

ARBITRATION AWARD

Commissioner: Willie M Ralefeta
Case No.: D1130/JHB/6477/06A
Date of Award: 14 December 2006

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

In the ARBITRATION between:

MTWU obo Madlinkosi Joseph Mtshali & Samuel John Ndlovu

(Union / Applicant)

and

Lobtrans SA (Pty) Ltd

(Respondent)

Union/Applicant's representative: Cleanet Qanda
Union/Applicant's address: PO Box 30925
Braamfontein
2017
Telephone: (011) 403-1619
Telefax: (011) 403-1852

Respondent's representative: Charlene Du Preez
Respondent's address: PO Box 975
Telephone: (011) 494-2181
Telefax: (011) 494-1187

Details of the hearing and representation

This is an arbitration in terms of the provisions of Section 188 read with Section 191 of the LRA 66 of 1995 ("the Act") Mr Mandlinkosi Joseph Mtshali & Samuel Joseph Ndlovu who are the applicants were represented by Mr Cleanet Qanda during the arbitration proceedings. The Respondent, Lobtrans SA (Pty) Ltd was represented by Ms Charlene Du Preez, the Human Resources Manager. The arbitration proceedings were conducted on the 14th December 2006 at the Bargaining Council Offices in Braamfontein.

Issues in dispute

To determine whether the dismissal of the applicant was both procedurally and substantively fair

Submission of evidence and arguments

Opening Statement by Ms Charlene Du Preez-Human Resources Manager

Ms Charlene Du Preez opened the proceedings with the following statement:

On the 22nd August 2006 the employer received a letter from the MTWU informing them that they had unfairly dismissed Mr Mtshali and Mr Ndlovu. The matter was then referred to the bargaining council where it was conciliated on the 22nd September 2006 and remained unresolved. The trade union disputed that the dismissal was both substantively and procedurally unfair.

No pre-arbitration meeting was conducted before the arbitration proceedings. The employer will dispute that the two applicants; Mr Ndlovu and Mr Mtshali were acquitted on the 14th and the 15th June 2006 respectively. (See letters from the magistrate in Botswana on pages 14th and 15th in the bundle of documents).

Following receipt of the letters from the magistrate, the Human Resources Manager attempted to contact the applicants on the company issued cell phones without any avail. (See pages 36 and 37 of the bundle). The Human Resources Manager tried to get hold of them for almost three weeks without success. She phoned them every second day on the office phone but could not find them.

On the 12th July 2006 the company sent them letters of having absconded. (See pages 19 and 28 letters of absconding to Mr Mtshali and Mr Ndlovu respectively). The second letter was sent notifying them of the disciplinary enquiry scheduled for 26th July 2006. See pages 20 and 29 second letters of absconding to Mr Mtshali and Mr Ndlovu respectively) When the applicants failed to respond the employer conducted a disciplinary enquiry on the 26th July 2006 in their absentia.

Both applicants were dismissed for absconding from duty. Both applicants were sent appeal forms

The respondent will also prove that the addresses to which the correspondence was sent were the addresses submitted to the company by the applicants in their application forms for employment. (See pages 34 and 35 respectively).

Further the respondent will produce written evidence to prove that the dismissal of the applicants was both procedurally and substantively fair.

Ms Charlene Du Preez as the sole witness of the respondent

Ms Charlene Du Preez testified under oath as follows:

She was employed by Lobtrans SA (Pty) Ltd as a Human Resources Officer in February 2005. She was promoted to the position of the Human Resources Manager in April 2006. Lobtrans' business is to transport fuel from Johannesburg to the countries across the borders of South Africa. They have depots in Johannesburg, Cape Town, Pietermaritzburg, Durban, Botswana and several towns.

Mr Ndlovu and Mr Mtshali were arrested in Botswana on 7th June 2006 for alleged stealing fuel from the company truck and selling. The employer received a letter on 2006 August 2006 from the trade union stating that their members, Mr Mtshali and Mr Ndlovu were unfairly dismissed.

On pages 14 and 15 of the bundle are letters from the Republic of Botswana indicating that Mr Mtshali and Mr Ndlovu were acquitted from the magistrate court on 14th and 15th June 2006 respectively. Both applicants had returned to South Africa after their acquittal but failed to report for work. For almost three weeks from the 16th June 2006, the employer tried to contact them on their company cell phones without any avail.

The applicants were issued with company cell phones and that can be proven by referring to pages 36 and 37 of the bundle. On the 12th July 2006 the employer started issuing the first letters of absconding. (See pages 19 and 28. On 21st July 2006 another letter was issued out to the applicants notifying them of the disciplinary hearing scheduled for 26th July 2006. The charges were absconding from duty. On 26th July 2006 a disciplinary hearing was conducted against them and they were dismissed in absentia.

They were given an opportunity to appeal against their dismissal but failed to do so. (See pages 22, 23, 24, 31, 32 and 33 in the bundle). All the letters were accompanied by registered mail and sent to the addresses supplied by the applicants when they joined the company. (See pages 34 and 35 letters confirming applicant's addresses in the bundle).

Both applicants were issued with the company disciplinary code handbook (See pages 16, 17 of the bundle for Mr Mtshali and pages 25 and 26 of the bundle for Mr Ndlovu respectively). They were familiar with the company rules regarding absconding. Both applicants were released on 14th and 15th June respectively but despite the fact that they had company cell phones, they failed to inform the employer about their whereabouts. The employer attempted to contact them but also failed. Therefore the dismissal for absconding from duty was both procedurally and substantively fair.

Cross-examination

Under cross-examination the witness testified that the applicants were given company cell phones to call specific company contact numbers if they needed to contact the employer. Further the witness asserted that for a period of more than two weeks the company attempted to contact them on their company cell phones without any avail. Further the witness admitted that they knew that the applicants were in jail because they had informed them about their arrest in Botswana.

Further the witness argued that the applicants had informed the employer that they were arrested for stealing diesel from the truck they were driving to go and deliver it in Botswana. Further the witness admitted that once the employer heard of the applicant's arrest, she went to visit them with one of the Human Resources Directors.

The witness further testified that she asked the applicants how the company could assist them, and they requested to be bailed out of jail. Further the witness contended that the prison officials told them to return to South Africa and wait for the applicants to be released. Further the witness admitted that they knew that the applicants were in jail but they did not bail them out.

Further the witness argued that the applicants were released from prison on 14th June 2006. The witness further contended that they never contacted the employer to inform him that they were waiting for the case to finish until the 22nd August 2006. The witness further argued that on the 22nd August 2006 the applicants were already dismissed from the company that is the reason the security officers refused them to enter the company premises.

Further the witness contended that they could not reopen the case on 22nd August 2006 because the applicants were in South Africa from the 14th June 2006. The witness further argued that Mr Mtshali was dismissed after he had been acquitted from the magistrate's court not while he was in jail.

The witness argued Mr Mtshali was dismissed after certain procedures were followed. Further, the witness contended that the applicants were both released

from jail on the 14th and 15th June 2006 respectively. Further the witness contended that the company tried to contact them without any avail.

Further the witness argued that the applicants were in South Africa from 14th to the 19th June 2006 but never attempted to contact the company. The witness asserted that the letters of acquittal of the two applicants were sent to the company by the magistrate court on the 14th June 2006 in Botswana.

Mr Mandlinkosi Joseph Mtshali as the applicant witness

Mr Mandlinkosi Joseph Mtshali testified under oath as follows:

- He started working for Lobtrans (Pty) Ltd on 23rd December 2004 as a driver;
- He was earning R3,555.49 pm;
- He was based at the Johannesburg depot;
- On 7th June 2006 he was sent to deliver diesel in Botswana;
- On 3rd June the police in Lobatse arrested him because they suspected that he was stealing petrol from the truck he was driving;
- The police transferred him to Gaborone police station where he had to appear in court;
- In Gaborone he met his colleague, John Ndlovu who was also under arrest for the same charges of stealing petrol;
- While in jail they were visited by their managers, Mr Pillay and Ms Du Preez who promised to come and bail them out of jail, but they never came back;
- On 14th June 2006, his brother bailed him out and he in turn bailed out his colleague, Mr Ndlovu on the following day;
- They used taxis to travel back to South Africa on 16th June 2006;
- On 19th June 2006 they went to work with the intention of reporting that they were still going back to Botswana because they had to appear in court on 20th June 2006;
- At work the security officers refused them entry into the premises of the company;
- Another reason for going to work was to speak to the employer to organize transport for them to go back to Botswana;
- They appeared in court in Botswana on 20th June 2006 and their case was postponed to 3rd July 2006;
- They stayed in Botswana until 16th August 2006;
- They were dismissed while in Botswana attending to the case;
- They referred their matter to their shop steward who declared a dispute against the employer at the bargaining council.

Cross-examination

Under cross-examination the witness contested that he was released from jail on 15th June 2006 and returned to South Africa the following day on 16th June 2006. Further the witness argued that he did not contact the employer on 16th June 2006 because it was a holiday.

Further the witness contended that he went to work on the 19th June 2006 and was in hurry to proceed to Botswana to appear in court on the 20th June 2006. The witness further admitted that he was issued with a company cell phone on 22nd March 2006.

Further the witness contended that he did not phone the Human Resources Manager, Charlene Dupreez because her contact details were not on the company staff list. Further the witness admitted having received the BVO or disciplinary code handbook in March 2006. Further the witness contested that his company cell phone was not working that is why he did not contact the Human Resources Manager.

The witness further contested that on 15th June 2006 he tried to phone the managing director, Mr Rashid Pillay but he did not respond. The witness further contested that he was not in possession of the updated staff telephone list as he had left all his belongings on the truck.

Further the witness contested that the reason he could not phone was that his cell phone was blocked. He further argued in his testimony that he used John's phone because his phone never functioned due to blockage by the company. He further contested that John's phone did not belong to the company.

Samuel John Ndlovu as the applicant witness

John Ndlovu testified under oath as follows:

- He started working for the employer on 11th November 2005 as a driver earning R3550.00 pm;
- He does not know the date of his dismissal because all the correspondence from the company was sent to his colleague's address, Mr Mtshali;
- He was arrested on 2nd June 2006 at Lobatse in Botswana for being suspected of stealing petrol from his truck;
- He was locked up in the police cells from 2nd June 2006 to 7th June 2006;
- They tried to negotiate for a free bail because they did not understand the reason for their arrest;
- They could not be granted a free bail as they were not Botswana citizens;
- They had to pay R5,000 each to be released on bail;

- On 14th June 2006 his brother came to bail him out and later the following day, he bailed Mtshali out;
- On 15th June 2006 he board a taxi with his colleague from Botswana to South Africa;
- They arrived in South Africa on 16th June 2006;
- On the 16th June 2006 he went to the depot in Aero ton but did not find his supervisor;
- He tried to phone Rashid but he did not respond, he then went back home;
- On 19th June 2006 he and Mtshali went to work with the hope of organizing transport to Botswana, but the security officer refused them entry into the company premises;
- He then proceeded to Botswana with his colleague, Mr Mtshali on the same day in a taxi;
- They appeared in court the following day on 20th June 2006 in Botswana;
- Their case was postponed to 1st July 2006;
- It was postponed again to 3rd August 2006 and postponed again to 10th August 2006;
- Eventually on 16th August 2006 he was acquitted;
- On 17th August 2006 they were refunded their bail;
- They left Botswana on 17th and arrived in South Africa on 18th August 2006;
- On 22nd August 2006 he went to report at the company but the security officer refused him and his colleague entry because they were dismissed;
- He did not have any documentary proof of his acquittal and bail refund; and
- We received a letter from the lawyer that they were acquitted on 16th August 2006.

Cross-examination

Under cross examination the witness admitted that he had received the BVO disciplinary code hand book and was aware of the company rules. Further he admitted that he was responsible to inform the employer about his whereabouts. Further the witness contested that on 16th June 2006 he went to the company depot in Johannesburg but found the security officer at the gate who made him to wait outside.

Further the witness argued that Jacob Diva saw him on 16th June 2006 waiting at the company gate. The witness further argued that on 19th June he did not phone because his shop steward, Abner was not at work. Further the witness contested that he did not phone the shop steward on the 19th June 2006 because he assumed that management wanted them to finish their case in Botswana before they could speak to them. Further the witness asserted that he had to travel to Botswana on 19th June 2006.

The witness further admitted that he did not have any proof that he had to appear in court on 20th June 2006.

Analysis of evidence and arguments

In terms of the provisions of Section 188 read with Schedule 8(2) of the Act, a dismissal that is not automatically unfair is unfair if:

- 1) the employer fails to prove that the reason for dismissal is related to the employees conduct; or
- 2) capacity; or
- 3) based on the employer's operational requirements; and
- 4) that dismissal was effected in accordance with a fair procedure

Considering the submissions and evidence from both parties, I find the dismissal to be procedurally fair because of the following reasons:

- The respondent has evidential proof that both applicants were acquitted by the magistrate in Botswana on 14th and 15th June 2006 (See pages 14 and 15 of the bundle A from the respondent);
- Both applicants were back in South Africa as confirmed in their admission during the cross-examination;
- Both Mtshali and Ndlovu failed to provide documents from court to prove that they had to report back to Botswana for a pending case on the 19th June 2006;
- Both Mtshali and Ndlovu were issued with company cell phones;
- Both cell phones contained all supervisors' and managers contact numbers which they could phone free of charge;
- The phones have international roaming;
- The onus rests on them to have notified the employer about their unauthorized absence and they did not do so even when their case was postponed several times;
- The respondent sent notices to them informing them of its intentions to dismiss for absconding but never bothered to respond and explained about their whereabouts;
- The respondent decided to dismiss the applicants in absentia because they remained silent and never communicated with him and never responded to his letters.

Considering the arguments and evidence above, I have no alternative but to regard the dismissal of the respondent procedurally fair.

In terms of Schedule 8 (7) of the LRA regarding guidelines in cases of dismissal for misconduct-Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard contravened was valid, reasonable, known and consistently applied to every body within the organization.

According to the applicants' and the respondent's evidence and submissions I consider the dismissal to be substantively fair because of the following reasons:

- Both Mtshali and Ndlovu admitted during cross-examination for having received the company's disciplinary code and being conversant with the company rules regarding absconding (See pages 16 and 17 and 25 and 26 of the bundle A);
- Both Mtshali and Ndlovu argued in their testimony that they reported to the depot in Johannesburg on the 16th and 19th June 2006, but failed to avail any witnesses to support their evidence;
- Both Mtshali and Ndlovu could not state clearly names of the security officers they spoke to during their presence at the depot; and
- Both Mtshali and Ndlovu were free from 15th to 19th June 2006 but failed to inform the respondent and the trade shop stewards about their whereabouts.

Considering the arguments evidence of both parties above, I find the dismissal of both Mtshali and Ndlovu to be substantively fair.

Therefore, it is my view that the respondent did comply with the provisions of Section 188 and Schedule 8 of the LRA.

Against this backdrop and on the balance of probability, I find the dismissal of the applicants to be both procedurally and substantively fair. In conclusion therefore, I make the following award:

Award:

After having considered the evidence and arguments of both parties, I now make the following award:

- **That the dismissal of both Mandlinkosi Joseph Mtshali and Samuel John Ndlovu was procedurally and substantively fair and therefore must be upheld; and**
- **That I make no order as to costs.**

Commissioner: Willie Moyahabo Ralefeta
Date: 28th December 2006

