
SOUTH AFRICA / JUDGMENT

Malaka v GPSSBC and Others (JR566/15) [2016] ZALCJHB 332 (18 August 2016)

[2016] ZALCJHB 332

COURT

Labour Court Johannesburg

BEFORE

Gwaunza

CASE / FILE NUMBER

JR566/15

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THE LABOUR COURT OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: JR 566/15

In the matter between:

MG MALAKA

Applicant

and

GPSSBC

First Respondent

T MPSHE

Second Respondent

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Third Respondent

Heard: 18 March 2016

Delivered: 18 August 2016

GWAUNZA, AJ

Introduction

- [1] This is an application by Ms MG Malaka (“Ms Malaka”) to review and set aside the arbitration award issued by the Second Respondent (“Commissioner”) under the auspices of the First Respondent (“Bargaining Council”).
- [2] Ms Malaka was employed by the Third Respondent, the Department of Justice and Constitutional Development (“DOJ&CD”), as Deputy Director: Performance Management. She reported to Mr Dicksen Muzwayine (“Mr Muzwayine”), the Director: Employee Relations Unit.

Background

Facts

- [3] From time to time, Ms Malaka travelled to various areas on behalf of the DOJ&CD to conduct workshops. The DOJ&CD would hire a car for Ms Malaka for this purpose. In this regard, Ms Malaka and Mr Muzwayine would sign an internal document known as a “VA 26 Form”, which contains, inter alia, the Authority Number, the purpose of the journey, date of collection of the vehicle, date of return of the vehicle, the signature of Ms Malaka – as the applicant – and the signature of Mr Muzwayine – as the authoriser. On the strength of the VA 26 Form, the DOJ&CD was able to requisition a vehicle from Travel with Flair (“TWF”) and TWF would hire the vehicle for Ms Malaka from Avis.
- [4] Ms Malaka was issued with the cellular phone by the DOJ&CD.
- [5] After an investigation which was conducted by Mr PP Makhobotloane (“Mr Makhobotloane”), the Deputy Director: Language Services, the following allegations were levelled against Ms Malaka on 28 February 2014:

5.1. Charge 1 (Fraud): Fraud in that Ms Malaka wrongfully and intentionally defrauded the DOJ&CD by submitting to TWF a forged and/or unauthentic VA 26 Form with Authority Number 45/2013. Ms Malaka thereby caused TWF to secure you a vehicle from Avis at the expense of the DOJ&CD. Ms Malaka knew that, in fact and in truth, she had not obtained proper authority to hire a vehicle and further that she had falsified the information on the VA 26 Form so that there was an impression that the application was approved when indeed the opposite was true. This resulted in the DOJ&CD suffering financial loss.

5.2. Alternative to Charge 1 (Falsifying Official Documents): Ms Malaka falsified official documents in that she wrongfully, intentionally and with intent to misrepresent, falsified VA 26 Form with Authority No: 33/2013 by altering the particulars of a journey to read 11 – 15 March 2013, when it was originally approved as 4 – 8 March 2013, so that she could use the same VA 26 Form to secure herself a vehicle without proper prior authorisation. She rendered herself guilty of falsifying an official document.

5.3. Charge 2 (Unauthorised Use of a Hired Motor Vehicle): Unauthorised use of a hired vehicle in that, on or about 9 March 2013, Ms Malaka collected a vehicle and she signed an agreement on behalf of the DOJ&CD in terms of which she was to return the vehicle on 18 March 2013. Ms Malaka, subsequently, without justification and/or authorisation failed to return the vehicle on 18 March 2013 as agreed but continued to keep and use the vehicle until 19 March 2013. Ms Malaka thereby rendered the DOJ&CD vicariously

liable for the payment of 19 March 2013, which usage was not official and was unauthorised.

5.4. Charge 3 (Unacceptable Use of the Department's IT Equipment and/or Internet): Unacceptable use of DOJ&CD IT equipment and/or internet in that, on or about 3, 17 and 24 February 2013, 3, 10, 17, 24 and 31 March 2013, 7, 14, 17, 21 and 28 April 2013, 5, 12, 17, 19 and 26 May 2013, 2, 4, 9, 17, 23 and 30 June 2013, and 7 July 2013, Ms Malaka wrongfully and deliberately connected to the internet and accessed a website named Adult Pictures, which site contains obscene and pornographic material. Ms Malaka acted in contravention of the provisions of clause 20.1, read with clause 20.2, of the Information Technology Acceptable Use Policy. Ms Malaka was further in contravention of paragraph 10.5, read with paragraph 11.3, of the Cellular Based Technology (Data Card) Policy Dated 18/12/2008.

[6] The facts around the aforementioned charges are as follows:

6.1. There are 3 VA 26 Forms that have relevance to the allegations that were levelled against Ms Malaka:

6.1.1. The first VA 26 Form ("Form 1") has an Authority Number "HR 45 / 2013" and was signed, on the face of it, by Ms Malaka and Mr Muzwayine on 28 February 2013. The purpose of the journey is recorded as follow: 'Performance Management Workshop Continuation at Hammaskraal: 04 – 08 MARCH 2013'. The collection date is 9 March 2013 and the return date is 18 March 2013.

6.1.2. The second VA 26 Form ("Form 2") also has an Authority Number "HR 45/2013" and was signed, on the face of it, by Ms Malaka and Mr Muzwayine also on 28 February

2013. The purpose of the journey is recorded as follow: 'Performance

Management Workshop Continuation at Hammaskraal: 11 – 15 March 2013 Continuation Workshop'. On this form, the typed dates "04 – 08 March 2013" are crossed out and replaced in handwriting with "11 – 15 MARCH 2013 Continuation

Workshop". The collection date is also 9 March 2013 and the return date is also 18 March 2013.

6.1.3. The third VA 26 Form ("Form 3") has an Authority Number "HR 33/2013" and was signed, on the face of it, by Ms Malaka and Mr Muzwayine also on 28 February

2013. The purpose of the journey is recorded as follow: 'Performance Management Workshop Continuation at Hammaskraal: 04 – 08 MARCH 2013'. The collection date is 1 March 2013 and the return date is 11 March 2013.

6.2. A cursory look at Forms 1, 2 and 3 raises eyebrows. The Form are all authorised on the same date, i.e. 28 February 2013. The workshop in Form 1 is from 4 to 8 March 2013 but the collection date is 9 March 2013 and the return date is 18 March 2013, i.e. after the workshop. Form 2 is, on the face of it, Form 1, only that the typed dates “04 – 08 March 2013” are crossed out and replaced in handwriting with “11 – 15 March 2013 Continuation Workshop”. With Form 2, however, the collection date is also 9 March 2013 and the return date is also 18 March 2013 – i.e. at least 2 days after the workshop. Form 3 makes reference to the workshop again on 4 to 8 March 2013. However, the collection date is 1 March 2013, which is two days before the workshop and the return date is 11 March 2013, which three days after the workshop.

6.3. Mr Muzwayine stated that he was aware of Form 1, which he had authorised and signed. He was, however, not aware of Forms 2 and 3, which he had not authorised. In relation to Form 2, he stated that he was not aware that the typed dates “04 – 08 March 2013” were crossed out and replaced in handwriting with “11 – 15 March 2013 Continuation Workshop”.

6.4. Despite concluding a rental agreement with Avis on 9 March 2013 in terms of which the vehicle was to be returned on 18 March 2013, Ms Malaka returned the vehicle to Avis on 19 March 2013. No financial loss was, however, incurred by the DOJ&CD because Avis did not charge it for 19 March 2013.

6.5. The Information Technology Acceptable Use Policy provides as follows:

6.5.1. Clause 20.1(i): The activities that are indicative of unacceptable usage of the internet by IT users include, but not limited to the following: Deliberately accessing sites that contain obscene, prejudice, pornographic, violent or otherwise unlawful material.

6.5.2. Clause 20(2): Where IT users are in breach of, but not limited to, the above-mentioned unacceptable use of internet services, the Department reserves the right to invoke disciplinary action in accordance with the Human Resources processes and/or temporarily revoke the IT user’s internet services.

6.6. Ms Malaka’s son gave evidence at the disciplinary enquiry and at the arbitration to the effect that it was him who used the DOJ&CD cellular phone data to access the website named Adult Pictures.

[7] Prior to the aforementioned allegations being levelled against Ms Malaka, the Department issued her with a final written warning on 26 July 2013 as a result of the allegation that between 3 December 2012 and February 2013, she overused the DOJ&CD cellular phone by incurring an amount of R16 083.13, which was beyond the prescribed limits.

[8] Pursuant to a disciplinary enquiry, Ms Malaka was found guilty of the allegations levelled against her and she was dismissed. The Department did not uphold her appeal and, thereafter, Ms Malaka referred an unfair dismissal dispute to the Bargaining Council. The arbitration took place on 17 February 2015 and the arbitration award is dated 27 March 2015. The Commissioner found that Ms Malaka’s dismissal was substantively fair.

[9] In reaching the decision that the dismissal was substantively fair, the Commissioner recorded the following in the arbitration award:

9.1. Ms Malaka contravened a rule or standard regulating her conduct in or of relevance to the workplace; the rule or standard was valid; the DOJ&CD was consistent in the application of the rule or standard insofar as, for example, 16 employees had been dismissed in the Eastern Cape Province as a result of the same conduct; the DOJ&CD has a zero tolerance approach to serious transgressions such as those that Ms Malaka was found guilty of.

9.2. Ms Malaka intentionally falsified documents for the purpose of securing a vehicle for hire, which would explain the excessive 912 kilometres that she travelled and the fact that she retained the vehicle over the weekend; Ms Malaka falsified the official documents because it could be reasonably expected of her to have known how to complete the VA 26 Forms because of the nature of her work, which included travelling, and her position as a Deputy Director; the evidence of Mr Makhobotloane was more probable and provided a logical explanation with regard to his propositions and Ms Malaka failed to dispute his evidence with a reasonable explanation;

although Ms Malaka did not forge the signature of Mr Muzwayine, the balance of probabilities favoured Mr Muzwayine's version that he did not sign the VA 26 Form because there was no compelling evidence to indicate a reason why he would lie about this.

9.3. Although the Department did not incur financial loss in relation to 19 March 2013, it did suffer financial loss as a result of the excessive kilometres travelled between 12 March 2013 and 18 March 2013, as well as the rental charge for this period; although Ms Malaka may have attended the workshop on behalf of the Department, the trip was unauthorised.

9.4. It is probable that Ms Malaka's son used the cellular phone without her permission; however, Ms Malaka is liable for the contravention of the IT Policy, even though she was remorseful and accepted responsibility.

9.5. The employment relationship broke down as a result of dishonesty on the part of Ms Malaka and consequently, dismissal was an appropriate sanction.

[10] It is this finding that Ms Malaka seeks to have reviewed and set aside.

Analysis

[11] It was difficult to ascertain with any measure of certainty what Ms Malaka's review grounds were. She did not have legal representation from what I can gather when she delivered her review application. It is understandable that, as a lay litigant, Ms Malaka would not have articulated her review grounds with the precision that is expected of lawyers. Ms Malaka did, nevertheless, have legal representation when she delivered her replying affidavit and heads of argument and when the matter was argued before me. She complains of bias on the part of the Commissioner and she alludes to misconduct and gross irregularities in her heads of argument.

- [12] Having regard to principles of fairness and equity, and having regard to the applicable law, I have considered the review application against section 145 of the Labour Relations Act 66 of 1995, as amended, (“LRA”), by asking whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach.[1]

Charge 1

- [13] Fraud is defined as the unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. In cases of fraud, an employer is not required to prove actual loss. Potential loss is sufficient. The falsification of any record or document with a view to obtaining some advantage is a form of fraud.[2]
- [14] In relation to Form 2, and as stated above, the typed dates “04 – 08 March 2013” are crossed out and replaced in handwriting with “11 – 15 March 2013 Continuation Workshop”. This Form 2 was submitted to TWF and, on the strength of this document, Ms Malaka was able to hire a vehicle from Avis from 9 March 2013 to 18 March 2013. The representation that arose from Form 2, which representation was made to DOJ&CD, TWF and Avis, was to the effect that Mr Muzwayine had authorised the hiring of a vehicle for Ms Malaka from 9 March 2013 to 18 March 2013 in order to attend a workshop from 11 March 2013 to 15

March 2013.

- [15] The Commissioner was confronted with two conflicting versions. On the one hand, Mr Muzwayine alleged that he was not aware of Form 2 and, in particular, he did not know that the typed dates “04 – 08 March 2013” had been crossed out and replaced in handwriting with “11 – 15 March 2013 Continuation Workshop”. On the other hand, Ms Malaka alleged that she called Mr Muzwayine to inform him of the amendment of the dates whilst she was at the offices of TWF. Ms Malaka also alleged that there was no written rule relating to the generation and completion of VA 26 Forms and, accordingly, she was not in contravention of any rule.
- [16] In my view, the explanation given by Ms Malaka for having altered the dates on Form 2 and, thereafter, submitting Form 2 to TWF for purposes of hiring a vehicle from Avis, coupled with her insistence that there was no written rule as aforementioned, is unconvincing and improbable. As the Commissioner rightly pointed out, ‘it could be reasonably expected from her to have known how to complete VA26 forms considering the nature of her work which among others included travelling and the capacity/rank which she occupied as a deputy director’. The Commissioner correctly weighed up the probabilities against the cogency of the versions that were presented to him.
- [17] In the circumstances, I agree that Ms Malaka made a misrepresentation to DOJ&CD, TWF and Avis which enabled her to secure a vehicle from Avis from 9 to 18 March 2013 unbeknown to Mr Muzwayine. The misguided avenue that Ms Malaka took is open to abuse and must be guarded against.

[18] Ms Malaka contends that there was no financial loss to DOJ&CD because the workshop did take place. As I have already stated above, in cases of fraud, the employer is not required to prove actual loss and potential loss is sufficient. In any event, it would seem that the DOJ&CD did suffer financial loss. Firstly, as stated above, the collection date recorded on Form 2 is 9 March 2013 – i.e. two days before start of the workshop – and the return date is 18 March 2013 – i.e. at least

two days after the end of the workshop. Ms Malaka seems to have retained the vehicle for personal use during this period. Secondly,

as the Commissioner rightly found, the DOJ&CD suffered financial loss as a result of the excessive kilometres that Ms Malaka travelled with the vehicle during this period. On both counts, the use of the vehicle was not for the benefit of the DOJ&CD.

[19] The finding of fraud by the Commissioner meets the reasonableness test referred to above.

Alternative to Charge 1

[20] I have already stated that the falsification of any record or document with a view to obtaining some advantage is a form of fraud. In this matter, the advantage that Ms Malaka obtained lies in the personal use that she had of the vehicle and the excessive kilometres that she travelled with it as stated above, both of which did not benefit the DOJ&CD. Be that as it may, my finding that fraud was reasonably established negates this alternative charge.

Charge 2

[21] In light of my finding regarding fraud above, it goes without saying that the use of the vehicle by Ms Malaka was unauthorised for the entire period, i.e. 9 to 19 March

2013. The finding by the Commissioner relating to unauthorised use of the vehicle therefore meets the reasonableness test referred to above.

Charge 3

[22] Ms Malaka went to the extraordinary length of having her son testify at the disciplinary enquiry and at the arbitration to the effect that it was him who visited the website named Adult Pictures. This evidence could not be disputed by the DOJ&CD. In these circumstances, Ms Malaka could not have been found to have deliberately accessed sites that contained obscene, prejudicial, pornographic, violent or otherwise unlawful material as contemplated in the Information Technology Acceptable Use Policy.

[23] The finding by the Commissioner that Ms Malaka was liable for contravening the policy in these circumstances does not pass the reasonableness test.

Finding

- [24] A finding of fraud and dishonesty often results in dismissal because the conduct goes to the heart of the employment relationship and it often destructive of it. The Commissioner, as stated above, found that the employment relationship broke down as a result of dishonesty on the part of Ms Malaka and that dismissal was warranted. The DOJ&CD takes the same view. The Commissioner also found that 16 employees had been dismissed in the Eastern Cape Province as a result of the same conduct. This type of misconduct is something that the DOJ&CD takes seriously. I see no reason to interfere with this approach.
- [25] In the final reckoning, the decision that the Commissioner arrived at is not one that a reasonable decision-maker could not have come to based on the evidence that was before him and the applicable law.

Conclusion

and costs

- [26] Ms Malaka did not act frivolously and/or vexatiously in the pursuit of the review application. Ms Malaka is also an individual litigant who, at times, was unrepresented and who sought to pursue her dispute without malice, in my view, in the bargaining council and in this Court. I, therefore, see no reasons in law or fairness to award costs against her.
- [27] For the above reasons, I make the following order:
1. The application to review and set aside the arbitration award issued by the second respondent under the auspices of the first respondent is dismissed.
 2. There is no order as to costs.

Gwaunza, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:

Advocate Mapila

Instructed by:

T Radzilani Attorneys

For the Third Respondent: Advocate Mhambi

Instructed by: the State Attorney.

- [1] Sidumo and Another v Rustenburg Platinum Mines Limited and Others [2007] 12 BLLR 1097 (CC) at para 110.

[2] John Grogan, Dismissal, Second Edition, 2014.

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