Arbitration Award Rendered

Case Number: ***LP4102-18***
Commissioner: ***Mpho Brendah Mabidi***
Date of Award: ***25-Oct-2018***

In the **ARBITRATION** between

DETAWU obo Siobo, James
(Union/Applicant)

and

Mukondeleli Bus Service
(Respondent)

Union/Employee's representative:
Union/Applicant's address: ***100 Market Street***
Office Number 04
Amie Bava Square
Polokwane
Telephone: ***0152970958***
Telefax: ***0152970967***
E-mail: ***freddy@detawu.org.za***

Employer's representative:
Respondent's address: ***P.O.Box 3979***
Thohoyandou
0950

Telephone: ***0159625329***
Telefax: ***0159625329***
E-mail: ***omegaline@gmail.com***

DETAILS OF HEARING AND ARBITRATION

[1]. The arbitration hearing was held on the 21st of August and 16th of October 2018 at Thohoyandou Labour Centre, Leisure Lodge, opposite Khoroni Hotel (Western Side), Thohoyandou, Limpopo Province at 09:00am. The dispute was referred to arbitration in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). The employee, DETAWU obo Siobo James was present and represented by Mr Freddy Phupheli, a union official from DETAWU whilst the employer, Mukondeleli Bus Servce was represented by Ms Suzette Denton, union official from NOESA. The proceedings were digitally recorded and interpreted in Tshivenda by Mr Baloyi R.R. Both parties submitted their Closing Arguments which were noted.

ISSUE TO BE DECIDED

[2]. I am required to determine the existence of the dismissal of the employee. Once the existence is established, I must determine the procedural and/or substantive fairness thereof. If I find that the dismissal is unfair on procedure, substance or both, I must determine the appropriate relief in terms of section 193 of the Labour Relations Act ("the LRA").

BACKGROUND TO THE ISSUE

The following issues are common cause:-

[3]. The employee was employed by the employer as a Bus Driver since 10th of July 2015. He was earning a monthly salary in the amount of R 8 264-72. The employee was charged with charges as stated in page 6 of bundle "R". The sanction on the Outcome and Sanction Report stated *"After having considered mitigating arguments and the evidence as presented. I recommend that the employee be issued with a final written warning valid for 12 months from 26th March 2018 (ito the Labour Relations Act) and further order that the employee pays the total damages caused to the employer's left and right blades. This amount will be deducted from the remuneration of the*

employee by way of monthly instalments, each instalment not exceeding 25% of the employee's net salary."

The following issue is in dispute:-

[4]. The dismissal of the employee is in dispute. It is the employee's version that the employee was dismissed by the employer telephonically on the 04th of April 2018. The company failed to follow due process of law before dismissing the employee. The employer on the other hand stated that the company never dismissed the employee. The employer uplifted the employee's suspension on the 04th of April 2018 and they never received any communication from the employee or the union that they were challenging the outcome of the hearing. The employer disputes that he refused the employee to report for duty and further disputes that he forced the employee to sign an acknowledgment of debt in the amount of R 9 000-00. The employee left employment on his own accord. The employee seeks reinstated without loss of remuneration as a relief. The onus to prove the existence of the dismissal rests on the employee.

SURVEY OF EVIDENCE AND ARGUMENTS

EMPLOYEE'S EVIDENCE

Documentary evidence

[5]. The employee submitted a bundle of documents that was marked bundle "A"- signed Outcome & Sanction Report. The documents in the bundle are what it purport to be and shall be referred to as such during the proceedings. The individual documents are not listed in this award for the sake of brevity.

Oral evidence

[6]. **Mr James Mbudziseni Siobo** testified under oath that he was employed by the employer as a Bus Driver. He received the outcome of the sanction on the 04th of April 2018 recommending that he be issued with a final written warning valid for (12) twelve months and that he further pays the total

damages caused to the employer's left and right blades by way of deduction in monthly instalments not exceeding 25% of the employee's net salary. On the date in question he was issued with another document titled acknowledgment of debt which the employer wanted him to sign it. He refused to sign it stating that he was unable to sign since the acknowledgement of debt which did not have any figure or quantification of the damages incurred by the company. Mr Mathivha (Managing Director) informed him that he must sign the acknowledgement of debt to enable him to report for work. He refused to sign the acknowledgement of debt and the employer disposed his tools of trade (ie his bus and ticket book). He has never received any document(s) from the employer stating that his suspension was uplifted. On the 30th of May 2018, he went to the employer and met him personally at his office enquiring about his salary. He further made telephone enquiry to Mr Mathivha on or about 16th or 17th of April 2018 enquiring about his salary. The employer informed him on the 30th of May 2018 that if he does not append his signature on the acknowledgment of debt it would be impossible for him to report for duty.

[7]. He never received any letter from the employer warning him that he was not reporting for duty. Mr Mathivha made him to stay at home merely because he refused to sign an acknowledgement of debt. After the 04th of April 2018, the company was no longer contributing any Provident Fund and Unemployment Insurance Fund including COIDA [Compensation for Occupational Injuries and Deseases Act). The company withheld his salary in that he refused to sign an acknowledgement of debt. He does not stay far away from his employer. The employer knew the whereabouts of the employee and he failed to call him to report for work. He was informed by Mr Mathivha that since he was refusing to sign the acknowledgement of debt he ceased to be an employee of the company.

[8]. *Under cross-examination, the witness stated, amongst others, the following:-*

He cannot remember when he joined the union. He confirmed union levies deducted for the month of March 2018. The main objective of being a union member is to be represented at any given time. He failed to inform his union that the employer forced him to sign the acknowledgement of debt because of the on-going bus strike. Mr Maguvhe Richard and Mr Norman

are shop stewards who represented him at the hearing. He contacted his union for the first time on the 04th of April 2018 when Mr Maguvhe took his papers at the bus rank. Mr Mathivha deals with pay roll. He spoke with him over the phone with regard to his outstanding salary and never asked him when he should report for duty since he was informed by him that he would not report for duty if he failed to sign an acknowledgement of debt.

[9]. He submitted his documents to his union for further handling. He was given the necessary support and he was also properly assisted by his union. He spoke with the employer on the 16th of April 2018 with regard to his salary. He was unhappy about the outcome of the hearing in that commuters carry mealie-meal and cements to be loaded in the bus which cause blades to be broken. He was unhappy with the outcome in that the amount of the damage on the outcome was not mentioned in the sanction report. He does not have any issues with paying damages incurred by the company but the unquantified amount of R 9000-00 was uttered by Mr Mathivha on the 04th of April 2018. He confirmed that he was informed that he will pay for damages but it was unquantified. There was no specific amount he was willing to pay for the damages. The employer failed to pay him in that he refused to sign the acknowledgement of debt. He denies that he refused to accept accountability on the damage suffered by the employer. He was unaware that the employee may deduct monies from his salary to pay for damages. He never walked away after receiving the findings of the chairperson of the enquiry.

[10]. *Under re-examination, the witness stated, amongst others, the following:-*

The amount of R 9000-00 was communicated for the first time to him on the 04th of April 2018 by the employer. The employer refused him to report for duty in that he refused to sign an acknowledgement of debt. On the 15th of April 2018 when he enquired about his salary, the employer never informed him to come to work. He does not have any knowledge when Mr Maguvhe Richard (shop steward) sent his documents to the union for further handling.

EMPLOYER'S EVIDENCE

[11]. The employer submitted a bundle of documents that was marked bundle "R". The documents in the bundle are what they purport to be and shall be referred to as such during the proceedings. The individual documents are not listed in this award for the sake of brevity.

Oral evidence

[12]. **Mr Pandelani Orich Mathivha** testified under oath that he is the Managing Director of the company. He is a member of NOESA in good standing for about (5) five years. All disciplinary enquiries are conducted by NOESA. He was not part of the disciplinary enquiry of the employee however he issued the employee with the outcome report. He met the employee on the 04th of April 2018 at Thohoyandou Bus Rank and he called the Cashier as a witness when reading out the outcome report to the employee in English. He translated same to Tshivenda and the employee stated that he understood the contents of the outcome report. The employer and the cashier signed the acknowledgment confirming receipt. He never uttered any word to the employee that he must not come back to work, he only read out to the employee the outcome report. He never had any altercation with the employee on the date in question. He never informed the employee that since he refused to sign the document he could not come back to work. He never spoke anything to the employee on the date in question except to read out the contents of the sanction report to him. The employee never asked questions for clarity with regard to the sanction report. He does not know why the employee failed to return to work. He refused to come to work unless the employer agreed not to deduct for damages. He had a discussion with the employee over the phone with regard to payments of damages and he informed him that he could not afford to pay the R 9000-00 for damages as he has a lot of debts and he could not come back to work. The company never dismissed him however, he personally called him and informed him that should come back to work and furthermore he must pay for the damages incurred. He said he would never come back to work but they would meet at CCMA. He pleaded with him to come back to work but he refused. He does not work with salary payments however he takes the salary pay sheet to the bank and the bank processes

payments to employees. He never received any complaint that the employee never received his salary. He never received any grievances or communication from the union except the referral form from CCMA.

[13]. *Under cross-examination, the witness stated, amongst others, the following:-*

He confirmed that before the hearing the employee was not reporting for duty. The employee's bus was not functional but was advised to report for duty even though his bus was functional but he refused to comply. The notice of hearing was explained thoroughly to him. The employee abandoned his bus and left. He made a telephone call to him that he must report for duty and furthermore that he must pay for the damages and he refused to do so. He could recall the date in which the misconduct was committed but by then the employee was not suspended. The employee was never charged for abscondment. The employee was never suspended until he went to the hearing. He (Mr Mathivha) was not at work on the 19th of March 2018 when the employee was put on suspension. He confirmed that a proper consultation was held between him and his representative in relation to the employee's case. His representative would never misrepresent him. He does not know how much the damages incurred or how the R 9000-00 was quantified but he enquired from people who knew and the figure of R 9 000-00 was obtained. He made a telephone call to the employee pleading with him to report for duty and the employee stated that he was prepared to report for duty but he was not ready to pay for the damages.

[14]. They never discussed the issues of damages on the 04th of April 2018 but he only read out and explained the contents of the sanction report. The amount of R 9000-00 for damages was never discussed on the 04th of April 2018. He never explained to the employee how this R 9000-00 was quantified but only discussed the contents of the sanction report. The only document he read out and explained to the employee was the sanction report, he never produce any other document and forced the employee to sign. The employee was never told not to report for work after explaining the contents of the sanction report but he chose to stay at home on his own accord. He read and explained the contents of the sanction report to the

employee and one of the cashiers was present witness such. He called the employee after (7) seven days, realising that he was not reporting for duty. He did follow proper procedure by calling the employee to report for duty but he chose to stay at home. He waited for him to report for duty and he further informed him telephonically that they would meet at CCMA. He never told the employee not to report for work. He pleaded with the employee telephonically that he must report for work and deductions for damages would be implemented but he decided to leave. He never withheld his salary for the month of April 2018 because he refused to sign an acknowledgment of debt. His duty is to receive payment sheet from his office and took it to the bank and the bank processes payment to employees. He could remember when last did the company deducted provident fund and unemployment insurance fund benefits.

[15] *Under re-examination, the witness stated, amongst others, the following:-* The employee was never dismissed but left employment on his own accord. All bus drives are not allowed to stay at home if their buses were not functional, they must continue to report for duty despite the bus not being functional. He conceded that the employee was suspended on the 19th of March 2018. The employee decided to stay at home on his own accord. He indicated that he would never report for duty if the employer implemented the deduction. The employee's name still exists in the books of the employer, he was never dismissed but left employment on his own accord.

ANALYSIS OF EVIDENCE AND ARGUMENTS

Substantive fairness

[16] In terms of section 192(1) of the Labour Relations Act 66 of 1995, if there is a dispute about the existence of the dismissal, the onus is on the employee party to establish the existence of the dismissal. Once the employee succeeds in this respect, the onus then shifts to the employer to prove on a balance of probabilities that the dismissal was fair, both in terms of substance and procedure. In this case, the dismissal was in dispute and therefore, the employee bears the onus of proving, on a balance of probabilities the existence of dismissal. Section1 38(7)(a) of the Labour

Relations Act 66 of 1995 ("the Act") also enjoins me to provide brief reasons for my findings.

[17]. Taking into the account evidence adduced by both witnesses, I find numerous contradictions with regard to the employer's witness in his testimony. It is keen to note that both parties were well represented in the disciplinary enquiry and at the arbitration hearing. It is common cause that the employee was not charged with abscondment but I find it difficult to understand why the employer failed to enquire in writing the whereabouts of the employee taking into account he was not reporting for work as pleaded. The employer has an obligation to satisfy himself as to the true intention of the employee that he was not willing to return to work. The mere speculation that the employee was not reporting for duty and deemed as if he has left on his own accord does not have any merit. Where the employee failed to contact the employer about his whereabouts, the employer has an obligation in law to establish his whereabouts. The purpose of ascertaining the employee's whereabouts is to warn him of the possible consequences he might suffer if he continued not to report for duty. Furthermore, to determine as an employer whether there is a valid reason for failure to report for duty and why the employee could not contact the employer about his absence. In this way the employer would be satisfying himself that the employee has no intention of returning to work.

[18]. The employer should have sent a letter to the employee's last known address informing him that unless he report for duty within a specified date and time, will be regarded as abscondment and the company would take further steps against him. If the employee returns to work by the specified date, the employer is entitled to enquire as to the reasons why he was not reporting for work and why he did not notify the employer about the reasons and circumstances causing the absence. The employer can then base on the explanation given decide on whether or not to take further action against the employee, for example, disciplinary action. As already stated, the employer has a duty to establish the employee's intention of whether he was not returning to work in a fair process. To satisfy the requirements of fairness, the employer had to show that it took steps to locate the whereabouts of the employee. The employer has an obligation to

give effect to the *audi alteram partem* rule before it could take a decision to dismiss such an employee. The employer must therefore try and locate the employee and hold a hearing before the employee could be dismissed. There is no principle of law in private sector to support the view that an employee has "dismissed himself". The employer who exercises a choice of dismissing an employee for failure to report for duty must do so for a fair reason and a fair procedure must be followed. It is unfortunately not the case in this instance. I find after weighing all evidence before me that the employee proved the existence of the dismissal.

[19]. The employee's representative stated that he was praying for reinstatement with retrospective benefits from date of dismissal which I concur. In *Nel v Oudtshoorn Municipality & another (2013) 34 ILJ 1737 (SCA), the meaning of reinstatement was explained with reference to a Constitutional Court's finding in Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration that reinstatement meant:- "To put the employee back into the same position he occupied before the dismissal on the same terms and conditions. Reinstatement is the primary remedy in unfair dismissal disputes it is aimed at placing an employee in the position he would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal and do not conclude an employment contract afresh. The employer merely restores the position to what it was before the dismissal."*

Procedural Fairness

[20]. Procedural fairness was also in dispute. The employee challenged procedural fairness on the ground that the employee was dismissed without following due process of the law. The employer's representative stated on record that there was no need to follow the due process of the law in that the employee was not dismissed but left employment on his own accord. I have already stated somewhere above the procedure which the employer must follow to satisfy himself on the true intention of the employee, which, unfortunately, cannot be repeated here. The requirements of a disciplinary hearing and the standard of proof required decided in the

case of ***Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others [2006] 9 BLLR 833 (LC),*** *"the court confirmed that the Labour Relations Act is silent on the contents of the notion of procedural fairness, the nature and extent of the right is spelled out in the Code of Good Practice: Dismissal in Schedule 8. The Code requires no more than that before dismissing an employee, the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take decision and give the employee of that decision".* There was no evidence led to rebut the employee's version in relation to the procedural fairness. In the circumstances, I therefore find that the employer failed to prove that the dismissal was effected in accordance with a fair procedure.

AWARD

[21]. I find the dismissal of the employee, Mr James Mbusidzeni Siobo to be procedurally unfair and substantively fair.

[22]. I order the employer, Mukondeleli Bus Service to reinstate the employee, Mr James Mbudziseni Siobo, on the same terms and conditions of employment which governed their employment relationship prior to the dismissal dated 04th of April 2018.

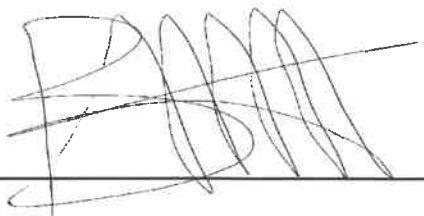
[23]. The said reinstatement is to operate retrospectively with effect from 04th April 2018. As a result of the retrospective effect of the reinstatement, the employer is ordered to pay the employee, Mr James Mbudziseni Siobo back pay in the amount of R 49 588-32 (Forty Nine Thousand Five Hundred and Eighty Eight Rand and Thirty Two Cents) being the employee's six (6) months' salary minus such deductions as the employer party is in terms of the law obliged or entitled to make.

[24]. I further, order the employer, Mukondeleli Bus Service to pay the employee an amount of R 8 264-72 (Eight Thousand Two Hundred and Sixty Four Rand and Seventy Two Cents) being the employee's outstanding salary for the month of April 2018 minus such deductions as the employer party is in terms of the law obliged or entitled to make.

[25]. The above amounts are due and payable by the employer to the employee on or before the 15th November 2018.

[26]. Furthermore, the said amount shall earn interest in terms of Section 143(2) of the Labour Relations Act 66 of 1995.

[27]. The employee must report for duty on the 15th of November 2018 at 08:00am at employer's premises.

Signature: 

Commissioner: ***Mpho Brendah Mabidi***

Sector: ***Transport (private)***