

SOUTH AFRICA / JUDGMENT

Buscor (Pty) Ltd v Ntimbana N.O (JR2948/19) [2024] ZALCJHB 458 (22 November 2024)

[2024] ZALCJHB 458

COURT

Labour Court Johannesburg

BEFORE

T Govender

CASE / FILE NUMBER

JR2948/19

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IN THE LABOUR COURT OF
SOUTH AFRICA, HELD AT JOHANNESBURG

Not Reportable

Case No: JR2948/19

In the matter between:

BUSCOR
(PTY) LTD
Applicant
and
THOMAS
NTIMBANA N.O
First
Respondent
THE
SOUTH AFRICAN ROAD PASSENGER
BARGAINING
COUNCIL
Second
Respondent
NUMSA
OBO S MABUZA
Third
Respondent
Heard: 16
November 2023

Delivered:

22 November 2024]

JUDGMENT

GOVENDER, AJ

Introduction

- [1] The matter before the Court is a review application in terms of section 145 read with section 158(1)(g) of the Labour Relations Act[1] (LRA), concerning an arbitration award issued under the auspices of the South African Road Passenger Bargaining Council per Commissioner Thomas Ntimbana N.O. (Commissioner).
- [2] The arbitration award is dated 26 November 2019 and the review application was brought on 20 December 2019. It is clear that the review application has been brought within the requisite six week period contemplated by section 145(1)(a) of the LRA.
- [3] In terms of the arbitration award, Mr Solomon Mabuza's (Mr Mabuza) dismissal was found to be substantively unfair, and reinstatement was ordered, with backpay equating to six month's remuneration. In these proceedings, Mr Mabuza is cited care of his union NUMSA, who acts on his behalf.
- [4] Mr Mabuza also challenged the procedural fairness of his dismissal at the arbitration, but the Commissioner only found Mr Mabuza's dismissal to be substantively unfair.
- [5] Prior to addressing the pertinent legal principles, it is necessary to canvass the material background of the matter.

Background facts

- [6] The applicant conducts business in the Road Passenger Industry. The applicant transports members of the public for reward.
- [7] Mr Mabuza was employed as a professional bus driver from 6 December 2006 until his dismissal on 22 May 2019. Mr Mabuza was charged with the disciplinary offence of sleeping whilst on duty on 18 February 2019 and 25 March 2019.
- [8] The third respondent referred an unfair dismissal dispute on both substantive and procedural grounds to the Bargaining Council on 18 June 2019.
- [9] A certificate of non-resolution was issued on 18 July 2019. The dispute was referred to arbitration on the very same day i.e. 18 July 2019. The arbitration proceedings took place on 29 October and 8 November 2019.
- [10] Mr Mabuza was dismissed for sleeping on duty while driving a bus carrying approximately 145 passengers on the two occasions referred to above.

The Applicant's version

- [11] The applicant states that Mr Mabuza was issued with a final written warning on 4 December 2018 for a similar offence. After the final written warning was issued, the applicant changed Mr Mabuza's shift to start in the afternoon, as opposed to his previous shifts which started in the morning, so as to afford him more time to rest.
- [12] Despite this change, Mr Mabuza fell asleep behind the wheel only thirty minutes into his shift on 18 February 2019 and three hours into his shift on 25 March 2019. Concerning the incident of 25 March 2019, this occurred after Mr Mabuza had been off for some seventy-one hours prior to his shift commencing, which should have afforded him sufficient time to rest.
- [13] The applicant supported its case with video footage from the bus, the evidence of various witnesses and testimony from the Assistant Operations Manager concerning Autotrak data which monitors the behaviour of drivers and the movement of buses. The latter witness testified that Mr Mabuza's driving behaviour was similar to that of another bus driver who fell off to sleep behind the wheel, causing an accident, which resulted in damage to the bus and injuries to passengers.

The Third Respondent's version

- [14] While the third respondent seemed to have raised a preliminary point that the review application was not brought in time, this is not borne out by the facts. In argument, Mr Snyman for the applicant advised the Court that it may be that the third respondent had conflated the matter with another review application involving Buscor and NUMSA on behalf of KL Shokwane.
- [15] The answering affidavit is deposed to by Mr Nkhangweni Justice Masutha (Mr Masutha) who is the union official from NUMSA who represented Mr Mabuza at the arbitration proceedings. Save for the issue of the alleged late filing of the review application, the facts set out in the third respondent's answering affidavit do accord with the facts of this matter.
- [16] In essence, NUMSA disputes that Mr Mabuza was asleep while driving the bus and further claims that the video footage demonstrates that Mr Mabuza was driving the bus properly without any signs of being asleep. NUMSA claims that the video footage corroborates Mr Mabuza's version.

The evidence led at the arbitration

- [17] The applicant led the evidence of Ms Nokuthula Markham (Ms Markham), Mr Sipho Patrick Ngomane (Mr Ngomane), Ms Moriameng Pilane (Ms Pilane), Mr David Wilson (Mr Wilson) and Mr Samuel Bheki Zwane (Mr Zwane). The third respondent led the evidence of Mr Mabuza and Mr Joshua Mona (Mr Mona).

The Applicant's evidence

- [18] Ms Markham testified that she was the Chairperson of Mr Mabuza's disciplinary enquiry and about the various facts that she considered in reaching the conclusion that he was guilty of misconduct and that dismissal was the appropriate sanction. In particular, she went through Mr Mabuza's employment history, which was riddled with written warnings, counselling, a fatal accident and sleeping on duty over the period July 2010 to January 2019.
- [19] Concerning the final written warning of January 2019, Ms Markham was the Prosecutor of that disciplinary enquiry and she testified that the matter was postponed more than three times so as to ensure that Mr Mabuza was given a fair opportunity to be heard, but despite advising Mr Mabuza that the last postponement would in fact be the very last one, he did not arrive for the disciplinary proceedings.
- [20] Although the disciplinary proceedings were to commence at 09h00 on 4 December 2018, in reality it only commenced at 11h00 so as to give Mr Mabuza a further opportunity to arrive. When he did not arrive, the matter proceeded in his absence, resulting in a final written warning being issued.
- [21] That Ms Markham was the prosecutor of the disciplinary enquiry where the final written warning was issued, and chaired the disciplinary proceedings where Mr Mabuza was ultimately dismissed, which proceedings were fairly in close succession, is not ideal, but given the informal nature of disciplinary proceedings, this is not irregular or materially wanting. Moreover, it does not appear that the third respondent had any objection in this regard.
- [22] When enquiring about Mr Mabuza's whereabouts with the Operations Manager, Ms Markham was told that Mr Mabuza had taken a shift that morning and was not out of town, nor off sick. Concerning the video footage, Ms Markham claimed that she could see Mr Mabuza very clearly. Concerning her general consideration of the matter, Ms Markham testified that she had no basis to be biased against Mr Mabuza.
- [23] In cross-examination Ms Markham was questioned about the location of the cameras on the inside of the bus which she confirmed from her general knowledge, but could not provide the precise location of where the cameras were located. Concerning the direction which the bus was driving i.e. whether it was driving straight or veering from side to side, Ms Markham testified that the Autotrak data would be best placed in response to the questions. She was questioned on the accident concerning which Mr Mabuza's driving was compared, i.e. the accident where one 'Ms Mabuza' was driving the bus concerned and drove into a tractor but did not meaningfully contribute in this regard. It does not appear that there is any relation between Ms Mabuza and Mr Mabuza.
- [24] Concerning the notices to attend the disciplinary enquiry which proceeded in Mr Mabuza's absence and where he received a final written warning, Ms Markham took Mr Mabuza's representative through the notices which were signed by Mr Mabuza, save for the notice of 21 November 2018. The reason that Mr Mabuza would sign for a postponement is because he would fail to appear at the disciplinary hearing and Ms Markham would call the operator to

ask for Mr Mabuza to come to the proceedings. On his arrival he would sign for a postponement.

- [25] Concerning the proceedings of 4 December 2018, which is the disciplinary enquiry which resulted in Mr Mabuza's final written warning, Mr Mabuza was told on 21 November 2018 to appear on 4 December 2018, but failed to attend which is why the matter was heard in his absence.
- [26] The next witness for the applicant was Mr Ngomane, who was employed by the applicant since 1981 and held the position of Assistant Operations Manager at the time of providing his testimony. Mr Ngomane testified about the video footage which he retrieved and he had charged Mr Mabuza for misconduct after showing him the video footage. Mr Ngomane testified that Mr Mabuza had told him that he was not sleeping while driving, but from observing the video footage he was of the view that Mr Mabuza was sleeping.
- [27] It was not the first time that Mr Mabuza slept on the job and had done this at least three times prior. Mr Mabuza's shift was changed to start in the afternoon to give him time to rest. Mr Mabuza's shift was changed after he was issued with a final written warning.
- [28] Concerning the last incident, Mr Mabuza started his shift at 15h30 in the afternoon and had approximately 145 passengers on the bus. The risk was a potential accident.
- [29] In cross-examination, Mr Ngomane confirmed that he was involved in the disciplinary enquiry which led to Mr Mabuza's dismissal in the capacity of complainant. Concerning the recommended sanction of dismissal, this came from the Chairperson and not from him. HHe testified that the bus was not moving side to side.
- [30] Mr Ngomane confirmed that he was shocked when he watched the video because it was not good that a driver was sleeping while driving and he called Mr Mabuza to come and have a look. Mr Ngomane confirmed that he had not watched the video concerning Ms Mabuza's accident. Mr Ngomane was concerned about the risk presented by Mr Mabuza sleeping while driving the bus. While it was put to Mr Ngomane that Mr Mabuza was not sleeping and that his eyes were not closed, he was adamant that Mr Mabuza's eyes were in fact closed, but he agreed that the bus was not moving from side to side.
- [31] Concerning the change in Mr Mabuza's shifts, Mr Ngomane testified that he was advised to change Mr Mabuza's shift, but when it was put to him that Mr Mabuza was not informed about why his shift was changed, he testified that Mr Mabuza would have had a meeting with the Manager to discuss the change in shifts and the final written warning. A meeting of this nature was disputed by Mr Mabuza's representative, which Mr Ngomane could not dispute.

- [32] The next witness for the applicant was Ms Pilane. Ms Pilane occupied the position of Executive Director and Operations Manager at the time of providing her testimony. Concerning a discussion that Ms Pilane had had with Mr Mabuza regarding his personal problems, she confirmed that he had told her that he has children and he needs to supplement his income. Mr Mabuza requested to go back to his original shift because it was flexible enough to allow him time to supplement his income.
- [33] An issue that also necessitated his change in shift was that passengers were complaining that he was constantly late to fetch them. After the change in shift, Mr Mabuza was again sleeping on duty. Ms Pilane recounted previous incidents of sleeping on duty as well as a customer complaint that Mr Mabuza was never on time.
- [34] Concerning the final written warning, she dealt with the appeal and she rejected the appeal, because it was not the first time that Mr Mabuza had been found sleeping on duty. Mr Mabuza was shown the video footage and was given an opportunity to improve, but he failed to do so. Ms Pilane confirmed that she did not have a discussion with Mr Mabuza concerning the final written warning. His change in shift was to afford him more time to attend to his personal issues and allowed him a rest period of fifteen hours. Ms Pilane confirmed that Mr Mabuza never came to her concerning any complaints regarding his shift.
- [35] In cross-examination she reiterated that she had received complaints concerning Mr Mabuza from passengers that he was never on time and that is when she started to engage with him, prior to him being found sleeping on duty. She also recounted an incident where he was found sleeping on duty and was called in to view the video footage and he was asked to improve without any disciplinary action being taken.
- [36] Concerning the process undertaken where a driver is found sleeping on duty, the buses are equipped with cameras which monitor incidents and once there is an incident, the footage is sent to all General Managers and Operations Managers of the division or the depot, as well as Assistant Operations Managers. The person who would look at it first depends on who accessed their computer first. She was not involved in the disciplinary proceedings which led to Mr Mabuza's ultimate dismissal. Ms Pilane confirmed that she had no personal issues with Mr Mabuza and that they had a good working relationship.
- [37] The next witness for the applicant was Mr Wilson. Mr Wilson confirmed that he had been employed by the applicant for thirty-two years and occupied the position of Assistant Managing Director at the time of providing his testimony. Mr Wilson dealt with appeals concerning dismissals. Mr Wilson considered the other incidents where Mr Mabuza fell asleep on duty. He considered the time of the shift concerned as well as the previous shift to assess whether Mr Mabuza had sufficient time to rest.

- [38] Concerning the incident of 25 March 2019, Mr Mabuza had returned from a weekend off, which meant that he was off for about seventy-one hours and twenty-five minutes before he resumed duty. He rejected Mr Mabuza's appeal because of his bad track record. When he discussed the matter with Mr Mabuza, Mr Mabuza confirmed that he had a 'lazy body' but disputed sleeping while driving. He testified that the core duty of a driver is to transport passengers safely and that because of Mr Mabuza's bad track record, he could not risk putting him back on a bus with passengers.
- [39] In cross-examination Mr Wilson confirmed that he watched the video footage from the bus and that Mr Mabuza regularly fell off to sleep while driving. Concerning the movement of the bus, the bus was driving in a straight line and never left the driving line. It was disputed that Mr Mabuza had said to Mr Wilson that he had a 'lazy body', but Mr Wilson was adamant that is what was said to him. Concerning the video footage, he was resolute that the video footage demonstrated that Mr Mabuza was sleeping and there could be no doubt in this regard. It was put to Mr Wilson that he failed to consider Mr Mabuza's appeal. Mr Wilson responded that there was no new evidence which would have warranted the appeal being entertained.
- [40] The next witness for the applicant was Mr Zwane who occupied the position of Assistant Operations Manager with the applicant at the time of providing his testimony. He confirmed that he had been working with the Autotrak System since 2009. Concerning the bus being driven by Mr Mabuza on 25 March 2019, he considered the information from the Autotrak System which demonstrated that there was an unusual pattern of driving. He compared this pattern to the accident which had occurred on 18 December 2018 where Ms Mabuza was the driver, and he realised that the patterns of speed and revs per minute (RPM) were similar to the patterns of the bus driven by Ms Mabuza immediately before the accident occurred.
- [41] Concerning Mr Mabuza's version that the vehicle did not swerve or move sideways on the day in question, Mr Zwane explained the different patterns and colours on the Autotrak graph. Importantly, he explained that when considering the graph for the acceleration pedal which concerned RPM, the driver was not constantly pressing the pedal, and if the driver's foot is consistently on the pedal, the pattern would be straight line and not shifting up and down, as was the case with Mr Mabuza. This was the same pattern exhibited by Ms Mabuza immediately before the accident took place.
- [42] The movement of the RPM graph for a normal driver is a consistent straight line and regarding Mr Mabuza, the pedal reading was inconsistent, which is not normal for the straight open road which Mr Mabuza was driving on. Mr Zwane also testified that this pattern was not normal, given his experience and that he had investigated many Buscor accidents.
- [43] During cross-examination he explained that he was an expert concerning Autotrak Analysis and had been trained by Autotrak. Mr Zwane's expertise was disputed because he had not come along with documentation to prove his qualifications, but Mr Zwane responded that

he was happy to provide his qualifications in this regard. Mr Zwane emphasized that he was an expert, having analysed cases such as these since 2009. When he was cross-examined on an analysis of the graphs relating to Ms Mabuza's accident and Mr Mabuza's driving on the day in question, he was adamant that the patterns were the same, in particular the RPM graph.

[44] The applicant then closed its case.

The Third Respondent's evidence

[45] Mr Mabuza then advanced his case.

[46] Mr Mabuza testified that he had commenced employment with the applicant on 6 December 2006 and was dismissed on 22 May 2019. At the time of his dismissal, he occupied the position of Professional Driver. Concerning the final written warning that was issued for sleeping on duty previously, he disputed that he failed to attend the disciplinary enquiry because he was not provided with a set down date, and stated that he was told that Mr Mona would tell him when the date for the hearing was rescheduled. In essence, his testimony was that the date was not confirmed, and he was not advised of the date.

[47] Concerning the video footage, Mr Mabuza explained that he had watched the video footage and that it demonstrated that he was not asleep. The angle of the camera in the bus does not show one's face directly and shows the top of one's head. Concerning the movement of the bus, he stated that the bus was moving in a straight direction. Concerning the allegation that he told management that he was not asleep but that he had a 'lazy body', Mr Mabuza stated that he had told management to review the video footage carefully because no one can be asleep while a bus is in motion.

[48] He confirmed that he appealed twice and that he was concerned about the sanction. Concerning the comparison between his and Ms Mabuza's driving and the analysis of the graphs, he stated that they do not look the same because the graph from Ms Mabuza's driving demonstrates that the vehicle moved to the right, while the graph of his driving demonstrated that he was driving straight. If he received a ruling in his favour, he wanted to return to work.

[49] Mr Mabuza's testimony was provided with the assistance of an interpreter and it does seem that there were some constraints regarding what he said to the interpreter and the interpreter's interpretation thereof. I say this because at some stage, the applicant's representative enquired from the interpreter whether he was providing a full interpretation of what Mr Mabuza had said.

- [50] During cross-examination Mr Mabuza confirmed that, concerning his change in shift, he met with Ms Pilane because she had changed his shift without any reason for doing so. Regarding Ms Pilane showing him video footage before he was charged and before his shift changed, he disputed this. Mr Mabuza disputed that he had mentioned trying to supplement his income to Ms Pilane. Mr Mabuza testified that he kept his job and his business separate.
- [51] When he was asked how Ms Pilane would know about this, he stated that 'they've got their own investigators'. He further testified that the 'company management do wrong things'. Concerning his appeal which served before Ms Pilane, he testified that he placed additional evidence before her.
- [52] Mr Mabuza testified that Ms Pilane had seen that he had bought an Audi Q5 and made comments that anyone who has got money must leave the company and continue their own business.
- [53] It was also put to Mr Mabuza that this was a new version not put to the other witnesses, while I pause to mention that much of what Mr Mabuza testified about was not put to any of the witnesses. I return to this below.
- [54] Concerning his failure to attend the disciplinary enquiry which resulted in a final written warning, he stated that the applicant was not ready to proceed because the representative was rushing to White River, but Mr Mabuza was ready to proceed. He was adamant that he had not received the new date and that Mr Mona would receive the date and inform him. This was disputed by the applicant's representative, and also seems to be a contradictory version. If he was at the hearing and ready to proceed and the applicant's representative was rushing to White River, then surely Mr Mabuza was aware of the date of the hearing. The versions provided by Mr Mabuza in this regard were mutually destructive.
- [55] It was also put to him that he was absent from the disciplinary enquiry on a number of occasions, which he disputed and said that if he was called he would have attended.
- [56] Mr Mabuza disputed the allegation that he was sleeping on duty. Mr Mabuza testified that there was an agenda against him to prevent him from doing his private business and that the allegation that he was sleeping on duty was essentially fabricated.
- [57] It was put to him that when his shift changed from the dayshift to the nightshift he had a fifteen hour rest period and that this period would have been sufficient for him to conduct his business. He in turn disputed that there was a fifteen-hour period.
- [58] On every occasion that it was put to him that his new version was not put to the witnesses, he stated that he was not the one asking the questions and that if he was conducting the cross-examination he would have asked many more questions.

- [59] When it was put to him that the applicant had exhausted all avenues to assist him by giving him three different shifts on three occasions and that there was nothing more that the applicant could have done to accommodate him, he responded that it was a waste of the Commissioner's time because 'you could not hit someone on one side and then continue to hit him on the other side and claim that you are helping him'.
- [60] Concerning the incident of sleeping on duty on 25 March 2019, it was put to Mr Mabuza that when he had started his shift, he had been off duty for about seventy-one hours and twenty-five minutes, to which he responded that he does not know where that was coming from.
- [61] When it was put to him that if he was disputing the shifts or that the rest periods were not sufficient, Mr Wilson had a meeting with him and he did not request a change of shifts or raise any sort of objection thereto, Mr Mabuza responded that he never consulted with Mr Wilson.
- [62] It was also put to Mr Mabuza that while he stated that he never consulted with Mr Wilson, it was also his evidence that he had consulted with Mr Wilson to ask him to re-look at the video footage, which he then confirmed and stated that he went to see Mr Wilson because of 'the pain that [he] was feeling after [he] had been charged.'
- [63] When it was put to Mr Mabuza that Ms Pilane indicated that he had been given a new shift with a resting interval of fifteen hours, Mr Wilson had stated that before starting the shift Mr Mabuza had been resting for seventy-one hours and the video evidence demonstrated that he was falling asleep, meaning that he was fatigued, he responded that the applicant's representative was moving in circles and if he had been given a chance to ask Ms Pilane and Mr Wilson questions they would not have been able to answer him.
- Mr Mabuza also stated that the applicant's representative putting versions to him was incorrect.
- [64] It was also put to Mr Mabuza that his business activities were probably causing him to sleep on duty, and he responded that he never slept on duty but what was happening was just hatred towards him and there is no such thing as sleeping on duty.
- [65] It was further put to him that he carried 145 passengers on the bus, the evidence of the witnesses who had testified together with the video footage and the Autotrak records demonstrated that Mr Mabuza was sleeping on duty, was a high-risk to the applicant and to passengers, and he could not be trusted. Mr Mabuza responded that he had never received any complaints from passengers and that he conducted himself in a manner that was acceptable. Mr Mabuza denied that he could not be trusted.
- [66] It was put to Mr Mabuza that he had never put the version of hatred or having a vindictive nature to Ms Pilane, and due to an interruption between Mr Mabuza and the interpreter, it does not seem that the answer was properly captured.

- [67] Concerning the appeal which served before Ms Pilane, he stated that she did not listen to the reasons provided by him. Concerning the findings of the Chairperson of the disciplinary enquiry, Mr Mabuza testified that Ms Markham was told to dismiss him as part of her job, so as to satisfy the applicant.
- [68] It was further put to Mr Mabuza that the video footage was very clear, that he was sleeping, and that at a particular stage his head tilted upwards directly towards the video camera which demonstrated that his eyes were closed and he was sleeping. Mr Mabuza responded that it was not possible for a person to close their eyes and sleep and still reach the destinations they were supposed to. He placed emphasis on the fact that the bus was driving in a straight direction and not veering from side to side.
- [69] The Autotrak evidence was further put to him which demonstrated that his driving patterns were similar to that of Ms Mabuza who had an accident with the bus, which he disputed because he had not had an accident.
- [70] When he was asked about how he felt about the applicant and returning to work, he responded that the plan was to go back to work and there was no problem with the applicant, but the applicant had a problem with him. He indicated that he was still prepared to work for the applicant. Concerning customer complaints, he stated that if Ms Pilane had received a complaint, she should have informed the Supervisors who would have in turn spoken to him, but that did not happen.
- [71] The next witness was Mr Mona. Mr Mona testified that he was an employee of the applicant, that he had commenced employment in 2011 and held the position of Professional Driver at the time that he provided his evidence. Mr Mona testified that he is the Chairperson of NUMSA and that he was involved in Mr Mabuza's disciplinary matters. Concerning the disciplinary matter which resulted in Mr Mabuza receiving a final written warning, he stated that the matter had been postponed about four times and during the last postponement he was told to advise Mr Mabuza when the next sitting would take place and that the applicant would phone him. Mr Mona confirmed the various notices to attend the disciplinary enquiry concerning which Mr Mabuza received a final written warning.
- [72] Concerning the final postponement, when asked whether there was a specific date to which the matter was postponed, initially Mr Mona confirmed that there was a specific date, and when he was told that the question related to the document in front of him, he changed his answer and stated that there was no date identified, and that he was told that he would be contacted and informed of the date. He was later informed by Mr Mabuza that the matter went ahead and Mr Mabuza showed him the final written warning. An appeal was lodged and was thereafter rejected. Mr Mona had assisted Mr Mabuza with the appeal. Mr Mabuza was not given an opportunity to present his reasons in support of the appeal and the appeal was rejected without a hearing.

- [73] When Mr Mabuza was charged for sleeping on duty, and a meeting was held with the Operations Manager, presumably Mr Wilson, it was explained that Mr Mabuza was not sleeping, but seemed to be tired. (This seems to align with Mr Wilson's testimony that Mr Mabuza said that he had a 'lazy body').
- [74] The Operations Manager allegedly responded that Mr Mabuza had a bad attitude and that is when he questioned whether Mr Mabuza had been charged for having a bad attitude or for sleeping on duty.
- [75] Mr Mona relayed an incident where Mr Mabuza was late for his shift because he had gone into town with his car, and when he returned the Operations Manager refused for him to continue with his shift and instead called another driver to take over the shift, which delayed the journey by fifteen minutes, whereas if Mr Mabuza was allowed to continue his shift, the journey would have been delayed by five minutes. He also stated that the Operations Manager allegedly said that Mr Mabuza has got a private business and an expensive car and he came to work to show off his expensive car and disturb operations.
- [76] Mr Mona was of the view that Mr Mabuza was set up in a trap. It was for these reasons that the Operations Manager rejected Mr Mabuza's appeal. Concerning the movement of the bus, he testified that the bus was moving in a straight direction and was not veering from side to side. He further testified that the bus trip went well with the loading of passengers, some of whom who were paying cash and who were issued with tickets, and passengers alighted the bus with the trip running smoothly. There were no complaints against Mr Mabuza. Mr Mabuza was nonetheless dismissed and an appeal was brought which was rejected, but no reasons were provided for the rejection of the appeal. He held the view that the disciplinary hearing leading to Mr Mabuza's dismissal was unfair.
- [77] In cross-examination, concerning the notice for the 4 December 2018 disciplinary proceedings, it was put to Mr Mona that Mr Mabuza himself had signed in receipt of the notice, which indicated the next date, to which Mr Mona responded that he was supposed to have received a phone call to inform Mr Mabuza of the date, but that phone call did not happen.
- [78] It was also put to Mr Mona that on 4 December 2018 the actual hearing only commenced at 11h00, even though it was scheduled to commence at 09h00, in an attempt to contact Mr Mabuza.
- [79] It was put to him that in the last hearing, the February and March 2019 incidents were combined into one hearing which he confirmed in respect of the two incidents, but he could not remember the date. He confirmed that he had viewed the video footage and it was put to him that he had previously admitted that Mr Mabuza looked tired on the video footage which he confirmed. He then stated that he couldn't see Mr Mabuza's eyes clearly in the video because the camera is at the top of his head. He then stated that he saw Mr Mabuza yawning.

- [80] When it was put to him that the video footage was clear and that there was no yawning, he responded that no driver could fall off to sleep while driving without being in an accident. It was put to Mr Mona that even concerning Ms Mabuza's accident, when she went over speed bumps, the bus was driving in a straight line, which he did not want to respond to because he said that he had not seen the accident or the video footage.
- [81] It was also put to Mr Mona that because Mr Mabuza was on a final written warning, it demonstrated that the applicant had done everything possible to assist him, including changing his shifts so that he was not tired, to which he responded that Mr Mabuza was tired, but he was not sleeping.
- [82] It was also put to Mr Mona that Mr Mabuza had been on a seventy-two-hour rest period prior to the March 2019 incident to which he responded that because the engine of the bus is close to where the driver is, the heat of the engine also affects the driver and creates an element of tiredness, and that anyone can get tired in the dark.
- [83] Mr Mona testified that Mr Mabuza had been employed since 2006 and the incident arose in 2018 and that the actual problem was that Mr Mabuza was seen driving an expensive car and that management was not happy about it, which is why they decided to stay on his heels to ensure that they catch him. It was put to Mr Mona that none of this was put to Ms Pilane and that this was a fabrication. He responded that he was not alone when he had a meeting with the Operations Manager, who stated that Mr Mabuza had his own business and that he should not come to the applicant's premises and disturb their business, but rather he should concentrate on his own businesses.
- [84] Mr Mona further testified that if the applicant really wanted to help Mr Mabuza, it should have gotten doctors involved to examine him and check what the problem could be.
- [85] Concerning Ms Pilane's evidence that there were passenger complaints, Mr Mona disputed this because he would have been invited to ask Mr Mabuza questions about the complaints.
- [86] In Mr Mona's opinion, management built a case against Mr Mabuza. When it was put to Mr Mona that Mr Mabuza's dismissal was handled by a presiding officer, and that there was also an appeal, Mr Mona stated that the appeal would have gone to Ms Pilane who Mr Mabuza did not have good relationship with. When it was put to him that dismissal appeals are handled by Mr Wilson, Mr Mona responded that Mr Wilson and Ms Pilane worked together and they collaborated, because if Ms Pilane does not want someone, she can easily inform Mr Wilson of that.
- [87] When it was put to Mr Mona that Mr Wilson had testified that Mr Mabuza's appeal was rejected premised on his investigations and because he presented a risk to the company and the passengers, Mr Mona responded that Mr Mabuza was not sleeping on duty. When it was put to Mr Mona that he was suggesting that the applicant should have waited for Mr Mabuza to have an accident and kill passengers before doing something, Mr Mona suggested that corrective discipline was appropriate, but not a dismissal.

[88] Mr Mona was adamant that there was a mandate to charge and dismiss Mr Mabuza.

Grounds of review

[89] The applicant has raised inter alia the following grounds of review:

89.1 The Commissioner concluded that Mr Mabuza could not drive the bus while asleep and therefore could not have been asleep. It is alleged that the Commissioner's finding in the face of video footage and multiple witnesses testifying that Mr Mabuza's driving behaviour was irregular was unreasonable. The conclusion reached by the Commissioner thus flies in the face of and completely negates critical and pertinent evidence and is difficult to comprehend, according to the applicant. In the light of this evidence, it simply cannot be said that the finding of the Commissioner is reasonable, rendering the same reviewable.

89.2 The Commissioner thereafter concluded that Mr Mabuza could not be seen sleeping on the video footage, but rather looked tired, exhausted and required body rest. This finding is alleged to be unfounded speculation, based on the Commissioner's own subjective views. The Commissioner seemed to have sympathy for Mr Mabuza and went out of his way to come to Mr Mabuza's aid. This is entirely unfair towards the applicant.

89.3 The Commissioner also stated that fatigue, exhaustion and tiredness do not constitute misconduct. However, it is alleged that having regard to the factual context set out above, this finding is entirely irrational and unreasonable. The finding completely negates the devastating consequences of this kind of misconduct in the industry concerned. The Commissioner ignored all the remedial steps taken by the applicant to remedy the situation. The Commissioner also ignored the critical responsibility that rested on Mr Mabuza as a bus driver. In short, if he was fatigued, he should not have driven.

89.4 In sum, it is alleged that the Commissioner totally disregarded the evidence of Mr Mabuza's driving behaviour and did not consider this, or the electronic tracking evidence presented to him. Secondly, the Commissioner identified the grave consequences of Mr Mabuza driving whilst exhausted, but stated that nothing was wrong with Mr Mabuza's driving behaviour. The applicant submitted before the Commissioner that it had taken proactive measures against these types of behaviour due to the devastating consequences that it could have and the Commissioner, while acknowledging the serious consequences, deemed the behaviour acceptable.

89.5 It is alleged that the video footage showed that Mr Mabuza's eyes were closed, but the Commissioner found that Mr Mabuza was exhausted, even though he had just been off duty for seventy-one hours. The Commissioner in this regard had completely misconstrued the evidence before him and had jumped to conclusions without any grounds for doing so.

89.6 The Commissioner then referred to the 'reasonable arbitrators' test as laid out in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*[2]. However, it is alleged that he did not apply a single factor as set out in this judgment. It is further alleged that had the Commissioner

actually applied these factors, he could only have reasonably determined that Mr Mabuza's dismissal was substantively fair.

89.7 It is further alleged that the Commissioner overlooked the fact that Mr Mabuza had committed the same offence on a previous occasion, and also failed to consider that there was a final written warning or that there was a pattern in this regard. Further progressive discipline was not reasonably possible.

89.8 It is further alleged that the Commissioner disregarded the evidence presented by the applicant and merely accepted Mr Mabuza's argument that you cannot drive a bus while sleeping without any reasoning as to why, other than Mr Mabuza being disciplined if Mr Mabuza had informed the applicant that he is unable to drive due to his exhaustion. It is alleged that the Commissioner was effectively saying that Mr Mabuza had no choice but to drive exhausted, risking the lives of himself, the passengers and third-party drivers, because if he did not, he would have been disciplined by the applicant.

89.9 The arbitration award allegedly sets an extremely dangerous precedent, for other drivers of the applicant.

89.10 It is alleged that the Commissioner failed to consider and apply most of the sanction considerations applicable, in deciding whether the sanction of dismissal imposed by the applicant was fair. He did not consider the nature of the misconduct, the importance of the rule, and the lack of any explanation for Mr Mabuza's transgressions. He did not consider the possible prejudice to the applicant or the issue of the trust relationship.

89.11 Finally, concerning the relief granted, it is alleged that the Commissioner failed to exercise the required discretion as per section 193(2) of the LRA, namely, to consider whether a working relationship was still possible, and the material delay caused by the third respondent in prosecuting this matter to finality. The applicant's case was that a continued working relationship was not possible. It is alleged that the remedy of reinstatement was not appropriate.

The test on review

[90] The test to be applied is that as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3].

[91] The Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4] affirmed the test on review as follows:

'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.'

[92] The review court is not required to consider every factor individually, to consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. A piecemeal approach in considering the award is inappropriate because the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could reach.[5]

Analysis

[93] Much of the evidence proffered by Mr Mabuza and his witness at the arbitration was not put to the applicant's witnesses.

[94] In *Platinum Mile Resources (Pty) Ltd v CCMA and Others*[6], the Court per Prinsloo J entrenched the following principles concerning versions not put to witnesses:

'[41] After a witness has given his or her evidence in chief, the other party is given the opportunity to cross-examine the witness. The intended purpose of cross-examination is *inter alia* to reveal weaknesses in the evidence adduced, to challenge the truth or accuracy of the witness's version, to bring to light facts reinforcing the cross-examiner's case, to elicit favourable facts, to place a defence on record and to put the version of the cross-examining party.

[42] A party has a duty to cross-examine on aspects which he or she disputes. The rationale of the duty to cross-examine is that the witness should be cross-examined so as to afford him or her an opportunity of answering points supposedly unfavourable to him.

[43] The failure to cross-examine a witness about an aspect of his or her evidence may have the result that the evidence may not be called into question later. The cross-examiner who disputes what the witness says has a duty to give the witness an opportunity to explain his or her evidence, to qualify it or to reveal its basis. Failure to do so has been dubbed extremely unfair and improper.[7] Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence.[8] From this point of view, such evidence will carry more weight than evidence disputed by means of cross-examination and the failure to cross-examine, will be a factor increasing evidential value.[9]

[44] A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity to cross-examine, did not wish to dispute the version or aspects of the version of the particular witness who was available for cross-examination.[10] A cross-examiner is duty bound to put his or her defence or version on each and every aspect he or she wishes to place in issue, to the witness.

[45] In *Masilela v Leonard Dingler (Pty) Ltd*,[11] the Court was faced with a scenario where a version was not put to a witness in cross-examination and held that:

“The problem that I have with the applicant's version where it differs from that of Masina is that none of it was put to Masina while he was testifying. This court has been denied the benefit of Masina's response. It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit.”

In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.” [Own emphasis]

[95] The unfortunate inference that can be drawn from Mr Mabuza's evidence and that of Mr Mona is that they were not being candid with the Commissioner. It is also evident that the Commissioner failed to assess the competing versions in accordance with the well established principles in *Stellenbosch Farmers Winery Group Ltd & Others v Martell et cie & Others*[12] or at all.

[96] This means that the probative value of the evidence provided by the applicant's witnesses outweighed the probative value of the evidence provided by Mr Mabuza and Mr Mona.

[97] When considering the evidence, the common cause facts are as follows:

97.1 Mr Mabuza was on a final written warning concerning sleeping while driving which had been issued in January 2019. Mr Mabuza's track record was littered with previous disciplinary contraventions;

97.2 While Mr Mabuza claims that the final written warning was issued in his absence without receiving notice, this issue was disputed and Mr Mabuza failed to challenge this final written warning through recourse such as an unfair labour practice dispute;

97.3 Mr Mabuza was noticeably tired when he drove the passengers concerned in both February and March 2019;

97.4 Mr Mabuza should not have been fatigued because, in view of his shift change, he was given sufficient rest time, and concerning the March 2019 incident, he had come from a weekend off;

97.5 Driving while being fatigued presents a serious risk to the passengers driven, the driver, as well as other commuters on the road. This cannot be discounted in view of the significant motor vehicle fatalities which occur on South African roads on a daily basis;

97.6 Despite being admittedly tired, Mr Mabuza drove the bus in both February and March 2019 placing many lives at risk and without alerting his managers to this fact;

97.7 There was no evidence led at the arbitration to suggest that Mr Mabuza would have been disciplined had he alerted his managers to the fact that he was too tired to drive;

97.8 Mr Mabuza was not in the position to dispute the Autotrak evidence, nor the evidence of Mr Zwane who was experienced in analysing Autotrak data and who testified that Mr Mabuza's driving pattern was irregular or abnormal.

[98] Mr Mabuza's shift had been changed on numerous occasions, on the applicant's version to accommodate him, and his failure to challenge the shift changes accords with the applicant's version on the probabilities.

[99] In view of the inherent risk which Mr Mabuza's conduct presented, and because all other forms of corrective discipline had been exhausted, the Chairperson of the disciplinary enquiry found that dismissal was the appropriate sanction.

[100] The Commissioner overlooked all of the above and instead found that:

[27] Fatigue, exhaustion and tiredness on its own do not constitute misconduct although its effect may have devastating consequences on the road. I did not see anything inappropriate about his actual driving behaviour. If charging and dismissing the applicant was the only way of being proactive, such subjective determination may seriously be exposed to abuse by unscrupulous employers.

[28] The question to be asked is what would have happened if same applicant reported for duty and informed his supervisor that he could not work because he felt tired and exhausted and not physically and mentally ready to drive. The same supervisor would have expected more in support of such claim, otherwise the applicant was going to be disciplined.'

[101] Importantly, when considering the serious allegations made by Mr Mabuza that the disciplinary proceedings and his dismissal were animated by ulterior purpose by the applicant stemming from him running a successful business on the side and driving an expensive motor vehicle, among other things, not only was there not a shred of objective evidence led in this regard, but also this kind of allegation against one's employer can only impugn the trust relationship, or rather the lack thereof.

[102] In *Khambule v National Union of Mine Workers and Others*[13] the Labour Appeal Court found that an employer is not obliged to lead evidence to satisfy a commissioner that the relationship has indeed broken down and the facts should speak for themselves. Moreover, when evidence is lead concerning a breakdown of the trust relationship, it is the commissioner who must determine whether dismissal in the circumstances of the matter before him is the appropriate sanction.

[103] The Commissioner overlooked these material facts and reached the following unsubstantiated conclusion:

[32] On this basis, the respondent failed to discharge the onus as required by section 192(2) of the LRA 66 of 1995 and the applicant's dismissal was substantively unfair. The applicant prayed for reinstatement and I have no reasons to order otherwise. In ordering such remedy, I took into account the nature of the charges, the circumstances of the allegations, the applicant's defence, his position and his length of service amongst others.'

[104] When considering the totality of evidence led at the arbitration, it is evident that the arbitration award embodies a decision that a reasonable decision-maker could not reach. Mr Mabuza's dismissal was for substantively fair reasons. Reinstatement was an entirely inappropriate remedy when considering the unbecoming conspiracy theories advanced against the applicant, which were unsubstantiated. For these reasons, it follows that the arbitration award falls to be reviewed and set aside.

Costs

[105] The final consideration is costs. It is trite that in labour matters, costs do not follow the result.[14]

[106] In order for costs to be granted, the Court's judicial exercise of its discretion to award costs must be engaged and there must be a justification for the departure from the ordinary rule that costs should not be ordered. The dictates of fairness in terms of section 162 of the LRA and the constitutional and statutory imperatives that underpin it, must be considered.[15]

[107] Having considered all of the facts of the matter, there is no basis for costs to be awarded against either party, nor has either party argued for costs.

[108] In the premises, the following order is made:

Order

1. The arbitration award issued by the first respondent is reviewed and set aside, and substituted with the following:

1.2

"Mr Mabuza's dismissal was substantively fair."

2. There is no order as to costs.

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Mr Sean Snyman of Snyman Attorneys

For the third respondent: NUMSA

Instructed by: Nkhangweni Masutha

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- [1] Act 66 of 1995, as amended.
 - [2] (2007) 28 ILJ 2405 (CC).
 - [3] (2007) 28 ILJ 2405 (CC).
 - [4] (2014) 35 ILJ 943 (LAC) at para 16.
 - [5] Ibid at paras 18 - 19.
 - [6] (JR 427/20) [2023] ZALCJHB 52 (1 March 2023) at paras 41 – 45.
 - [7] Small v Smith 1954
 - (3) SA 434 (SWA); Barry v Mxaisa 1977 (4) SA 786 (O).
 - [8] S v Boesak 2000
 - (3) SA 381 (SCA).
 - [9] CWH Schmidt and H Rademeyer, “Law of Evidence”,(Lexis Nexis South Africa), 9-54 – 9-72.
 - [10] See: President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 1 SA 1 (CC).
 - [11] (2004) 25 ILJ 544 (LC) at para 28.
 - [12] 2003
 - (1) SA 11 (SCA) at para 5.
 - [13] (2019) 40 ILJ 2505 (LAC).
 - [14] See: MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another
 - [2008] 6 BLLR 540 (LAC) and Zungu v Premier of the Province of KwaZulu-Natal and Others
 - (2018) 39 ILJ 523 (CC).
 - [15] Union For Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others (2021) 42 ILJ 2371 (CC), specifically at para 35, read with Goba v Rand West City Local Municipality and Others
 - [2021] JOL 51406 (LC) specifically at paras 30 and 31.

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