

ARBITRATION
ARBITRATION AWARD

Arbitrator: T. Ndzombane

Case Reference No.:WCRFBC 27274

Date of award: 29 November 2013



In the arbitration between:

_____ Union/Employee party

SATAWU OBO E. MARAIS

and

_____ Employer party

ENVIROSERVE (PTY) LTD

Union/Employee's representative: Mr Simon Willems (Union Official)

Union/Employee's address:

Telephone:

Fax:

Employer's representative: Mr Morgan Mrubata [Labour Relations Manager]

Employer's address:

Telephone:

Fax:

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the Cape Town offices of the National Bargaining Council for the Road Freight Industry on 14 November 2013. The proceedings were digitally recorded and handwritten notes were taken. The applicant, Mr Marais, was represented by a Union Official, Mr Willems. The respondent, Enviroserve (Pty) Ltd, was represented by its Labour Relations Manager, Mr Mrubata. The parties agreed to submit their closing arguments by no later than 19 November 2013.

ISSUE IN DISPUTE:

2. I am required to decide whether or not the applicant's dismissal was both procedurally and substantively fair.

BACKGROUND OF THE DISPUTE:

3. The applicant was employed by the respondent on 07 July 2012 as a Driver. He earned a monthly salary of R7200.00 [seven thousand two hundred rand] prior to his alleged unfair dismissal. He stated that he was never been involved in any act of misconduct and therefore his dismissal was substantively unfair. Moreover, Mr Willems argued that the applicant was a shop steward and the Union was not consulted prior to suspend or charge the applicant by the respondent.

4. The respondent stated that the applicant was charged for the following charge:

- a. Unauthorized disposing of the company property at the scrap yard (bins) on 6 July 2013, 12 July 2013 and 13 August 2013.

5. The applicant was found guilty of the above charge and the sanction of dismissal was meted out as an appropriate. The respondent stated that the dismissal was both

procedurally and substantively fair. The applicant was given sufficient time to consult with his union to represent him at the disciplinary hearing.

SURVEY OF ARGUMENTS & EVIDENCE:

6. I have considered all the evidence and argument, but because the Labour Relations Act, 66 of 1995, as amended (LRA), requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

RESPONDENT'S CASE

7. **Mr Jacques Du Preez** stated that he is employed by the respondent as the Regional Manager and he presented the following evidence under oath. His position deals with logistics as they do the actual transporting of the waste. His role is to make sure that customers receive cost effective products and the employees maintain the safety standards. On numerous occasions the managers spoke to the employees to stop doing the illegal stuff. It was prevalent in the company that goods got stolen by the employees. There was a case whereby a gearbox was stolen.

8. He received an anonymous phone call which informed him that there were company bins which were at the scrap yard but could not tell him which scrap yard the person was referring to. He then drove around the scrap yards but with no success.

9. On 19 August 2013 Mr Laurens informed him that he had received an anonymous tip off and this time around an address of the scrap yard was mentioned. They then proceeded to go to L. Faivelowitz scrap yard whereby they met a Manager, Mr Louis, who showed them the company bins at their premises. Subsequent to that they took the photos of the bins and requested to be provided with some documents which shows who had sold the bins to them.

10. On 20 August 2013 they received the documents from the scrap yard. Mr Louis was under the impression that the transactions were legitimate. The respondent does not sell the scraps to L. Faivelowitz Scrap yard instead they are contracted with SA Metal and Reclaim. They have account with these two scrap yards.
11. A driver will have a document which indicates where to go and where to dispose a specific metal. The truck will be weighed and thereafter a metal also will be weighed. They do not deal with cash transactions. But in these transactions employees were involved with cash. A replacement of a bin is estimated at R10.000 to R15.000 rand. The estimated total value of the bins sold is R300.000. In all these days in question the applicant was the driver of the trucks.
12. There was no instruction to dispose a load at the scrap yard. If there is any deviation the information will be recorded by the controller which in this case such never happened. In terms of their chain of command the driver is in charge of both the truck and his assistant. The invoices shows that Mfakadolo have received the money from the scrap yard. Logic therefore dictates that the driver had to transport Mfakadolo to the scrap yard.
13. On 13 August 2013 there is another transaction but the applicant's assistant was Ndinisa. The cash received by Ndinisa was R1484.78 (one thousand four hundred and eighty four rand seventy eight cents) and on 12 August 2013 the cash received by Ndinisa was R4525.06 (four thousand five hundred and twenty five rand six cents). There is no way that an assistant could pull up the bins hence the applicant had to drive him. It was never indicated that an assistant who does not have a driver's licence drove the truck on those days.

14. There is a big financial loss to the company as they need to replace 24(twenty four) bins. This hampers the operations of the company as they cannot discharge their responsibilities to their clients. All employees who were involved were subjected to disciplinary hearings and were dismissed. They were able to link the applicant to the trucks on these particular dates.
15. According to the tracker report it shows that the truck driven by the applicant was at the scrap yard on the dates as mentioned in the charge sheet. The applicant was dismissed for being involved in illegal activities and the sanction was fair. The company has zero tolerance to theft and fraud activities. The company cannot longer trust the applicant as he was involved in dishonest activities hence he had to drive a truck worth one million rand.
16. **Armand Laurens** stated that he is employed by the respondent as the Supervisor and he presented the following evidence under oath. On 06 July 2013 the applicant was the driver of the truck as per the log sheet. The tracker report shows that the applicant went to the scrap yard. A driver has to report when he enters or leaves the premises of a client. They managed to get back 24 (twenty four) bins from the scarp yard but other bins were already been sold. A Maso was subjected to a breathalyser test and tested negative at the premises of the respondent. Subsequent to that the client tested a Maso and was positive. A final written warning was issued to a Maso.
17. **Kenny Freeman** stated that he is employed by the respondent as Training officer and he presented the following evidence under oath. Applicant was inducted by him with regard to company policies. He also investigates misconduct and accidents on behalf of the company. He was asked to take the photos at the scrap yard and he took the bins which were approximately 20 or higher.

APPLICANT'S CASE

18. **Edmund Marais** stated that he is the applicant in this matter and he presented the following evidence under oath. On 06 July 2013 he was on duty and started working from N7 straight to Bellville. He disputed that he was at the scrap yard on the day in question.
19. On 12 and 13 August 2013 he admitted that he was at the scarp yard because his assistant had asked him to drop him there in order to collect his Identity Document. He then argued that it was the only reason he was at the scarp yard. He denied that he had ever disposed anything at the scarp yard of the days in question. He also denied that he ever received any monies for disposing something at the scarp yard. In both days the request was to assist his assistant to get his Identity Document. He was just assisting his assistant.
20. **Simpiwe Ndinisa** stated that he was previously employed by the respondent as Assistant Driver. On 12 August 2013 he went to the scrap yard to fetch his Identity Document. On 13 August 2013 he does not know or remember as to what had happened on that day. There is a specific day that he went to the scarp yard to sell the bins but could not remember the date.

ANALYSIS OF ARGUMENTS & EVIDENCE:

21. The respondent bears the onus to prove that the dismissal was effected with a fair procedure and reason on the balance of probabilities in terms of section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act").
22. The following are common cause issues:
- a. That in all occasions the applicant was the driver of the trucks;

- b. That both assistants had received cash from the scrap yard as a result of disposing bins;
- c. That invoices and tax certificates were issued by the scarp yard,
- d. That the respondent had dismissed the employees who were found guilty of theft or fraud;
- e. That the applicant was aware of the rule and had participated in the programmes which were meant to curb the scourge of theft and illegal activities.

23. There is no evidence that the two assistants at some stages during their course of duties on the days in question were ever been not with the applicant. Records show that the applicant was with his assistant through out the course of the working hours. It stands to reason that at no stage that the assistants were ever been separated from the applicant on those days. It remains strange that the applicant disputes that he was not at the scrap yard on 06 July 2013, even though, the tracker report shows that the applicant was at the scrap yard.

24. At no stage the applicant had disputed the authenticity of the tracker report. Moreover, he admitted that the truck was driven by him on the day in question. The applicant failed to provide any information as to why the truck which was assigned to him was at the scrap yard on the day in question rather than a mere denial. The overwhelming evidence informs us that the applicant was at the scrap yard to dispose the metal waste and his mere denial does not assist these proceedings at all.

25. The applicant's version that on 12 August and 13 August 2013 he was at the scrap yard to get the Identity Document of his assistant stands into sharp contrast with the evidence of Mr Ndinisa who testified that he was only at the scrap yard on 12 August 2013 to get his Identity Document. Mr Ndinisa insinuated that he does not remember as

to why he was at the scrap yard on 13 August 2013. Logic dictates that if Mr Ndinisa did not get his Identity Document on 12 August 2013 he would have testified to that effect. Failure to lead such evidence one can infer that the reason that they were at the scrap yard on 13 August 2013 with the sole purpose to sell the metal debris. In any event it is clear from the evidence that on both the 12 and 13 August 2013 they were at the scrap yard with the sole purpose to sell the metal debris. This conclusion is also supported by the evidence that the applicant had to go through the weighbridge which indicates that the truck had a load on the day in question.

26. Mr Ndinisa admitted that he was involved in selling the bins of the respondent without permission but refused to implicate the applicant thereof. Under cross-examination Mr Ndinisa refused to answer all the questions that appeared to implicate the applicant but also failed to protect the applicant for questions put to him that the applicant was involved. Mr Ndinisa resorted to respond by saying he had no comment to all questions implicating the applicant to the offence.

27. At a later stage he conceded that on 13 August 2013 he went to the scrap yard to sell the bins but with a different driver. Obviously, this evidence that Mr Ndinisa was with a different driver is a lie because on the day in question he worked with the applicant. Moreover, the bin is so big to the extent that there is no way that the applicant would not have seen the load in the truck. Having considered the entire evidence I find on the balance of probabilities that the applicant was aware and was involved in selling of the respondent's bins to the scarp yard without the necessary authority to do so.

28. Turning to the procedural defect argued by the applicant in that the respondent failed to consult the Union as the applicant as a shop steward. It is not in dispute that the applicant was a shop steward. Logic therefore dictates that the respondent ought to have consulted the Union prior to the respondent suspending the applicant. Evidence shows that at no stage that the Union ever challenged the respondent in this regard as it is the first time to be raised at these proceedings.

29. In **NCBAWU Vs Masinga & Others [2000] BLLR 171 (LC)** *“it was found that a Commissioner did not commit a reviewable irregularity in finding that a dismissal of a shop steward was not procedurally unfair merely because of a failure to notify and consult the union”*. Even though it is appreciated that an employer should consult a union in the event that a shop steward will be charged but failure to do so will not automatically lead to procedurally unfair. The union ought to lead evidence that there was a prejudice suffered by the Union with regard to its operations to prove that indeed there was unfairness. Failure to lead such evidence is fatal to its case. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that both the dismissal was procedurally and substantively fair.

AWARD

1. I therefore find that the applicant’s dismissal was procedurally and substantively fair.
2. The application for unfair dismissal is hereby dismissed.

Signed and dated at Cape Town on 28 November 2013.

A handwritten signature in black ink, enclosed in a hand-drawn oval. The signature is stylized and appears to read 'Thuthuzela Ndzombane'.

Arbitrator: Thuthuzela Ndzombane