ARBITRATION AWARD

Arbitrator: K. Gunase
Case Reference No.: GPRFBC 14772
Date of award: 14 June 2011

In the ARBITRATION between

SATAWU obo Henry Yato Zwane

(Union/Applicant/Employee)

And

Crossroads Distribution (Pty) Ltd

(Respondent/Employer)

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1. BACKGROUND, DETAILS OF HEARING AND REPRESENTATION

i. This dispute, involving an alleged unfair dismissal, was certified as unresolved on 19 January 2011 and referred to arbitration together with proof of service on 18 February 2011. The matter was first set down on 1 April 2011 when it was postponed by agreement and accordingly came before me on 4 May 2011. At this point Mr. Henry Yato Zwane, the applicant, attended in person together with his representative, Mr. E. Manyoni a SATAWU official. An interpreter, Ms. S. Vuso, was also present throughout the proceedings at the applicant's request. Ms. R. Oelofse, RFEA official, represented the respondent, Crossroads Distribution (Pty) Ltd. The parties were likewise in attendance at the second and last hearing on 2 June 2011.

ii. A brief pre-arbitration meeting was held in my presence on the first day. At this point the respondent's citation was confirmed as recorded hereinabove. Further, it was recorded as common cause that:

- The applicant was employed on 11 September 2006;
- The applicant worked for the respondent as a driver;
- The applicant earned R5 422,84 (basic, gross) per month at the time of his dismissal;
- The applicant was dismissed on 10 November 2010;
- The date of the (alleged) incident was 25 September 2010, and
- A disciplinary enquiry scheduled for 4 October 2010 was held on 13 October 2010.

Further, it was agreed that the respondent would begin with its case because the dismissal was not in dispute.

iii. Both parties produced a bundle of documents for the purposes of the hearing: The applicant's was recorded as 'A' and the respondent's as 'B'. Further, it was noted that the applicant sought retrospective reinstatement as relief.

iv. As noted the hearing was concluded on 2 June 2011 and this extended to the submission of oral closing argument. I add that the arbitration proceedings were digitally recorded and the Council retained same at the conclusion of each process.

2. ISSUE TO BE DECIDED

i. Whether the dismissal of the applicant is substantively and procedurally fair.

ii. Three charges were leveled against the applicant: 'A.W.O.L. Refusal to obey or carry out a lawful instruction given by a person in authority. Non-compliance with, or failure to follow established instructions' (p.1 of 'A').

iii. In so far as procedural fairness is concerned, the applicant averred that the chairperson of the disciplinary enquiry was biased.

3. SURVEY OF EVIDENCE AND ARGUMENT

As noted elsewhere, the proceedings were mechanically recorded. Thus what appears below is a summary of each party's case in so far as it is relevant for the purposes of this determination; it is by no means a minute of what transpired in the course of the proceedings.

The Respondent's Case

i. Mr. J. H. P. Strydom (Strydom) testified that he chaired the applicant's disciplinary enquiry and confirmed that he was the author of the documents contained on pages 1-4 of 'B'. Strydom stated that he found the applicant guilty 'on all three charges' and that the parties were given an opportunity to address him on aggravating and mitigating factors, which he then considered. The applicant had a valid final written warning for misconduct on his file, which he also considered, thus concluding that the termination of the applicant's services was the appropriate sanction.

ii. Strydom was cross-examined as well as re-examined.

iii. Mr. J. L. Wilskut (Wilskut), a manager in the respondent's employ, testified that the applicant worked under him. Referring to the contract with the Post Office, he stated that the respondent transported mail from Tshwane and Witspos to various regions and this was subject to a strict time schedule against which the respondent's performance was measured.

iv. As a result of the aforesaid drivers are to report at work one hour before the departure time and are required to arrive at the destination on time. The witness briefed most drivers, including the applicant, at their interviews at which point the contents of the contract were explained to them: it was agreed that a driver had a certain route and had to abide by the rules. Wilskut stated further that should the route be cancelled a driver would be diverted from his route to another due to the tight schedule; this was also agreed upon. In this regard he

added that drivers were so advised in meetings that were held. As to a driver's remuneration, Wilskut indicated that an hourly rate had been agreed upon but this resulted in drivers who did shorter routes earning less than their counterparts that served on the long distance routes. Consequently it was agreed that all the drivers would be paid a 'fixed pay rate'.

v. On Saturday, 25 September 2010 Wilskut was on duty because one of his supervisors was ill. As a result he organized the dispatch of the vehicles on the various routes. All the drivers in the yard were put on routes however the respondent ran short of a driver. As a result he instructed the applicant to do that route whereupon the applicant in turn asked him, 'Seeing my route is cancelled, where is the driver for this route?' The witness explained the situation after which the applicant refused to obey the instruction that he had given him. Wilskut then outlined the consequences of the applicant's refusal to obey the instruction to him; however the applicant 'blatantly insisted' and stated that he would not obey the instruction. Wilskut noted that he explained the situation to the applicant again; the applicant repeated that he would not obey the instruction. As a result Wilskut was forced to get another driver and later prepared a charge sheet to be handed to the applicant on Monday.

vi. The applicant was not given permission to leave after he had refused to follow the instruction. In this regard Wilskut added that the applicant was not given a further instruction after the aforesaid. Following the applicant's refusal he was busy with dispatches at the mail center in order to ensure that all the vehicles had left. When he returned to the office he did not see the applicant and continued with his work.

vii. After the applicant was given his letter of dismissal on 10 November 2010, he came to Wilskut who was in the yard with security personnel. The applicant said to him, 'James you fired me' and then 'started to hit' him. The people with Wilskut grabbed the applicant and took him away. Wilskut went to the office where his superior took a photograph of the bruise he had sustained. Wilskut also told his superior that he wanted to see a doctor, which he did and a document was completed in this regard (p.5 of 'B'). The witness added that he also laid a charge of assault at the police station but that the police could not find the applicant because he had left the yard; Wilskut is still waiting for this matter to be heard. He added that he would be unable to work with the applicant again.

viii. Regarding pages 3 & 4 of 'B' which refers to the applicant having received a final written warning at a disciplinary enquiry held on 1 October 2010, the witness noted that the applicant had appealed but that he was unsuccessful.

ix. Wilskut was cross-examined as well as re-examined and I asked a few questions for clarity; this concluded the respondent's case.

<u>The Applicant's Case (adduced with an interpreter in attendance)</u>

x. The applicant testified in support of his case. He stated, on the first charge of AWOL, that he had completed a leave form: one Philemon had approved his leave for 6-9 August 2010 (pp.4-5 of 'A') and this was the only period of absence that he could recall. The applicant obtained page 5 after his mother had taken ill and he needed to extend his leave, which was granted as far as he knew. Money had been deducted from his salary because it was granted as unpaid leave and no disciplinary action was taken against him when he returned to work after visiting his ill mother. He obtained the said document from the hospital after his dismissal.

xi. On 25 September 2010 he was advised that he was to drive to Cape Town (Route 30). As a result he reported for duty and at about 06h00 (while at the respondent's premises) he received a call from Wilskut who stated that his route is 'no longer going'. Hereafter Wilskut stated that he must take 'Route 3', which was not his route. The applicant's response to the aforesaid was 'what are the shunters and stand-by's supposed to do because this is something that they are supposed to do'. Wilskut responded that he is giving the applicant an instruction as the person in charge. The applicant then tried to explain that he 'does not mind doing it' but that it is something that the standbys are supposed to do because he was a driver that had an assigned route. Hereafter Wilskut called a standby, Mr. Albert Mdluli, to take the route; there were 5 standbys in the yard at the time. The applicant disputed that there were none and that Wilskut had to call someone to come in. The applicant remained on the premises till 11h00: it had been agreed that if a driver was not on his route, he had to stay in the yard until this time. Accordingly the applicant disputed the allegation that he had been absent without leave on the day.

xii. The applicant was asked to comment on Wilskut's evidence that he had been beaten up (by the applicant) on 10 November 2010. Hence he stated that 'this was new' to him and that he had 'never touched' Wilskut. The applicant recalled that they had an argument because he asked Wilskut when he was going to give him 'all that belonged' to him whereupon Wilskut responded that the applicant 'should get out of [his] face'. The

applicant added that he could not say why Wilskut believed that the alleged incident impaired the employment relationship: he had never laid a hand on Wilskut and they had only argued at which point Wilskut had pushed him. Furthermore Wilskut's attitude towards him changed when he (the applicant) bought a new car. He added that he wanted to return to the respondent's employ.

xiii. The applicant confirmed that the respondent had been inconsistent in dismissing him and cited the case of Mr. Majola who was not at work, had a route and was not dismissed. He could however not recall whether this person received a 12-month final written warning. As to the final written warning that the respondent referred to, the applicant stated that he never received same and disputed Wilskut's evidence in this regard.

xiv. The applicant received the notice to attend a disciplinary enquiry on the following Monday/Tuesday and Mr. Albert Mdluli represented him. The applicant believed that Strydom was biased because he had been found guilty although Mdluli had told Strydom about the standby drivers who were at the yard. The applicant could not recall whether a document recording his final written warning had been presented at the disciplinary enquiry.

xv. The applicant was cross-examined and re-examined. I also asked a few questions for clarity.

xvi. Mr. A. Mdluli (Mdluli) testified in support of the applicant's case. He stated that he works for the respondent as a driver and is also a shop steward. He was at the respondent's premises on 25 September 2010, as well as at the applicant's disciplinary enquiry where he served as representative. On the former occasion he was asleep when Wilskut telephoned him and advised that he was short of a driver for a route. Mdluli elaborated that he was a shunter on standby and thus not a driver that had a route. Further the rule was that if the respondent were short of a driver for a route, the shunter would take that route. Consequently he told Wilskut that he would be there after some 10 minutes. Hereafter Wilskut contacted him again and stated that he was short of another driver; Mdluli indicated that another standby, Bongani, was available and this individual took a route as well. The two drivers that were not at work were Messrs. Majola and Mampo.

xvii. Mdluli disputed Wilskut's evidence that he had contacted a driver from outside the premises and maintained that he was on the premises at the time because his home is in Nelspruit. He could not say whether there were any other standbys in the yard at the time because they each have their own sleeping quarters; he had only seen Bongani before going to sleep and thus advised Wilskut hereof.

xviii. The applicant was supposed to have done the Cape Town route but that was not running. When the applicant was asked to do another route he said that he could not because there were shunters to do it; thus one of them (either the witness or Bongani) did the route. He added that the applicant had to remain at the yard till 11h00. Should there be a supervisor the driver would ask if there was anything for him to do and if not, would be free to leave.

xix. Regarding the disciplinary enquiry the witness testified that Strydom had been biased because the applicant was dismissed notwithstanding the explanation of the manner in which the respondent operated. Further Majola was charged for not being at work, which was the same charge that the applicant faced although he was at work. Nonetheless Majola received a final written warning valid for 12 months.

xx. Mdluli was asked to comment on Wilskut's evidence that there was an agreement to the effect that if a driver has no route he could be put anywhere else; he responded that 'there was nothing like that'. Further, he had no knowledge of the final written warning that the respondent alluded to in respect of the applicant's disciplinary record; neither this nor the applicant's file was presented at the disciplinary enquiry.

xxi. Mdluli stated that they were told to wait for the outcome of the disciplinary enquiry; he was however not present on 10 November 2010 being the date of the applicant's dismissal.

xxii. Mdluli was cross-examined as well as re-examined and this concluded the applicant's case.

xxiii. As noted elsewhere the parties rendered oral closing submissions.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

In making this determination I record that whilst the summary hereinabove records the essence of each party's case, I have had regard to all the evidence adduced in the course of the hearing as well as the arguments submitted. Moreover this award has been rendered with due regard to section 138(7) of the Labour Relations Act No. 66 of 1995, as amended ('the Act'), which requires an arbitrator to issue an award with brief reasons.

i. In terms of section 192(2) of the Act the onus rests on the employer to prove the dismissal fair. This entails proving, on a balance of probabilities, that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure (s188(1) of the Act). Further in considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair

procedure regard must be had to Schedule 8 of the Act, which is the Code of Good Practice on Dismissals ('the Code'; s188(2)). I add that it is trite that these proceedings constituted a hearing *de novo* on the merits of the matter. *Vide*: *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC) at par [18]. As recorded elsewhere the respondent was charged with proving both the procedural and substantive fairness of the applicant's dismissal; I deal with each in turn.

ii. Item 4 of the Code regulates that an employer should conduct an investigation to determine whether there are grounds for dismissal and that this need not be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand and, the employee should be allowed the opportunity to state a case in response to the allegations and be afforded a reasonable time to prepare the response. The employer should also communicate the decision that should, preferably, be in writing.

iii. In the instance the applicant party did not aver that the respondent failed to comply with the aforesaid aspects regulated by the Code; instead the sole challenge was that Strydom was biased, which the respondent disputed.

iv. Bias, in the normal course, is inferred from the way in which the chairperson conducts the disciplinary enquiry. In the instance no such allegation was levelled during the enquiry, instead it stems from the contention that the applicant was dismissed in spite of certain facts being brought to Strydom's attention during the enquiry and that this demonstrates bias. In other words, the applicant party questioned the correctness of Strydom's verdict and recommendation that the applicant be dismissed. This was also evident from Mdluli's evidence when he stated that the sanction Strydom meted out and the timing of his outcomes were indicative of bias.

v. Having evaluated Strydom's evidence I find that there is nothing to indicate that he had pre-judged the case before him, that he deferred to the opinion of anyone in making his decision or that he did not make an independent decision, rightly or wrongly. There is also no evidence to suggest that he deliberately ignored the applicant's case and submissions presented at the enquiry and was thus not impartial.

vi. Accordingly I am not persuaded that Strydom was biased, as claimed, and determine that the applicant's dismissal was procedurally fair.

vii. I turn now to substantive fairness. As noted three charges were levelled against the applicant, the first being absence without leave (AWOL). Strydom testified during the arbitration that the applicant was found guilty on all three charges. It was however put to the applicant under cross-examination that Strydom's finding records that he was only found 'guilty on charges 2 and 3' (p.2 of 'B'). Indeed if one has regard to Strydom's 'Summary of the Proceedings of the Disciplinary Hearing' (pp.1-2 of 'B'), it records as an established fact that 'Mr. Zwane did report for duty on the day in question – 25/09/2010'. Moreover it is not recorded that the applicant was guilty on the first charge. In light of the aforesaid it would appear that the respondent's evidence on this score was ambiguous and, given Strydom's written summary, the applicant's dismissal was not premised on his culpability on the first charge. What also lends credence to this is Strydom's reference to 'failing to carry out a reasonable instruction' as 'a very serious charge which can not be tolerated' (on aggravating factors), and his reference to 'the offence' in his determination on the sanction.

viii. However given the ambivalence in the respondent's case I note further that it was nonetheless common cause that the applicant had reported for duty on 25 September 2010 and remained at work, on his own version, until 11h00. It was also the evidence of both the applicant and Mdluli that he was required to remain in attendance until this time and such testimony was not impeached. I add that Wilskut conceded under cross-examination that it was not the first time the applicant had left early because his route did not run, and that on the day the other routes had drivers so there was no other route for the applicant. Given the rule in place I am not persuaded that the respondent discharged the onus of proving that the applicant was culpable on this charge in any event.

ix. Turning to the further charges, the third appears to be a duplication of the second. I say this since the respondent led no evidence to reflect that there was, in fact, a difference between the two. If I am incorrect in this assessment, then I determine that the respondent failed to prove, on a balance of probabilities, that the applicant was culpable on 'non-compliance with, or failure to follow established instructions'. This is because the respondent's case hinged on the instruction that Wilskut issued and which the applicant (allegedly) failed to follow; this was essentially the second charge levelled against the applicant. Accordingly there was no evidence to support the third charge.

x. On the second charge, which was the 'refusal to obey or carry out a lawful instruction given by a person in authority' I note the following. It is trite that the duty to obey is fundamental to the employment relationship. Further the refusal to obey a lawful instruction, where the refusal is sufficiently serious, justifies summary

dismissal. In light of the aforesaid it stands to reason that the instruction or order should be within the contemplated scope of employment.

xi. In the instance it was not in dispute that:
- Wilskut was in a position of authority and that, as such, he could issue instructions.
- The applicant's designated route was cancelled and that another route had no driver.
- Wilskut issued an instruction to the applicant to drive on the different route.
- The applicant refused to obey the instruction.

xii. In light of the aforesaid and the evidence adduced it is apparent that the applicant questioned the instruction because he believed the route had to be allocated to a shunter; this was his understanding per the respondent's policy. It is also in fact what occurred when Mdluli and Bongani, who were both on the premises, were indeed allocated to two routes. As a result it is evident that the applicant did not view the instruction as either reasonable or lawful (although the charge refers only to the latter) given the terms of his contract of employment. On the other hand Wilskut testified that whilst there are drivers and shunters, drivers such as the applicant who had a designated route could nonetheless be reassigned to another.

xiii. In making the determination as to which version is the more probable and acceptable one I am guided by the dictum in *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC) where Francis J stated the following:

> "This Court is faced with two mutually destructive versions only one of which is correct. In deciding which version to accept and which one to reject I am obliged to consider inter alia the issue on a balance of probabilities. The onus is on the respondent to prove on a balance of probabilities that its version is the truth. The onus is discharged if the respondent can show by credible evidence that its version is the more probable and an acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where questions of demeanour and impression are measured against the contents of a witness's evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety" (at 390G-391A).

xiv. Wilskut was not a satisfactory witness and had to be cautioned to answer questions asked under cross-examination. His evidence was also ambivalent: on the one hand he stated that the instruction was issued and the consequences of the failure to obey outlined to the applicant. On the other hand he stated that if there were shunters, the respondent would not 'unnecessarily use a driver'. He also refused to answer or comment on pertinent issues under cross-examination, which did little to enhance his credibility.

xv. Further the lawfulness of an instruction is usually determined by reference to contract, statute or regulation. In the instance there was no documentary evidence to support the respondent's case whether in the form of a contract of employment or a written tabulation of the applicant's duties and responsibilities. The respondent also failed to prove that the applicant was, in fact, aware of a rule that he had to work on a route that was not his assigned one. Whilst Wilskut testified that this was stated at meetings his evidence on this score was distinctly unspecific. Further given his evidence on what had been agreed on with the drivers, there was nothing to substantiate his assertion that this amendment to the terms and conditions of employment had been agreed upon. Indeed Mdluli disputed that there was such an accord with the shop stewards. Accordingly the respondent provided no proof that the applicant was contractually bound to take another route because of an understanding in this regard.

xvi. The applicant's testimony under cross-examination on the 'company policy' is also pertinent: one Mr. Zipho Makoba ensured that the drivers signed for their routes. They were further told that a driver would take 'a special' if his route 'was not going' and that if a shunter was available this individual would take over the other route; only if there was no shunter would the driver then take the route. Mdluli corroborated the applicant's evidence on the allocation of specific routes to drivers during 2009. He also testified on when a driver would go on a different route i.e. if there was no shunter to take the route. Moreover he confirmed that shunters were available on the premises on the day in question because he and Bongani fell within this category. The respondent's assertion to the contrary is therefore improbable. Consequently I am not persuaded that the respondent discharged the onus of proving this decisive element of the second charge i.e. that the instruction was lawful (as couched) and accordingly determine that the applicant was not culpable on this charge either. Thus I determine that the applicant's dismissal was substantively unfair.

xvii. In light of the aforesaid it is not necessary for me to consider the allegation of inconsistency, or the appropriateness of the sanction and this includes any consideration on whether the applicant had been issued with a prior final written warning, which was the subject of much debate between the parties in the course of this hearing.

xviii. The remedies that may be afforded to the applicant are set out in section 193 of the Act. The applicant sought retrospective reinstatement. The respondent led evidence that this would be inappropriate because of a physical confrontation between the applicant and Wilskut on the day of dismissal. The applicant disputed that he had assaulted Wilskut and claimed that they had simply argued when he had approached Wilskut. He however also claimed that Wilskut's attitude towards him changed after he had bought a new car.

xix. Having had regard to the parties' evidence on this score it is evident that there was an altercation between the applicant and Wilskut on the day of the dismissal, the dispute being whether it was physical in nature and who was (allegedly) assaulted. I say this because the applicant claimed that Wilskut pushed him whereas Wilskut claimed that the applicant was the aggressor. To my mind the fact that there was such a confrontation, irrespective of the exact nature and extent thereof, has a direct bearing on the continuation of the employment relationship precisely because it is predicated on mutual respect. Furthermore Wilskut remains in the respondent's employ, was the applicant's superior and, significantly, there is no indication of a change in the line of reporting. Thus I am persuaded that reinstatement would be inappropriate in terms of s193(2)(b) of the Act, which leaves compensation as the alternative remedy.

xx. Section 194(1) of the Act regulates that the compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal. Accordingly having considered:

- The facts and evidence;
- My finding that the dismissal is substantively unfair only;
- That reinstatement would be inappropriate;
- The applicant's tenure of 4 years, and
- The applicant's undisputed testimony that he is currently unemployed despite efforts to secure alternative work since his dismissal on 10 November 2010,

I determine that compensation in the equivalent of six months' remuneration will be just and equitable in the instance. Given the parties' agreement that the applicant was remunerated at R5 422,84 per month as at the date of dismissal this equates to R32 537,04.

5. AWARD

i. The dismissal of the applicant, Henry Yato Zwane, by the respondent, Crossroads Distribution (Pty) Ltd, is substantively unfair but procedurally fair.

ii. The respondent is to pay compensation to the applicant in the sum of R32 537,04 (Thirty-Two Thousand Five Hundred and Thirty-Seven Rand and Four Cents) being the equivalent of six months' remuneration calculated as follows: R5 422,84 per month X 6.

iii. The sum aforementioned is to be paid to the applicant less any requisite tax deduction as regulated by the South African Revenue Services and within twenty-one (21) days of the respondent's receipt of this award.

iv. There is no order as to costs.

Signature: _____

Arbitrator: Kaushilla Gunase