle of the employer ('the NLC'), between 2 and 8 June 2020. He admitted being guilty of the three charges levelled against him for this misconduct and was dismissed. However, in his internal appeal he claimed that he had pleaded guilty because the representative of the employer at the disciplinary enquiry had suggested that he might obtain a more lenient sanction if he did.

[3] Nevertheless, by the time Mvakwa's claim of unfair dismissal came before the arbitrator, the issue for determination was whether there was inconsistent treatment, whether the sanction of dismissal was too severe, and whether he was supposed to be designated as a high risk driver who should have been taken through a driving course before being allowed to drive a vehicle. The question of inconsistent treatment was not canvassed in evidence and, understandably, the arbitrator appeared to have neglected to determine that issue.

[4] The charges and the factual basis of each one were as follows.

4.1 Charge 1 was misuse of a company vehicle. The charge stated: "You are charged with misuse of a company vehicle in that between the 2nd and 8th of June 2020 or at any time incidental thereto, when assigned a company vehicle with registration number JC 18 DW GP for official use, you misused the vehicle in question by operating

LABOUR COURT

same outside the ordinary hours of work without approval while you knew or ought to have known that by so doing you were committing a misconduct and it was wrong of you to do so.

This charge was based on Mvakwa driving the vehicle on Sunday evening, 7 June 2020, without obtaining permission and contrary to purposes for which he entitled to use the vehiclce. The disciplinary code recommends a final written warning for a first offence and dismissal for a second infraction.

4.2 Charge 2 was reckless and negligent driving of the company vehicle. The charge read: "You are charged with Reckless and Negligent Driving in that between the 2nd and 8th of June 2020 or at any time incidental thereto, you were reckless and negligent in driving the company vehicle with registration number JC 18 DW GP which resulted in the same vehicle being involved in an accident and sustained damage on its right hand side bumper and fender while you knew or ought to have known that by so doing you were committing a misconduct and it was wrong of you to do so."

The charge related to damage to the vehicle, which Mvakwa claimed had been sustained when he reversed the vehicle out of his home on Monday 8 June 2020 and the car slid on a wet surface causing him to hit his gate. This misconduct ordinarily attracts a final written warning followed by dismissal for first and second infringements.

4.3 Charge 3: related to a contravention of NLC Fleet Management Policy and read: " You are charged with Contravention of the NLC Fleet Management Policy in that between the 2nd and 8th of June 2020 or any time incidental thereto, you failed to record fully your daily trips in the logbook for vehicle with registration number JC 18 DW GP which was assigned to you for official use while you knew or ought to have known that your conduct was a misrepresentation of the actual record of the usage of the company vehicle."

This charge concerned Mvakwa failing to fill out the purpose of his trip when he drove the vehicle on Sunday evening without authority. Failing

LABOUR COURT

to follow the policy and procedures attracted progressive sanctions of a written warning, final written warning and dismissal for successive contraventions.

[5] Mvakwa had been employed in May 2018 and obtained his driver's licence in December 2018. He was involved in a minor incident in May 2019 when he 'bumped' the vehicle he was driving and was involved in an accident in September 2019. In October 2019 he was issued with a final written warning for misuse of an NLC vehicle and failing to comply with NLC vehicle policy and procedures. More details of the final warning are given below.

[6] In June 2020, Mvakwa had been given the use of an NLC vehicle for the sole purpose of transporting himself and one other employee to and from home during the COVID pandemic. He was not permitted to use the vehicle for any other purpose than driving the route to and from work. He did not complete the necessary details on the vehicle log and on Sunday evening of the 7th of June he drove the vehicle for about 30 kilometres, which he claimed he had done to make sure the battery was charged, but which he agreed was unauthorised. He also damaged the front left fender of the vehicle quite badly, which he claimed had happened on Monday morning of 8th June when he was reversing the car out of his property before leaving for work.

[7] The chairperson of the disciplinary enquiry had imposed a sanction of dismissal taking the following factors into account:

7.1 The NLC car had been damaged because of Mvakwa being involved in an accident while using the vehicle without authority outside of working hours.

7.2 He had also admitted to deviating from the authorised route he was supposed to travel.

7.3 Mvakwa had sought to justify his actions on the basis that he only obtained his driver's licence in 2018 and lacked driving experience.

7.4 Mvakwa had previously being issued with a final written warning on 8 October 2019 for misuse of a company vehicle and failing to comply

LABOUR COURT

with company policy and procedure. He had been permitted to use the car in question to conduct a workshop in Knysna on a Saturday and on his return was supposed to park it at his home behind locked gates until he returned it on Monday. However, during the weekend he used the car for personal reasons without obtaining authority. While doing so, he claimed to have been robbed and assaulted and the vehicle sustained damage. The second charge was that he did not report the incident to his superiors, or the police, and he attempted to cover up the incident by having the damage spray-painted. Aggravating factors noted on the warning were that it was the second time he had damaged a vehicle within a three-month period and he had dishonestly claimed the incident happened on his return from the workshop on Saturday, whereas it had occurred in another area in the small hours of Sunday morning. On the final written warning it stated that it was valid for six months, whereas the disciplinary code stipulated that a final written warning was valid for twelve months. The manager who issued the warning said it was an error that the warning stated it was valid for six months, but this was only noticed after Mvakwa was dismissed.

7.5 Subsequent to receiving the warning in October 2019, Mvakwa had also been involved in two separate accidents between 7 August and 7 September 2019, which he blamed on the employer failing to upgrade his driving skills. He obtained his driver's license in 2018. The NLC Fleet management policy requires a driver must have a licence and at least 12 months continuous driving experience. It also provided that drivers without traceable experience had to undergo a driving test before they could be authorised to drive an NLC vehicle. The chairperson felt that the onus was on Mvakwa to have raised this when he was asked to drive.

7.6 Although Mvakwa admitted his guilt and said he regretted his actions, when he gave evidence in mitigation, he sought to justify his action by blaming the employer for his lack of adequate driving skills.

LABOUR COURT

7.7 Mvakwa had intentionally deviated from the authorised route to attend to personal business (a braai at a friend's home) and his reckless and negligent driving had caused the damage to the vehicle.

7.8 Although there was no direct evidence of a breakdown in the employment relationship, given the nature of the serious charges and the circumstances in which they were committed, a breakdown in the trust relationship had occurred.

7.9 NLC policy stipulated that both in respect of misuse of a vehicle and reckless and negligent driving, the sanction for a first offence is a final written warning and dismissal for the second. Deviating from an authorised route normally attracted dismissal for a third transgression. Given Mvakwa's lack of remorse, there was no reason to suppose further corrective steps would stop him from continuing to commit such misconduct in future.

[8] Mvakwa appealed against the sanction of dismissal, claiming that he had only pleaded guilty in the enquiry because the employer representative had spoken to him before the enquiry and made him believe that a less harsh sanction would be imposed if he pleaded guilty. The appeal was unsuccessful.

The award

[9] The arbitrator concluded that Mvakwa's dismissal was substantively unfair. She reinstated him with retrospective effect to the date of his dismissal. In addition, she ordered the NLC to arrange for him to undergo a driving test and, if necessary, send him on additional training as a driver at his own expense and in his own time.

[10] The arbitrator found that Mvakwa only obtained a license in April 2019[1] and under paragraph 7.6.4 of the Fleet Management policy he ought to have had twelve months continuous driving experience before he could be a driver paragraph are required to undergo a driving test before being

[1] This might have been a typographical error as Mvakwa's own evidence was that he obtained his licence in December 2018.

LABOUR COURT

authorized to drive an NLC vehicle under paragraph 7.6.6 of the policy. The evidence was that Mvakwa only drove an NLC vehicle about five times in three months.

[11] Paragraph 7.8.1 of the policy set out a number of criteria to identify "high risk drivers". If one of the criteria were met, a driver would be regarded unacceptable. The criteria consisted of a number of "*moving violation convictions*", including "*two preventable accidents in a 12-month period".* Because Mvakwa had two accidents in which a vehicle was damaged in the first year of having a licence, the arbitrator reasoned that he ought to have been regarded as a 'high risk' driver and should have been required to undergo further training at his own expense. The arbitrator concluded that the NLC did not follow its own policy. It must be mentioned that the policy in question only took effect on 1 April 2020, and it is unclear what the previous policy might have said, but neither party made an issue of this.

[12] The arbitrator's assessment of each charge is summarised below.

Charge One: misuse of a vehicle

[13] The arbitrator found it was natural Mvakwa would have been performing work after hours. The charge carries a final written warning for a first offence and dismissal for the second, whereas the charge of operating the vehicle on an unauthorised trip better described what he had done and only carried a sanction of a written warning for a first offence. Accordingly, she recharacterized the charge of misuse as one of unauthorised use of a vehicle.

[14] The arbitrator then proceeded to find Mvakwa guilty of operating the vehicle on an unauthorised trip and deviating from his allocated route. Such misconduct carried a recommended sanction of a written warning. She also accepted Mvakwa's version that the trip was for charging battery and that it was not for his personal benefit.

[15] It seems the unauthorized trip in question was driving the vehicle for 30 kms on Sunday evening, which he claimed was to charge the battery. It was not disputed that the car was having battery problems because of

LABOUR COURT

standing during Covid. He drove the car for 22 minutes and travelled about 30km without turning off the ignition during that time. The arbitrator considered this was excessive for purpose of charging vehicle but was excusable given Mvakwa's inexperience with vehicles.

Charge two : negligent and reckless driving.

[16] The arbitrator found he was negligent in damaging car when reversing out of this gate, because he must have been moving steadily when it happened. She attributed it to negligence, or not taking proper care, because she found he was inexperienced in driving in the dark. In her view, he had not acted recklessly because that would have required him to act carelessly or thinking about the consequences.

[17] Moreover, Mvakwa could be held liable for the damage. The sanction for this misconduct is a written warning WW. The fact that Mvakwa lacked the necessary driving experience and that his competency should have been tested were mitigating factors in the arbitrator's view and she found that the appropriate sanction for this misconduct was a written warning valid for 6 months from date of award.

Charge three: failure to record daily trip details

[18] Although daily trips were supposed to be recorded in the vehicle log book and there was no excuse for this omission, thought it might have been a simple mistake, the arbitrator noted that a first offence carried a sanction of a written warning only.

Conclusions

[19] In conclusion, the arbitrator decided that none of the offences committed by Mvakwa warranted his dismissal. The arbitrator found no need to consider the previous final written warning issued in October 2019 because it had been issued to Mvakwa as a six-month warning and had never been corrected, even if the policy stated that final written warning lasted for twelve months.

LABOUR COURT

[20] The arbitrator's additional remedial relief was clearly affected by her view that further driver training for Mvakwa was needed and appeared to have the view it was mandatory. The evidence that he had been designated as a 'high risk' driver was based on hearsay and none of the management witnesses knew of anyone who had been identified as a 'high-risk' driver.

[21] As such it made no sense to deny him reinstatement because his dismissal could not be justified, so it could hardly be argued that the relationship had broken down.

Grounds of Review

[22] The review is grounded on the principle that an award is reviewable if it is not one that any reasonable arbitrator could make on the material before them, which amounts to a gross irregularity in the conduct of the proceedings in terms of s 145(2)(a)(ii) of the Labour Relations Act, 66 of 1995 ('the LRA'). The NLC seeks to impugn various specific findings in the award as untenable on this basis.

Arbitrator impermissably substituting the first charge

[23] The arbitrator impermissibly changed the nature of the first charge from misuse of a vehicle to unauthorized travel, notwithstanding that he had pleaded guilty to the original charge, and when he could not even have deviated from an authorized route on Sunday because he was not supposed to travel at all that day. In making this alteration, the NLC argues that the arbitrator assumed the role of initiator and the employer, rather than doing what she ought to have done, which was simply to decide whether he was guilty of the actual charge. She had effectively misdirected her enquiry by deciding what she would have done if she had been the employer instead of deciding if what it had done was fair, contrary to the Constitutional Court's dictum that *"A commissioner is not*

LABOUR COURT

given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair".[2]

[24] The employer argues that if she had simply decided that the misconduct of misusing a vehicle had been committed, she would then needed to have decided if it was unfair to dismiss Mvakwa, given his previous final written warning for the same misconduct. Obviously, this presumes that the arbitrator's finding that the final written warning had expired is also reviewable, which will be discussed below.

[25] Mvakwa argues that the arbitrator merely found him guilty of a lesser charge which was within her power. An arbitrator may find an employee guilty of a lesser competent charge, even if that charge was not stipulated in the charge sheet, provided that the employee would not have conducted their defence differently had they known about it[3]. However, in this instance, even if the charge of making an unauthorised trip might conceivably be a less serious form of misconduct within the ambit of the more serious charge of misuse of a vehicle, Mvakwa pleaded never pleaded to this as a lesser charge, but pleaded guilty to misuse of a vehicle, which does carry a more severe sanction. In the absence of him specifically pleading to making an unauthorised trip, the arbitrator was not at liberty to advance this alternative on his behalf[4].

[26] This was not the only instance in which the arbitrator attempted to open an alternative defence for Mvakwa, which he had never advanced himself. Thus, for example, she attributed his alleged collision with his gate in part to his inexperience in driving in the dark. She had asked him if it was dark and he did not respond to her. Instead, he emphasised that he was driving on a slippery surface. Another example of the arbitrator's attempt to insinuate new lines of inquiry that would assist Mvakwa, was illustrated by

LABOUR COURT

---

[2] *Sidumo & Ano v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at paragraph 79.

[3] *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 *ILJ* 2477 (LAC) at paragraph 17.

[4] See *Director-General, Department of Public Works & another v Public Service Sectoral Bargaining Council & others* (2012) 33 *ILJ* 1649 (LC) at paragraph 33 *and Solidarity on behalf of Erasmus v Eskom Holdings SOC Ltd* (2024) 45 *ILJ* 2073 (LC) at paragraph 73.

her pursuit of a line of enquiry about whether it was part of his job description to drive in the course of his work.

[27] Assuming, for the time being, that the final written warning was valid for twelve months, the NLC rightly points out that the court must still be satisfied that if the correct charge is considered, no reasonable arbitrator could still reach the conclusion that the dismissal was substantively unfair.[5] This will be discussed further below.

The arbitrator's conclusion that the final written warning of 8 October 2019 was only valid for 12 months

[28] The NLC argues that the arbitrator could not have reasonably accepted that the final written warning which, on the face of it, was only valid for six months could be accepted as correctly stipulating when it would expire. It argues that its witnesses consistently stated that this was an error and at odds with the disciplinary policy which stated that final written warnings were valid for twelve months.

[29] The arbitrator had reasoned that clause 7.8.1 of the disciplinary code made provision for deviations from the recommended sanctions and accordingly "*offences could be regarded as being more severe or less severe where circumstances permit.*" The arbitrator cited this provision in her discussion of the length of a final written warning and clearly interpreted this provision as authority for issuing a final written warning with a shorter lifespan than twelve months. However, that clause deals with deviation from a prescribed disciplinary sanction where circumstances justify it. The prescribed disciplinary sanctions simply refer to written warnings, final written warnings and dismissal. This point is emphasised in clause 7.8.2 of the code which talks about the severity of a sanction being influenced by mitigating and aggravating factors. In the context of the code, a reference to the prescribed sanction cannot on any reasonable interpretation be anything other than a reference to the fact that, in some instances, a written warning might be issued even when a

[5] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC) at paragraph 31.

LABOUR COURT

final one is prescribed. The period of warnings is not stipulated in the list of prescribed sanctions but is set out elsewhere in the code. It is also telling that the proforma final written warning attached as Annexure "C" to the disciplinary code stipulates that it shall last twelve months and does not provide for alternative periods. Accordingly, the arbitrator's assumption that the code provides for flexibility in the duration of warnings has no foundation in the text of the code. In the circumstances, it is difficult to see on the evidence how it can be argued that the warning fell away after six months when everything points to twelve months as the applicable period of a final written warning and that the six-month period stipulated on the issued warning was a genuine mistake. Moreover, one only has to consider the severity of the misconduct underlying the issuing of that warning to appreciate that, even if the length of a final written warning could be varied depending on aggravating and mitigating factors, this was a case in which aggravating factors significantly outweighed mitigating ones and a curtailment of the normal twelve-month period would have been very baffling.

[30] Mvakwa argued that because the employer was not aware of this error at the time of his dismissal, it could not rely on the correct version at the arbitration. This is at odds with the principle that an arbitration hearing is a hearing *de novo* and the NLC was entitled to advance its case that the final written warning was contrary to the code.

[31] On the evidence before her, the arbitrator's conclusion that the final written warning was only valid for six months is unsustainable as a tenable finding.

The arbitrator's remedial remedy

[32] The question of whether the arbitrator was entitled to proscribe testing and a driving course as part of her award, is a factor which might have a bearing on determining if dismissal was an appropriate sanction. In unfair dismissal disputes, the remedies available to an arbitrator are reinstatement, re-employment and compensation. No authority was cited by the NLC to support its contention. It is a common practice that relief in

LABOUR COURT

the form of reinstatement or re-employment may be subject to conditions such as the imposition of a final warning. In my view, it was not beyond the bounds of the arbitrator's competence to impose remedial action which was in conformity with the NLC's fleet management policy.

Overall evaluation of the award on the evidence

[33] In light of the discussion above, the arbitrator's redefinition of the first charge and her disregard of the final written warning issued in October 2019 were material and significant flaws in her reasoning which no reasonable arbitrator would have made. The combined effect of both of these findings was to minimize the severity of Mvakwa's misconduct and enabled the arbitrator to avoid having to consider whether corrective discipline was feasible.

[34] It is telling that the arbitrator uncritically accepted his explanation of taking the car out late on a Sunday night in order to charge it, when he had previously charged it at work by letting the motor run without driving it. She also ignored the evidence that he had been driving the vehicle on alternate days in the preceding week, without the battery running down and blithely accepted his explanation for not phoning the relevant manager to drive the car on Sunday night, simply because he did not think it was appropriate to phone her then. She failed to appreciate that Mvakwa believed he could exercise his own discretion despite his disciplinary history relating to vehicle usage and despite previously having been held up at night when driving an NLC vehicle. Although his explanation was not seriously disputed, it was also not canvassed in even the most cursory detail with the NLC's witnesses.

[35] The NLC argues also that the remedial action ordered by the arbitrator did not address a fundamental problem about Mvakwa's conduct, namely that irrespective of his poor driving skills, he did not adhere to the policies governing vehicle use. Amongst other things, he had twice driven the vehicle in circumstances where he knew the vehicle was not issued for the use to which he put it and, on the second occasion, having already been previously issued with a serious final warning. The fleet policy, in

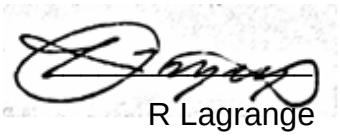
LABOUR COURT

part, was to protect its vehicle assets and unauthorised use of the vehicles. A breach of it obviously potentially exposed it to the risk of avoidable damage or loss. The arbitrator failed to appreciate that the NLC was entitled to expect compliance with the policy and it is difficult to understand on what basis the arbitrator was confident Mvakwa's compliance could be relied on in future if he was reinstated.

[36] In light of the discussion above, I am satisfied that it was not tenable of the arbitrator to conclude that Mvakwa's dismissal was fair based on the evidence before her.

Order

1. The arbitration award of the Second Respondent under the auspices of the First Respondent on 10 November 2021 in case number WECT 3994-21 is reviewed and set aside.
2. The dismissal of the Third Respondent, Mr Y Mvakwa, by the Applicant was substantively fair.
3. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	MK Mathipa
Instructed by:	Malebye Motaung Mtembu Inc.
For the Respondent:	B Aarninkohf from Aarninkhof Attorneys

LABOUR COURT