ARBITRATION AWARD

Arbitrator: **K. Gunase**
Case Reference No.: **WCRFBC 23241**
Date of Award: **28 August 2013**

In the ARBITRATION between

ILUSA obo Mr. Ashwill Jerome Whites
(Union/Applicant/Employee)

And

VDM Logistics (Pty) Ltd.
(Respondent/Employer)

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1. DETAILS OF HEARING AND REPRESENTATION

i. This dispute, involving an alleged unfair dismissal, came before me on 11 April 2013 at the offices of the National Bargaining Council for the Road Freight and Logistics Industry in Parow, Cape Town. Mr. J. Greef represented Mr. Ashwill Jerome Whites ('the applicant'). Mr. M. R. Basson represented the respondent, VDM Logistics (Pty) Ltd. In this regard I note that the respondent was initially cited as 'VDM Vervoer' and Mr. Basson recorded at the hearing that this was incorrect. Both parties were afforded the opportunity to address the matter. Given the respondent's contentions and the applicant party's concession as to the correct citation I duly made a ruling on substitution in terms of the Council's rules. This, together with my reasons, was noted on record at the time.

ii. The issues were narrowed and in terms hereof it was recorded as common cause that:

- The applicant was appointed as a driver on 14 November 2011.
- The applicant was remunerated at the rate of R1502,35 per week (basic, gross) at the time of dismissal.
- There was a disciplinary enquiry on 19 October 2012.
- The applicant was dismissed on 30 October 2012, which was also his last day of work.
- The applicant's dismissal was not in dispute.

The respondent produced a bundle of documents for the purposes of the hearing (Bundle 'A'), which was later supplemented. In this regard I note the applicant party was afforded the opportunity to peruse same. Further, although the applicant party recorded on 11 April 2013 that it had no documentation that it sought to use in the course of the proceedings, it produced three photographs on 16 August 2013 that were compiled as Bundle 'B'. This was permitted as was the respondent's supplementation of its bundle in the interests of fairness. The respondent was likewise afforded the opportunity to peruse the applicant party's bundle, as well as take instructions thereon.

iii. The matter was recorded as part heard on 14 April 2013. It did not proceed on 22 July 2013 when the matter was scheduled at the Municipal Council Offices in Vredenburg because the respondent had not been notified of the proceedings. The matter was thus concluded on 16 August 2013 in Vredenburg when the parties were in attendance as recorded hereinabove. I add that the arbitration proceedings were digitally recorded and same was submitted to the Council following each process.

2. POINTS IN LIMINE

No points were raised.

3. BACKGROUND FACTS

The respondent is a trucking business based in Saldanha. The applicant was initially engaged as a general worker but this altered when he was employed as a truck driver on 14 November 2011. The applicant was involved in an accident on a client's premises (Oranje Vis) in St.Helena Bay on 4 October 2012. Two charges of gross negligence were subsequently levelled against him - 'Ernstige nalatigheid op 04 Oktober 2012, in dat u skade veroorsaak het aan 'n klient se eiendom' and 'Ernstige nalatigheid op 04 Oktober 2012, in dat u skade veroorsaak hat aan die maatskappy se eiendom' (p.16 of 'A'). The applicant disputed that he was culpable on both charges averring that there was a problem with the brakes and steering mechanism of the vehicle, which he had reported verbally to his supervisor. The applicant sought retrospective reinstatement as relief. The dispute referred to the Council was certified as unresolved on 11 March 2013 and referred to arbitration together with proof of service on 15 March 2013.

4. NATURE OF THE DISPUTE / ISSUE TO BE DECIDED

i. Whether the applicant's dismissal is substantively and procedurally fair.

ii. On the latter aspect the applicant party contended that:

- the applicant's right to be represented was infringed;
- The applicant was not given an opportunity to be heard;
- There was no evidence, presented by either side, at the disciplinary enquiry;
- The chairperson asked all the questions and was not independent.

5. SUMMARY 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. Messrs. M.R. Basson (Basson), C.J.P. Smit (Smit), P.M. Prins (Martin), and P.V. Prins (Prins) testified in support of the respondent's case.
ii. Basson testified that he chaired the applicant's disciplinary enquiry on 19 October 2012 and ensured that procedures were followed: he confirmed that the applicant received the notice to attend the enquiry (the applicant was charged on 17 October 2012) and that he was aware of his rights and the charges.
iii. Basson kept hand-written notes of the process. Those present were recorded (p.33 of 'A') and he gave the complainant and the applicant an opportunity to state their cases. Once the applicant had done so, Basson asked questions and the applicant answered. Basson had further questions in relation to the specific charges. However Mr. Greef (Greef), the applicant's representative, indicated that the applicant will not answer any more questions but that he (Greef) would do so because he had consulted with the applicant. Basson responded that the applicant was under 'cross-examination' and that only he could answer. Greef reiterated his stance and Basson repeated the aforesaid.
iv. Greef disagreed with Basson contending that the employee would not get a fair hearing. He also indicated that they (the employee party) will withdraw if he (Greef) could not answer the questions. Basson advised that whilst this was their right, the matter will continue in their absence. Nonetheless the employee party withdrew from the process. The matter continued and Mr. van Niekerk also gave evidence. The hearing adjourned where after Basson made his finding: he found the applicant guilty of the charges. The determination on sanction was given to the applicant on 23 October 2012.
v. Basson was cross-examined and afforded the opportunity to clarify any issue so raised.
vi. Smit testified that he is in charge of the respondent's trucks and thus prepares the daily job list as well as the control list for the following day. He detailed his experience having worked with trucks for some 25 years.
vii. Regarding the matter at hand Smit testified that the applicant called him on 4 October 2012 advising that there was an incident and that someone should come out to the scene in St. Helena Bay. The witness was not involved in the investigation of the matter. One Albie, who was in charge of the client's site, indicated that he would go out because the witness was otherwise engaged.
viii. Smit served as complainant at the applicant's disciplinary enquiry; as such he spoke to the applicant about the case as well as to people at 'Oranje Vis' in St. Helena Bay where the incident occurred. He was thus told that the truck (which the applicant had driven) hit a wall and photographs were taken hereafter (pp.23-6 of 'A'). Referred to the cost of damages on the vehicle (p.27 of 'A'), the witness noted that this was obtained from the workshop manager (Prins).
ix. A 'fault list' is completed daily by the drivers in respect of the truck that they each drive; page 28 is the only one that the applicant completed on 4 October 2012. Said document did not record any problems with the vehicle's steering mechanism or the brakes. Further, no problem with the vehicle's brakes was brought to the witness' attention prior to the day in question (4 October 2012).
x. The witness indicated that, as the complainant, he had the opportunity to give evidence at the disciplinary enquiry as did the applicant. He further confirmed that the chairperson had asked the applicant questions during the hearing; Greef had objected and said that he would answer. When Basson told Greef that he could not do so, the employee party said they would not continue and left. The matter continued hereafter and later adjourned.
xi. Smit was cross-examined and re-examined.
xii. Martin testified that he is in the respondent's employ and that his job involves the planning and scheduling of the trucks. The applicant had not called him on the day in question and he was not aware of any technical problems with the truck the applicant drove before the incident occurred.
xiii. The witness confirmed that the fault list (p.28 of 'A') is the only one the applicant submitted on 4 October 2012. He was also not aware of any other fault list or problems with the vehicle that had been reported to him.
xiv. Martin was cross-examined and re-examined.
xv. Prins, the respondent's workshop manager, testified that he has 43 years' experience in the transport industry. He was aware of the accident involving the applicant on 4 October 2012: the latter had claimed that the vehicle's brakes and steering were faulty. However the vehicle was driven from Oranje Vis to the respondent's

site about 10 km outside Saldanha following the incident being a distance of 45-50km. The mechanic who had retrieved the vehicle, one Derick van Niekerk, had tested the vehicle in order to determine if he could drive it and he could find no faults.

xvi. The vehicle was sent to 'Weskus Voertuig Toetsstasie' the following day and a report was furnished reflecting that the brakes on the vehicle were roadworthy (pp.45-47 of 'A'). The witness used these results to do certain calculations of his own (p.49) and given the outcome, he was able to say that the brakes were in good working order. Prins also stated that the brakes were calibrated as certified on 8 July 2012 (p.32 of 'A') and that the brakes were last tested on 1 October 2012 (p.51 of 'A'). Had there been a problem or if the vehicle was not roadworthy, which was not the case, the respondent would have been unable to obtain the vehicle's license.

xvii. The witness was not aware that the vehicle suffered from any defects whether shortly before or after the incident in question. Following the incident he saw the damages on the vehicle and referred to page 27, which he authored, regarding the repairs. Thus he noted that although the windscreen was repaired elsewhere, the other parts were in stock at the respondent's store i.e. the bumper, side step box and side mirror, and the damaged ones were thus replaced. Prins also referred to the prices for the items had they been purchased directly from a Mercedes Benz agent (p.50). Repairs to the client's wall were necessary (as recorded on page 27 aforesaid) and in this regard the witness also made reference to page 43 of 'A' being an invoice for R21 500,00 from 'Piet Le Roux Konstruksie Bk', which undertook the repair work.

xviii. Asked to comment on the photographs in the applicant's bundle, Prins stated that the vehicle had been repaired by 10 October 2012, which was after it had been to the testing station. He thus disputed that the vehicle's condition, as depicted in the photograph (p.1 of 'B'), was indeed the case as at said date. As to the second photograph, allegedly taken on 7 July 2013, the witness noted that the photograph depicted the truck: it had been recently damaged and was at the workshop the previous week.

xix. Referred to the fault list (p.28 of 'A'), Prins confirmed knowledge thereof; he was not aware of any other list recording that the steering was faulty or that the brakes needed attention. He added that the vehicle in the instance was designed in such a way that if there is a problem e.g. an air leak one would be unable to drive the vehicle, which was a ten-wheel truck and trailer. In the instance the trailer also had brakes and same were likewise tested.

xx. Prins was cross-examined and re-examined; this concluded the respondent's case.

<u>The Applicant Party's Case</u>

xxi. The applicant and a witness, Mr. Saul Frank Baaitjie (Baaitjie) testified in support of the applicant party's case.

xxii. The applicant stated that on 4 October 2012 he inspected the vehicle and also checked the oil and water. He started the vehicle but then approached his superior, Martin, because of what had occurred the day before i.e. while driving the vehicle in Cape Town the applicant experienced a problem with the brakes on two occasions. The applicant had telephoned Martin in this regard and the latter told him to continue. Thus the applicant told Martin on 4 October 2012 that he could not drive the truck because of the problem. Martin's response was that there was no other vehicle and that he must continue because the fish meal had to be loaded.

xxiii. The applicant testified that he drove the vehicle because if he did not obey the instruction, he could have faced disciplinary action or be sent home. En route to Oranje Vis for the second load the applicant experienced a problem with the vehicle's brakes once more. He contacted Martin who told him to continue and also asked if he was afraid. Thus the applicant maintained that he had advised Martin about the vehicle's condition prior to the incident and, that Martin had said that there was no mechanic available and that he must do the load.

xxiv. The applicant loaded the fish meal and proceeded to reverse in an area with a small hill/rise behind him, a gated wall as well as pellets outside, which was not the case when he did the first load. The applicant described his manoeuvres in some detail indicating, *inter alia*, that he was about 6m from the wall when he turned and the brakes failed. He used the handbrake but the vehicle continued to move until it reached the wall and then stopped.

xxv. The applicant stated further that he had reported the problem he had with the steering to Martin and the mechanic who no longer works for the respondent; he also recorded it on an earlier fault list. As to the brakes, the applicant maintained that there was an air leak and despite this he was told to continue driving the vehicle. He added that he did so because he has family responsibilities and did not want to face disciplinary action or be sent home.

xxvi. The applicant added that he had driven a MAN truck (No.36) prior to the one he drove on the day in question (No.19); he was taken off the former when it was allocated to another driver and placed on the latter when a colleague (Baaitjie) was off sick. He drove No.19 for about a week.

xxvii. The applicant was cross-examined but not re-examined. I asked a few questions for clarity. Thus the applicant confirmed the relief sought. He also testified that he has been working as a casual since November 2012 and that despite this he wanted to return to the respondent's employ because the remuneration was better and he had worked well there. He further confirmed that he had no prior disciplinary record.

xxviii. Baaitjie testified that he works for the respondent as a driver and had used truck no.19 for 7 months. He experienced a problem with the vehicle on the first day he used it when picking up fish meal in St. Helena Bay: there was a problem with the steering wheel which he detailed. He noted that he was able to reverse the vehicle out of the area with much difficulty and this was despite his 20 years of experience.

xxix. On return to the respondent's site he reported the problem with the steering wheel to Martin. The following day the witness did not want to drive the vehicle and Martin indicated that he would check when the vehicle could go into the workshop. In the meantime the witness continued to report the matter and also spoke to the mechanic, Derick. The latter advised that the problem could be fixed but that this would take time and the fish meal had to be transported. Derick explained to Baaitjie how to turn the steering wheel so that it could be aligned; he also told him that the vehicle was in that state because of an accident.

xxx. Baaitjie testified that he grew accustomed to the fault. Further, he drove the vehicle because if he did not he could be charged for refusing to obey an instruction, or sent home in which event he would lose a day's pay. He added that he had reported a fault (verbally) four times to Martin and had done so because recording the matter on the fault list was fruitless. He also maintained that he had made reports to Smit. Baaitjie added that another vehicle was allocated to him on his return from sick leave.

xxxi. Baaitjie was cross-examined but not re-examined. This concluded the applicant party's case.

xxxii. The parties were afforded the opportunity to submit oral closing argument on the last day of the proceedings and both representatives did so.

6. 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 section 188(2) regulates that 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'). I add that it is trite that these proceedings constituted a hearing *de novo* on the merits of the matter. See: *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC) at par 18. As noted elsewhere the applicant party challenged both the substantive and procedural fairness of the dismissal; I deal with each aspect in turn.

Re: Procedural fairness

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. It is evident that the applicant party's allegations on procedural unfairness stemmed from the fact that Basson, as chairperson, questioned the applicant during the disciplinary enquiry. Neither the applicant nor a witness testified on the allegations of procedural unfairness. Turning to the respondent's evidence, Basson stated that he was the author of the hand-written notes in the bundle. Given this and his testimony it would appear that both sides provided their versions (pp.37-38 of 'A'). Smit also confirmed that the applicant gave his version and I am thus satisfied that the applicant was afforded an opportunity to state his case.

iv. Turning to the allegation that Basson asked questions and was not independent I note the following. Greef contended that he was entitled to provide the answers because he had consulted with the applicant and the latter was not under oath when the questions were asked. Basson testified that he sought clarity on certain issues and that only the applicant could answer the questions. Furthermore he had not made any decision at that point. Basson disputed that he was partial adding that he had to get the facts before he decided on the matter and this is what he was doing at the time.

v. Having evaluated Basson and Smit's evidence on the nature of the proceedings it is apparent that the disciplinary enquiry was not nearly as formal as the arbitration hearing, which Greef compared it to. Indeed it need not be. In A*vril Elizabeth Home for the Mentally Handicapped v CCMA & Others* [2006] 9 BLLR 833 (LC) it was held that the criminal model of disciplinary procedure is no longer applicable to internal disciplinary proceedings by employers:

> "When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegation made against that employee, which need not be a formal enquiry, *it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss*" (at 841 A, per Van Niekerk AJ, emphasis added).

Consequently I am not persuaded that Basson was biased as claimed.

vi. As to the further claim that the applicant's right to be represented was infringed, it was common cause that Greef represented the applicant at the disciplinary enquiry. It is further common cause that the employee party left the proceedings following the exchange with Basson; this the employee party elected to do after being apprised that the matter would nonetheless proceed in their absence. In this regard I note further that the questions Basson posed (as he testified) involved gaining clarity on the applicant's version. This is borne out by his notes, which reflect that it related to the incident that only the applicant provided evidence on. Consequently I am not persuaded, on a balance of probabilities, that the applicant's right to be represented was infringed by Basson's ruling that the applicant and not Greef answer the questions posed. I add that, given the nature of the proceedings, had Greef answered the questions it may have been arguable that the *audi alteram partem* principle was not respected.

vii. Re: Substantive Fairness

viii. It is trite that negligence constitutes a failure to comply with the standard of care which would be exercised in the circumstances by the reasonable person. Given that the applicant was employed as a truck driver, the applicable standard is that of the reasonable person with such skill or knowledge. Thus in order to discharge the onus the respondent had to prove, on a balance of probabilities, that there was a departure from that applicable standard of conduct.

ix. The applicant was charged, found guilty and dismissed on two counts of gross negligence. In the instance the validity of the standard i.e. that the applicant was to act with the skill of a reasonable driver, the applicant's awareness thereof and the consistent application of the said standard was not in dispute. It was also not in dispute that:

- The applicant completed a fault list for 4 October 2012 prior to commencing his duties and that this document did not record any issue with the vehicle's brakes or steering mechanism. There was no other list for the day and neither Smit, Martin nor Prins' evidence was contested in this respect.
- The applicant completed one load at Oranje Vis and the incident occurred when he was leaving this client's premises after he had loaded the vehicle during his second trip.
- The incident caused damage to both the respondent's vehicle and the client's wall. In this regard I am mindful that whilst the applicant party disputed the cost thereof, neither charge encapsulates an amount as far as damages are concerned.

x. The respondent maintained that the applicant had been grossly negligent because the vehicle was road worthy. On the other hand the applicant disputed that he contravened the standard and that he was culpable on both charges. The applicant further averred that the vehicle was mechanically defective and that he was thus not negligent when the respondent's vehicle and client's wall were damaged as a result of the incident on 4 October 2012.

xi. In making the determination as to which version is the more probable and acceptable one I am guided by the following. Firstly Hoffman & Zeffertt note in The South African Law of Evidence, 4th ed., Butterworths, 1998, at pp.526-7 that:

> "Courts often speak of a balance of probabilities, but the metaphor must be treated with care. The idea which this image conveys is that the party bearing the onus has to put sufficient evidence into his pan of

the balance to make it outweigh the other. But this can be misleading. If the party who produces some slight evidence in his evidence, and the other party none at all, the metaphor suggests that his pan should go down. But in fact the court may feel that the evidence is not sufficient to enable it to say that either party's version is the more probable. It may even find the contentions of the party who has produced no evidence are the more probable…Thus courts have occasionally had to point out that evidence does not have to be accepted merely because it is uncontradicted. What is weighed in the "balance" is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case".

xii. Secondly, the dictum in *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC) where Francis J stated the following is also instructive in the instance:

"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).

xiii. Has the respondent proved, on a balance of probabilities, that the applicant was grossly negligent? I am not so persuaded. Instead I am drawn to the conclusion that the respondent has failed to discharge the burden of proof for the following reasons:

- The mere fact that there was an accident and, that the respondent and its client suffered damages as a result is insufficient to prove (gross) negligence; negligence is established by proving that the applicant through either an act or omission departed from the applicable standard of conduct. In the instance the respondent's case did not indicate what act or omission on the applicant's part constituted gross negligence. This aspect was canvassed when Martin was asked, under cross-examination, how the applicant was negligent. He simply stated that there was an accident and, based on this fact alone, concluded that the vehicle was not properly handled.
- Whilst not in dispute that the vehicle was returned to the respondent's premises following the incident, the individual who apparently drove the vehicle from Oranje Vis did not testify at these proceedings. Indeed the respondent led no evidence on why this was the case and as much as emerged during the respondent's opening address is that he is no longer in the respondent's employ, which in itself is no bar. Accordingly the only reasonable inference that can be drawn from the evidence and undisputed facts is that the vehicle was returned to the respondent's site. Prins' evidence as to the condition of the vehicle when this occurred, however, constituted hearsay.
- Prins was unable to say whether the vehicle was taken to the respondent's site with the load; this was pertinent given when the incident occurred i.e. after the vehicle was loaded and the applicant's claim that the brakes were faulty at that time. What Prins was able to say is that the (empty) trailer was hitched when the vehicle was taken to the testing station the following day.
- Prins' experience in the transport industry was not disputed. He was however not called as an expert witness nor was he qualified as one during his testimony. Prins confirmed that the vehicle was sent for testing to the 'Weskus Voertuig Toetsstasie' the day after the incident and that a report was furnished. He further maintained that the vehicle was roadworthy and not defective as the applicant claimed. Notably Prins' assessment (p.48) hinged on the report, which was based on a test that he did not conduct. The applicant party disputed the report (pp.29-31/pp.45-7 of 'A') and made no admissions as to its contents. Despite this the document was not proved during the proceedings as the author/examiner did not testify. Again, the respondent laid no basis as to why the report should be accepted as evidence in the absence hereof. I add that whilst Prins also testified that the vehicle's brakes were last tested on 1 October 2012, the respondent furnished only a job card in this respect (p.51 of 'A'). Prins' testimony in this respect was therefore unsubstantiated.

- The evidence indicated that the fault list is not a conclusive record: both the applicant and Baaitjie testified that verbal reports could and were made about the vehicle's condition by them both. The respondent adduced no evidence to indicate that such manner of reporting was impermissible, or that the applicant party's testimony was simply a fabrication. Indeed the contrary appears true: Martin testified under cross-examination that if a problem with the steering wheel was noted albeit verbally, the matter would be reported to the workshop. Prins also stated under cross-examination that if a problem occurs during the day a driver reports the matter to his superior and this is then reported to Prins for further action.
- It was Martin's evidence under cross-examination (more than once) that he could not recall being contacted about the vehicle's brakes on 4 October 2012. He reiterated this under re-examination when questioned about the applicant contacting him. On this score I note that the fact that Martin could not remember the verbal reports does not imply that the applicant did not contact him. On the other hand the applicant's evidence on the verbal reports to Martin was not discredited under cross-examination, nor was there anything to suggest that the applicant was untruthful in this respect.
- The applicant was a satisfactory witness and his testimony on what transpired during the incident was not impugned under cross-examination. Further he explained, under cross-examination, why he completed the fault list as he did on 4 October 2012: he reported the problem with the brakes to Martin the day before and, the trailers are removed at night. The applicant also testified that he contacted Martin on 4 October 2012 (as he had done the day before) and was advised to continue in spite of the vehicle's condition. My comments above on Martin's testimony are apposite here too. As to the steering wheel, he maintained that he told Prins about it adding that a verbal report was preferable because the fault list is left lying around. Baaitjie corroborated the applicant's evidence on reporting faults as well as the vehicle's condition, which included the problem he had with the steering wheel that he explained in some detail. His testimony remained largely unchallenged. Further, whilst Prins indicated under cross-examination that the steering was within specification and that there was no danger in using the vehicle, he added that this will now be repaired as the matter was only reported to him on or about 12 August 2013. Given the aforesaid I accept that the vehicle's history and state was clearly relevant. Consequently I am not persuaded that the applicant party's evidence on the vehicle's condition was spurious or improbable.

7. CONCLUSION

For the aforesaid reasons I determine that:

i. The applicant's dismissal was procedurally fair.
ii. The applicant was not culpable on both the charges and that his dismissal was accordingly substantively unfair.

8. REMEDY

i. The applicant sought retrospective reinstatement, which is the primary statutory remedy in terms of the Act as confirmed in *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration & others* [2008] 12 BLLR 1129 (CC). The respondent presented no evidence that such an order would be inappropriate in terms of either section 193(2)(b) or (c) of the Act. See: *Visser v Mopani District Municipality and others* [2012] 3 BLLR 266 (SCA). Nonetheless I have considered the facts and evidence in the instance and can find no factor, which indicates that this is an inappropriate remedy. See: *Mediterranean Textile Mills (Pty) Ltd v SACTWU* [2012] 2 BLLR 142 (LAC).
ii. Turning to the issue of retrospectivity and back pay, Ndlovu JA in the *Mediterranean Textile Mills* matter, *supra,* referred (at 156B-C) to the following *dictum* in *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) with approval:

> "Fairness comprehends that regard must be had not only to the position and interest of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances…And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act".

iii. Given my findings it is apparent that the applicant drove the vehicle despite the problems he experienced with it. Whether he should have, or whether his explanation for doing so would have sustained a defence to a charge of insubordination if he refused to drive it are moot points. What is however pertinent is that although the particular circumstances in the instance did not justify a finding that the applicant was grossly negligent (for

the reasons recorded hereinabove), it nonetheless occasioned a loss. Accordingly I am drawn to the conclusion that an order for reinstatement with six months back pay would be just and equitable in the instance.

9. AWARD

i. The dismissal of the applicant, Mr. Ashwill Jerome Whites, by the respondent, VDM Logistics (Pty) Ltd, is procedurally fair but substantively unfair.

ii. The respondent is to reinstate the applicant, with effect from the date of dismissal, on the same terms and conditions that prevailed prior to the applicant's dismissal and without any loss in benefits. This is subject to the condition that the applicant shall be entitled to only 6 (six) months' back pay being the sum of R39 031,05 (Thirty-Nine Thousand Thirty-One Rand and Five cents) calculated as follows: R1502,35 per week X 4.33 X 6. Said amount is to be paid to the applicant less any legal deductions on 30 September 2013.

iii. The applicant is to report for duty on or before 18 September 2013.

iv. There is no order as to costs.