

SOUTH AFRICA / JUDGMENT

G4S Secure Solutions (SA) (Pty) Ltd v Strauss N.O and Others (D267/21) [2024] ZALCD 26 (14 August 2024)

[2024] ZALCD 26

COURT
Labour Court DurbanBEFORE
T GovenderCASE / FILE NUMBER
D267/21

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FLYNOTES:

LABOUR – Dismissal – Reckless
or negligent driving –
Security
guard driving escort vehicle – Skidded off road leading to
extensive damage – Commissioner found
dismissal
substantively unfair – Ordered reinstatement and backpay –
Commissioner viewing video footage and photos
– Plausible
that vehicle hit puddle of water – Employee tried his best
to navigate difficult weather conditions
by not driving at maximum
speed – Speed of 107km per hour on highway where limit is
120km per hour was reasonable –
Had to keep close pursuit of
client vehicle being escorted – Review application
dismissed.
IN THE LABOUR COURT OF
SOUTH AFRICA, DURBAN
Not Reportable
Case No: D267/2021

In the matter between: G4S
SECURE SOLUTIONS (SA) (PTY) LTD
Applicant
and
COMMISSIONER
DAWID STRAUSS N.O
First
Respondent
COMMISSION FOR
CONCILIATION MEDIATION
AND
ARBITRATION
Second
Respondent
VIKANI
THULANI MLOTSHWA
Third
Respondent

Heard: 23 November 2023

Delivered: 14 August 2024

JUDGMENT

GOVENDER, AJ

Introduction

- [1] The matter before the Court is a review application in terms of section 145 of the Labour Relations Act[1] (LRA), concerning an arbitration award issued under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) per Commissioner Dawid Strauss (Commissioner).
- [2] The arbitration award is dated 25 April
2021. The review application was brought on 17 May 2021. While there is no indication of when exactly the arbitration award was received, 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, the first respondent's (Mr Mlotshwa's) dismissal was found to be substantively unfair, and reinstatement was ordered, with backpay. The applicant challenges this finding as being unreasonable.
- [4] The only issue in the arbitration which concerned procedural fairness was whether the charge sheet contained sufficient information to allow the applicant to prepare and defend himself. The Commissioner dismissed the notion that there was any irregularity regarding the formulation of the charge in view of Mr Mlotshwa acknowledging that he was aware of

the applicant's disciplinary code as well as the specific charge at issue. This finding by the Commissioner is not challenged by the applicant, meaning procedural fairness is not at issue.

- [5] Prior to addressing the pertinent legal principles, it is necessary to canvass the material background of the matter.

Background facts

- [6] The applicant is in the business of rendering private security services throughout South Africa. During his tenure, Mr Mlotshwa was employed as a Grade A Security Guard and Driver of the applicant's escort vehicles. Mr Mlotshwa had been employed since 20 December 2018 until his dismissal on 3 March 2020.
- [7] On 10 February 2020 at around 07h30, Mr Mlotshwa was driving one of the applicant's escort vehicles northbound on the N2 highway when an accident occurred.
- [8] It is common cause that Mr Mlotshwa was escorting a client's vehicle which was carrying valuable tobacco products when the accident occurred. It is also common cause that when escorting a client's vehicle, the escort vehicle is required to keep pace with the client vehicle.
- [9] The weather conditions were rainy, with poor visibility and the road was wet on the day in question. Mr Mlotshwa lost control of the vehicle, which resulted in the vehicle skidding off road and rolling.
- [10] No other vehicles were involved in the accident. The vehicle was damaged to the point where it was initially considered to be a right off, and later it was determined that it could be repaired.
- [11] On Mr Mlotshwa's version, the vehicle which he was driving hit a puddle of water, which caused him to lose control of the vehicle, it being too late for him to employ evasive manoeuvres to avoid the puddle. While he testified that his fatigue, as a result of not being given annual leave since he commenced employment, and his excessive working hours may have contributed to the accident, he was adamant that the prevailing weather conditions were the primary cause of the accident.
- [12] On the applicant's version, Mr Mlotshwa was driving recklessly or negligently which resulted in the accident. Prior to the accident, Mr Mlotshwa was seen on video footage from inside the vehicle holding the steering wheel with one hand, he looked sleepy, he had overtaken four vehicles immediately prior to the accident occurring and was driving at an excessive speed of 107 km per hour, when considering the prevailing weather conditions. While the applicant initially contended that there was a speed limitation rule internally, it later conceded that drivers were allowed to drive at the speed limit on the highway.

[13] Mr Mlotshwa was accordingly given a notice to attend a disciplinary hearing on 25 February 2020 for a disciplinary hearing which was to take place on 27 February 2020. The charge was as follows:

‘1. CHARGE 1:

7.10 Causing a Traffic Accident due to Reckless driving’.

[14] Following the disciplinary proceedings, where Mr Mlotshwa was represented by a fellow employee, namely Mr Wiseman Ziqubu (Mr Ziqubu), he was summarily dismissed for:

‘...causing a traffic accident due to reckless / negligent driving’.

[15] Mr Mlotshwa was advised of his dismissal on 3 March 2020.

[16] Mr Mlotshwa referred an unfair dismissal dispute to the CCMA on 18 May 2020. Because the referral of his unfair dismissal dispute was late, Mr Mlotshwa applied for condonation in this regard. Condonation was granted concerning the late referral of the dispute on 27 May 2020.

[17] The arbitration was held on 31 August, 17 November 2020 and 6 April 2021. Mr Mlotshwa testified in support of his case and also led Mr Ziqubu as a witness. The applicant led Mr Nimrod Mkhize (Mr Mkhize) as its only witness.

[18] As stated above, the arbitration award is dated 25 April 2021.

Grounds of review

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

19.1 The arbitration was significantly delayed as a result of the impact of the COVID-19 pandemic which should have been taken into account insofar as the issue of backpay is concerned. This includes the reduction of staff at the CCMA as part of cost saving measures;

19.2 The Commissioner applied a more stringent standard of proof than the balance of probabilities and misconstrued the test for negligence.

With reference to paragraph 29 of the arbitration award, the applicant contends that the Commissioner only considered the test for recklessness and not simple negligence. The applicant further states that the Commissioner was required to consider the reasonable man test;

19.3 The Commissioner failed to recognise Mr Mlotshwa’s admission that he was tired at the time by finding that he was unable to determine whether fatigue played a definitive role concerning the accident. In so finding, the applicant contends that the Commissioner

required proof beyond that of a ‘...simple probability’;

19.4 The applicant further contends that the Commissioner allegedly found that ‘...there was a sizeable pool of water on the road surface and consequently accepted the Third Respondent’s [Mr Mlotshwa’s] contention that hitting a puddle caused him to lose control of the vehicle. It appears that the Commissioner found from this that the Third Respondent [Mr Mlotshwa] was not negligent’;

19.5 The applicant states that in reaching the above conclusion, the Commissioner failed to give consideration to the material issues

applicable to negligent driving, particularly when accidents occur on a straight road;

19.6 The applicant further states that the Commissioner failed to recognise that Mr Mlotshwa bore the evidentiary burden and in accordance with the maximum of *res ipsa loquitur*, the common cause facts were that the motor vehicle had veered from a straight road and rolled, impugning negligence on Mr Mlotshwa’s part.

[20] In the applicant’s supplementary affidavit, it expands upon the above grounds of review and adds that the Commissioner’s

preferred reliance on the photographs from the accident scene taken subsequent to the accident, and not the video evidence which was contemporaneous, was unreasonable. Moreover, the applicant contends that the video footage demonstrates that there was no pool or puddle of water on the road.

The test on review

[21] The test on review to be applied is that as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2]. The Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[3] affirmed the test on review as follows:

‘In short: A reviewing 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 that is reasonable.’

[22] 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.[4]

Analysis

[23] While there was substantial evidence led on the divergence between the charge sheet and the ultimate basis for the dismissal, as stated above, the Commissioner found that there was no irregularity stemming from this. This was premised on the applicant acknowledging that he was aware of the disciplinary code from where the charge was drawn and he acknowledged this specific charge as contained in the disciplinary code.

[24] This matter turns on a discrete factual issue which is whether Mr Mlotshwa drove recklessly or negligently causing the accident and if so, whether his dismissal was substantively fair.

[25] The test for negligence is whether a reasonable person in the appellant's position would have reasonably foreseen harm befalling the respondent as a result of his conduct, and would have taken reasonable steps to prevent the harm. If so, the question is whether he took reasonable steps to avert the harm that ultimately occurred.[5] The reasonableness of such conduct is assessed objectively.[6]

[26] The Commissioner found as follows concerning whether the applicant was reckless or negligent:

‘[29] For the respondent to show that the applicant was reckless or negligent, it would have to show that the applicant must have foreseen that his conduct could have caused the MVA, that the applicant's conduct was wilful and that he took no steps to avoid the incident. This would mean that the applicant must have shown a total disregard for the driving and road conditions. I find that in each of these incidences the answer must be in the negative. The applicant maintained a speed of around 107/109km/h, which is far below the speed limit of the road, being 120km/h. In my mind this shows that he recognised that there was a hazard and that he took reasonable steps to mitigate the hazard of wet roads. To the contrary the respondent has not presented any evidence to show what speed would in fact have been appropriate under the prevailing conditions, nor has it presented evidence to show that the speed the applicant travelling at was not appropriate for the prevailing conditions. The respondent must therefore fail its cause to show that the applicant was negligent/reckless’. (Emphasis added.)

[27] In *Majeng v S*[7] the Court stated as follows regarding the distinction between negligent and reckless driving:

‘[7] The distinction between reckless and negligent driving is a matter of degree. Recklessness, in essence, is the more significant form of carelessness and negligence, the lesser form. In this case, it seems apparent that the offender drove a vehicle; (a) by overtaking when it was not safe to do so and, (b) that oncoming traffic had to slow down for the vehicle which he was driving. The presiding officer did not determine whether the offender's conduct was of such a high degree as to amount to gross negligence and thus ‘recklessness.’ Gross negligence includes conscious negligence.’

- [28] When considering the above, it is clear that the Commissioner applied the correct test for negligence, and that he also considered recklessness, which in essence is gross negligence. It is further clear that the applicant's contention that the Commissioner misconstrued or failed to consider the test for negligence is misplaced.
- [29] The arbitration award must be read holistically, and a piecemeal interpretation and reading of the award is the antithesis of the test on review.
- [30] In addition, the applicant argued that the principle of *res ipsa loquitur* is applicable, in that there is a presumption that there has been negligence, and the employee must then tender a reasonable explanation. In this regard, Mr Beckenstrater for the applicant handed up the judgment in *Stacey v Kent*[8] in support of the argument that an explanation should have been given by the employee and not by the employer as the Commissioner contends.
- [31] But this is to conflate the respective tests before the Commissioner.
- [32] Section 192(2) of the LRA provides that in a matter where the existence of the dismissal is established, the employer must prove that the dismissal is fair. The onus of proving the fairness of the dismissal is peremptory.
- [33] The applicant's reliance on the judgment in *Stacey v Kent* does not disturb the onus as per section 192 (2) of the LRA, but also the facts of that matter are entirely distinguishable, in that while the road was slippery in that matter, the main reason for the application of the maxim *res ipsa loquitur* was because the collision in question had occurred with the respondent being on the incorrect side of the road, which required an explanation from the respondent. In addition, *res ipsa loquitur* is not a presumption, but rather an inference of negligence[9].
- [34] In addition, Mr Matwa who appeared for Mr Mlotshwa referred the Court to paragraph 38 of his heads of argument in support of his contention that the applicant was relying on outdated authority. In this regard, Mr Matwa referred the Court to the judgment in *Road Accident Fund v Mehlomakhulu*[10].
- [35] While I do not believe that the applicant established the inference of negligence on the facts, as stated above, the applicant was duty bound to prove the fairness of the dismissal and in any event, Mr Mlotshwa tendered an explanation for the accident, which was the weather conditions, the road being wet and him losing control of the vehicle because he hit a puddle of water, which he could not avoid. For reasons elaborated upon below, the applicant has not managed to disturb Mr Mlotshwa's version.
- [36] The bases for alleging Mr Mlotshwa's negligence is largely speculation which was somewhat taken out of context.
- [37] The Commissioner certainly did not elevate onus of proof beyond a balance of probabilities, when considering the arbitration award against the totality of evidence led at the arbitration.

[38] The applicant led the evidence of Mr Mkhize in an attempt to dispute the existence of the puddle of water. The reality is that Mr Mkhize was not present when the accident occurred and his evidence largely turned on his observations from the video evidence, such opinion not being that of an expert.

[39] Since the video evidence served before the Commissioner and because one of the grounds of review was that the Commissioner should not have relied on the photographs but should have instead relied on the video evidence, I have considered the video evidence and I agree with the Commissioner that the video footage is not clear and as such does not support the applicant's version that there was no puddle of water on the road.

[40] The only video evidence which seems to be of some assistance is the rear video footage, which demonstrates that there was a large splash of water as the vehicle lost traction and swerved off the road, thereby lending credence to Mr Mlotshwa's version that there was a puddle of water.

[41] The Commissioner reasoned as follows concerning his reliance on the photographs:

'[28] The next issue I will deal with is whether there was a puddle/pool of water on the road surface that caused the applicant to lose control of the vehicle. The video footage in this regard is not clear, but the photos taken at the scene of the MVA (contained in bundle C) in my view allows one to form an opinion as this aspect. On C pg. 1 one is able to see a vehicle driving through what seems to a patch on the road that is distinctively different to the rest of the road surface. The vehicle then also generates what seems to be a lot of water spray/mist as it passes through that patch. On C pg. 2 and 3 there are two vehicles passing through the same area of the road surface, with both vehicles generating a large spray or mist. On page C 4 there are also two vehicles, one having just gone through the patch mentioned above and the other still approaching it. The front vehicle has a large amount of spray or mist in its trail, whereas this spray or mist is not present where the second vehicle is approaching that patch in the road. I find that this evidence I sufficiently convincing that there was, what seems to be a rather sizable pool of water or puddle/pool of water on the road surface. This is precisely what the applicant has maintained throughout his case and what he wishes for me to believe to be the main factor that caused the MVA. I then also find that it is very plausible that driving through this

pool/puddle of water could have been the cause of the applicant to lose control of the vehicle, resulting in the MVA'.

[42] The Commissioner engaged in a detailed analysis of the photographs in reaching his conclusion that it was plausible that there was a pool/puddle of water which could have been the cause of Mr Mlotshwa losing control of the vehicle. There is accordingly no basis to fault the Commissioner in this regard, absent cogent evidence to the contrary.

[43] It further bears emphasis that the applicant has sought to underplay the fact that Mr Mlotshwa was escorting a client vehicle which was carrying valuable tobacco products. Mr Mlotshwa was required to keep pace with the client vehicle and the client vehicle is not

visible in the video evidence, meaning that Mr Mlotshwa was cognisant of the weather conditions and was not driving fast enough to be directly behind the client vehicle. Mr Mlotshwa driving at a speed of 107km per hour, on the highway where the speed limit is 120km per hour is reasonable in the circumstances.

- [44] Had Mr Mlotshwa slowed down dramatically and not kept up with the client vehicle in so doing, he would have contravened his duties. It seems that Mr Mlotshwa tried his best to navigate the difficult weather conditions by not driving at the maximum speed permissible, while at the same time trying to keep a close pursuit of the client vehicle being escorted.
- [45] Concerning Mr Mlotshwa's fatigue, it is common cause that Mr Mlotshwa had not taken leave since he had commenced employment and had worked excessive hours. Mr Mkhize confirmed the applicant's operational constraints and shortage of drivers.
- [46] Mr Mlotshwa readily conceded that he was tired and that this may have contributed to the accident, but he was resolute that the actual cause of the accident was the puddle of water, which he could not avoid.
- [47] Save for stating that Mr Mlotshwa had come from a two day rest period, and could have swapped positions with his co-driver, the applicant provided no real evidence, save for speculation, that Mr Mlotshwa driving while fatigued had caused the accident. Just because Mr Mlotshwa admitted to being tired, does not mean that this was the cause of the accident.
- [48] The Commissioner finding that he was unable to determine whether fatigue played a definitive role is accordingly unassailable when considering the totality of evidence.

Relief

- [49] Concerning the remedy of reinstatement, the applicant did not really take issue with this, while I am cognisant that the applicant challenged the Commissioner's findings on substantive fairness, save for stating that the Commissioner should have factored in the delays in the arbitration occasioned by COVID-19.
- [50] When considering that Mr Mlotshwa referred an unfair dismissal dispute in May 2020, condonation for the late referral of about one month was granted, conciliation had to take place and the matter was heard in August and November 2020 and finalised in April 2021, I can appreciate that there was some delay in the matter.
- [51] The applicant argued that the award should only have been retrospective for seven months, i.e. fifty percent of the time. The difficulty is that there was no evidence led concerning the delay in this regard. Again, the real question is whether the Commissioner's finding that 'had the applicant then not been dismissed unfairly he would have worked for 13 months and 2 weeks from the date of his dismissal, up to the date of the award' and awarding backpay in this amount unreasonable?

[52] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[11], the apex court held as follows:

‘..The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal...’

[53] Having considered the facts and legal principles, there is no reason to interfere with the Commissioner’s findings on reinstatement

and backpay. The application of the Commissioner’s discretion in this regard is one that a reasonable decision-maker could reach.

Costs

[54] The final consideration is costs. It is trite that in labour matters, costs do not follow the result.[12]

[55] 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.[13]

[56] 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.

[57] In the premise, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr Charles Beckenstrater Instructed by: Moodie and Robertson Attorneys For the third respondent: Mr MB Matwa Instructed by: DETAWU

[1] Act 66 of 1995, as amended.

[2] (2007) 28 ILJ 2405 (CC).

- [3] (2014) 35 ILJ 943 (LAC) at para 16.
- [4] Goldfields (Ibid) at paras 18 to 19.
- [5] See: Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 at para 31.
- [6] See: Louw v Patel (245/2021) [2023] ZASCA 22 (9 March 2023) at para 22.
- [7] (47/2023)
- [2023] ZAWCHC 41 (28 February 2023) at para 7.
- [8] 1995 (3) SA 344 (E).
- [9] Stacey v Kent 1995 (3) SA 344 (ECD) at 352 E – F. See also: Van Biljon v S (Leave to Appeal) (AR 396/2010) [2012] ZAKZPHC 60 (17 September 2012) at para 7
- [10] 2009 (5) SA 390 (E).
- [11] [2008] 12 BLLR 1129 (CC) at para 36.
- [12] 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).
- [13] 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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