

SOUTH AFRICA / JUDGMENT

Maditse v CCMA and Others (JR 2725/2019) [2021] ZALCJHB 69 (28 May 2021) [2021] ZALCJHB 69

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2725/2019

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The Labour Court of
South Africa
(Held at Johannesburg)
Not
reportable
Case
No: JR 2725/2019

In the matter between:

SEROGOLE
DONALD MADITSE
Applicant
and
CCMA
First Respondent
SEELE
MOKOENA
N.O
Second
Respondent
ESMOENE
CEILING
CC
Third Respondent
Hearing: 27 May 2021
(via Zoom)
Date
of judgment: 28 May 2021. Judgment delivered by email.

JUDGMENT**VAN NIEKERK J**

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 31 July 2017. In his award, the arbitrator found that the applicant's dismissal was procedurally and substantively fair.
- [2] The background facts are not in dispute. The applicant was employed by the third respondent as a site supervisor. For this purpose, the applicant was allocated a vehicle owned by the third respondent. The applicant was dismissed for the unauthorized use of the third respondent's vehicle for private business, and for driving the vehicle on a public road in excess of the speed limit.
- [3] The arbitrator found that the applicant had been allocated a vehicle to enable him to discharge his responsibilities as a site supervisor. The tracking records submitted in evidence and not disputed disclosed a consistent pattern of going to work and returning home during working hours. On the evidence, the arbitrator found that the applicant had failed to show that he went home on any of the occasions recorded in the car tracking records to fetch material needed on site, as he had claimed. The applicant further did not dispute the final written warning given to him on 22 October 2018 for the same offences. Insofar as the applicant contended that his driving in excess of the applicable speed limit was justified by reason of the fact that he was acting on the instructions of his manager, this was denied by the third respondent's witness. The arbitrator found that the applicant ought to have been aware that road traffic regulations could not be contravened at the behest of anybody except on the instruction of a law enforcement officer. Besides that, the memorandum referred to in the evidence disclosed that the third respondent's management did not promote speeding, as did the final written warning. In all of those circumstances, the arbitrator upheld the applicant's dismissal.
- [4] The grounds for review are broadly to the effect that the arbitrator committed a reviewable irregularity in that the applicant's contract of employment made clear that traffic fines for speeding and other misdemeanours would be the responsibility of the applicant. The applicant's submission would appear to be that in these circumstances, the contract made no provision for any disciplinary offence relating to infringements of traffic regulations. In other words, what the applicant contends that the arbitrator ought to have found is that any traffic fine incurred by the applicant was to be dealt with solely in terms of his contract, by way of reimbursement to the third respondent.

[5] The review application was filed late. The applicant states that he received the award on 20 July 2019. The six-week period prescribed by section 145 expired on 4 September 2019. The application was served only on 22 November 2019, more than 11 weeks late. The degree of lateness is not insignificant. The explanation for the delay is to the effect that the applicant sought legal advice only in October 2019 when he was advised by an attorney, who required a deposit to

draft the review papers. On 12 November 2019 the deposit was paid and the applicant was assisted in the drafting of the review papers.

[6] Even if I accept that this is a satisfactory explanation, I must necessarily weigh the explanation with the fact of a significant delay and the applicant's prospects of success. The applicant's prospects of success must necessarily be determined having regard to the threshold for review. This court may intervene if and only if the

applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. A right of review has been clearly distinguished from a right of appeal. This court is not empowered to intervene simply because it would have come to a different conclusion on the same facts. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). The Labour Appeal Court has affirmed this principle and held that while the failure of an arbitrator to apply his or her

mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable

outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, while a failure properly to assess the evidence is indicative of an unreasonable outcome, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons

of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

[7] The applicant has failed to make out a case that meets the above threshold. In essence, his contention is that the arbitrator's decision is wrong, and that it should be set aside on that basis. Insofar as the applicant relies on the terms of his contract, there is nothing in law which precluded the third respondent from taking disciplinary action against the applicant for the unauthorised use of his vehicle and exceeding the speed limit. The term of the contract on which the applicant relies says no more than that the applicant indemnifies his employer in the event that fines are levied in respect of the vehicle allocated to the applicant. In other words, it was the applicant's responsibility to pay the fines but that did

not in itself absolve him from any obligation not to exceed the speed limit, or not to use the vehicle for the purpose other than one which was authorised by the third respondent. In the circumstances, in my view, the applicant's prospects of success in the review application are minimal, if they exist at all.

- [8] In the result, condonation stands to be refused. The application was not opposed in the virtual hearing (although the third respondent filed a notice of intention to oppose the application) and the question of costs thus does not arise.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

Andre van Niekerk

Judge of the Labour Court of South Africa

REPRESENTATION

For the applicant: Self

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Prepared on 10 October 2026 · Esheria