

SOUTH AFRICA / JUDGMENT

Nhlengethwa v Eagle Liner (Pty) Ltd (D415/08) [2010] ZALCD 12 (17 December 2010) [2010] ZALCD 12

COURT

Labour Court Durban

BEFORE

Cele

CASE / FILE NUMBER

D415/08

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NUMBER: D415/08

Not Reportable

SAMUEL NAPHTAL NHLENGETHWA

Applicant

And

EAGLE LINER (Pty) Ltd

Respondent

JUDGMENT

Cele J.

Introduction

[1] This is an application to make an arbitration award dated 25 May 2007, issued by Commissioner Aubrey Ngcobo, under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA), an order of court in terms of section 158 (1) (c) of the Labour Relations Act Number 66 of 1995 (the Act). Simultaneously, the applicant seeks a declaratory order that the respondent has failed to comply with the said arbitration award and that the respondent be ordered to make payments to the applicant in terms of the award with retrospective effect. The respondent opposed the application, raising such a dispute of

facts that the matter had to be referred to oral evidence for the resolution of such facts.

Factual

background

- [2] The applicant was in the employ of the respondent as a bus driver from about September 2001, in a commercial transport industry. He would be deployed to different routes including those between Gauteng Province and KwaZulu-Natal. On 4 July 2006 the applicant was at work operating a bus of the respondent at Standerton area. Inspectors employed by the respondent boarded his bus to do their routine checking and they found three passengers without tickets. This incident led to the respondent charging the applicant with an act of misconduct. He was found to have committed that misconduct and was dismissed. He then referred an unfair dismissal dispute for conciliation and arbitration. Commissioner Ngcobo found that the applicant was guilty of the misconduct charged but that the dismissal was too harsh as a sanction. He therefore found the dismissal to have been substantively unfair. He also found the procedure followed to have been lacking fairness and he ordered the respondent to re-employ the applicant at the same position and on the same terms and conditions as existed prior to his dismissal. The respondent did not challenge the award which was issued on 25 May 2007.
- [3] On 11 June 2007 the applicant reported for duty at the Head Office of the respondent in Lenesia in Gauteng and he presented himself to Mr Moletsane one of the Managers of the respondent. Parties are in dispute about whether or not the applicant went home to fetch his personal belongings in preparation for the resumption of work. They are also in dispute about the nature of work performed by the applicant from 11 to 13 June 2007, but it is not in dispute that he availed his services for the respondent. The General Manager of the respondent, Mr Ghalib Ismail arranged to meet the applicant on 14 June 2007. The meeting took place as arranged. They both agreed that the applicant was to operate a special bus from Gauteng to Durban on the following day, Friday, 15 June 2007. Mr Ismail informed the applicant to work on a newly created Gautrain route as from the following Monday, 18 June 2007. According to the pleadings the applicant was dissatisfied about being allocated to a route which he had not services before. He referred to the Nquthu, Mondlo route as his regular route. He had been operating in this route when he committed the misconduct which led to his dismissal. The applicant did not turn up to operate the special bus from Gauteng to Durban on Friday. Nor did he report for duty on 18 June 2007.
- [4] In April or May 2007 two members of the respondent company and one Mr Peter Rabally of the Caribbean Blue company jointly undertook a business venture of transporting workers involved in the building of the Gautrain project in Gauteng. 3 employees of the respondent were put into the project as bus drivers together with 5 drivers employed by Mr Rabally. Mr Rabally was responsible for the day to day operation of the venture with Mr Ismail giving him help as and when it was necessary. The respondent initially supplied more buses than Mr Rabally but later Mr Rabally acquired more buses for his drivers. The applicant returned

to report on duty a few weeks after the commencement of the Gautrain route.

- [5] Mr Mnguni, being the representative of the applicant as the Organiser of the Democratic Rights Workers Union of SA wrote a letter dated 26 June 2007 on behalf of the applicant, for the attention of Mr Fazil Bhayla, the respondent's Director. He pointing out that Mr Ismail had refused to accept the applicant back at work in the same position and to accord him the same conditions as had existed before his dismissal. He said that Mr Ismail was therefore refusing to comply with the terms of the arbitration award. He called on Mr Bhayla to intervene, saying that the applicant was to work in his position as a driver, at the same place, and was to receive the same benefits. He said that the applicant was to work in the same route as before, failing which he would apply for the award to be made an order of court. The respondent issued a letter dated 2 July 2007 under the hand of Mr Bhayla as a response to his letter. The letter outlines the chronology of events and then states:

".....Mr Ghalib informed Mr Nhlengethwa that he was going to start at Gautrain which is our sister company, on Monday 18 June 2007. Mr Nhlengethwa decided to leave the company on 14 June 2007 and he did not comply with Mr Moletsane's instruction to operate the special to Durban

In view of all this, the company believes that Mr Nhlengethwa absconded himself from work on 14 June 2007."

- [6] The issues between the parties were not resolved and the applicant initiated the present application.

The evidence

Applicant's version

- [7] The applicant said that when Mr Ismail told him to work at the Gautrain route, he had no problem except that he wanted to know from Mr Ismail if there were appropriate sleeping facilities available for drivers in that route. Mr Ismail told him to enquire from other drivers what facilities there were. He then looked for drivers operating in that route and found one, a Mr Jabulani Nene who told him that they has a serious problem in that drivers had to sleep and bath in bases. The drivers had to relieve themselves in bushes. The applicant considered his age of 57 years and realized that the working conditions were demeaning. He went back to Mr Ismail and told him of the problem. Mr Ismail hand gestured and said he could not help him. The applicant telephoned Mr Mnguni who asked to talk to Mr Ismail. Messrs Mnguni and Ismail had a telephone discussion on the issue raised by the applicant and Mr Ismail told Mr Mnguni not to teach him his job. While the discussion continued, Mr Ismail's telephone rang and the applicant went to wait outside.

- [8] The applicant again telephoned Mr Mnguni who told him to leave the working place if he was told that he was not accepted back. Mr Mnguni undertook to discuss the matter with a Director of the respondent who was at the time away and not available. The applicant left the workplace for the reason that Mr Ismail had indicated to him that he (Mr Ismail) was not happy about the return of the applicant as well as his complaint that there were no sleeping facilities in the Gautrain route. Mr Mnguni then wrote the letter of 26 June 2007.
- [9] Mr Nene testified that he joined the Gautrain route in May 2007 to be one of the three drivers of the respondent. There were other 5 drivers employed by a Mr Rabally. All the 8 drivers operated within the Gautrain route where more buses belonged to the respondent. He met other drivers operating in that route and he was made to understand that they had to sleep in their buses as no accommodation facilities were made for them. They parked buses in a rectangular manner and used the enclosed space for bathing purposes. They had no ablution facilities. They had no security and as buses could not be locked, they were vulnerable to attacks. This was at Modderfontein where they had to pick up their passengers. Mr Rabally, who was too keen to meet and talk to his employees, soon found accommodation for his drivers at Kempton Park. He said that Mr Ismail complained about drivers going to sleep at Lenasia as it involved travelling a long distance and wastage of fuel. He said that during the time he worked for the respondent no arrangement at Boksburg had been made for their accommodation and that if any such accommodation was made, it would have been after he had resigned from the employment by the respondent. He could not explain why in his statement no reference was made of him meeting the applicant at the workplace to talk about sleeping accommodation in the Gautrain route. He said that he could not read and write English. He said that he had discussed accommodation problems with Mr Ismail on a number of occasions.
- [10] Mr Mnguni said that the applicant had telephoned him on the day he met Mr Ismail after he had reported back at work. The applicant told him that Mr Ismail was not willing to re-employ him on the same terms as were stated in the arbitration award in that he (the applicant) was being deployed to a sister company but had no problem with it save that there were no proper sleeping facilities in that route. In the letter written by Mr Mnguni no reference was made of the positive attitude of the applicant in accepting the instruction from Mr Ismail. Mr Mnguni was at pains in an attempt to explain this disparity when taxed on it. He corroborated the version of the applicant about the conversation he had with Mr Ismail who denied any unwillingness on his part to implement the terms of the award which he (Mr Ismail) said was in front of him. Mr Ismail then became emotional and accused Mr Mnguni of attempting to teach him his job as he was trying to intervene and he handed the telephone back to the applicant.
- [11] The applicant needed to know what to do. He advised him that he would find another member of management to try and resolve the impasse and he telephoned Mr Moletsane who declined to intervene due to the seniority level of Mr Ismail to him. Mr Mnguni learnt that the Director of the respondent was out of the country but would be back in the office on

26 June 2007. They had to wait until that date and when it came, he telephoned Mr Bhayla and outlined the situation to him Mr Bhayla suggested that Mr Mnguni was to reduce what they had discussed into writing, hence the letter of 26 June 2007. He was too shocked when he received the letter dated 2 July 2007 from Mr Bhayla as he thought Mr Bhayla was more understanding of the situation. He could not gather strength to respond to that letter.

- [12] Mr Mnguni conceded that his union had no organizational rights with the respondent even though the union had members working for the company. He said that he was still in the process of setting up meetings with management for the recognition of his union. He conceded that he had not raised the working conditions problem in the Gautrain route with the respondent, saying that he had himself not heard of it before the telephone discussion he had with the applicant. He subsequently instructed the attorney of the applicant to initiate the present application.

Respondent's version

- [13] The respondent had one witness, Mr Ismail whose evidence on the disputed issues is now to be dealt with. At the commencement of the Gautrain route Mr Rabally had not been able to secure accommodation facilities for drivers. Drivers had then to return to the Lenesia depot and in so doing had to travel a distance of about 80 kilometres. They slept at a hostel but were not happy and they had to find a house in the suburb. Mr Rabally worked hard on the issue and he finally found accommodation for drivers in Boksburg where there was a construction mine site belonging to ERPM. As the project grew bigger workers were moved in January 2008 to another site in Modderfontein and a house was then found to accommodate the drivers. They were working under strict conditions and could possibly lose the contract to transport workers if they, as transport operators did not comply with such regulations.
- [14] In relation to the re-employment of the applicant, Mr Ismail met the applicant on 14 June 2007 in his office. The applicant had no problem when instructed to undertake the bus special from Gauteng to Durban. He then brought the applicant up to date in relation to the business of the company and more about the Gautrain project. He then told the applicant that he would work on the Gautrain route. While the applicant preferred the Mondlo route which he had been working on before his dismissal, he had no problem in working in the Gautrain route. There was no permanency on routes worked on and the applicant might work on the Mondlo route on the next day as the company was guided by the demand at the time.
- [15] Mr Ismail could not put the applicant in the route he had been working on because there were operational changes with the result that other drivers were allocated to that route. There was also a legal issue pertaining to their license for operating in that route but after a week or so the applicant might have been allocated to work in that route. The meeting ended with no hassles. He did not tell the applicant to enquire from other drivers about sleeping facilities for the Gautrain route. He could not remember having spoken to Mr Mnguni about

the sleeping facilities in the Gautrain route and he said that if such a discussion had ensued, he would have referred Mr Mnguni to the Human Resources department of the respondent in Pietermaritzburg. He conceded that sleeping in buses would certainly have been an appalling arrangement, if it had been done.

- [16] Mr Ismail was surprised when Mr Moletsane telephoned him on Friday to report that the applicant had not reported for duty on Friday. Mr Moletsane had to drive the special bus to Durban and they found another driver to drive it back. The applicant did not report for duty on Monday and Mr Ismail telephoned Mr Zwane of the HR Department in Pietermaritzburg to report the absconding employee and he left the matter to be dealt with by Mr Bhayla.

Evaluation

- [17] The dispute between the parties is about whether or not there was a substantial compliance by the respondent with the terms of the arbitration award. It remained common cause that the applicant tendered his services as directed by the award. While there was some dispute about the activities of the applicant from 11 to 14 June 2007, the respondent accepted that he was on duty. The arbitration award directed the respondent to re-employ the applicant on the same position and on the same terms and conditions as existed prior to his dismissal.
- [18] The reference to the same position is clearly a reference to the applicant having to be re-employed as a bus driver, which is the position he held before his dismissal. There appears to be no issue on this aspect. The term or condition of employment which appears to be the subject of a dispute relates to whether or not the applicant was entitled to demand to be allocated to a particular route. This issue appears not to be a serious problem when seen from the version of the applicant which has been vacillating from a demand to be placed on a particular route and a complaint about the sleeping facilities of drivers operating the in the Gautrain route. Paragraph 6 of the statement of claim and the letter written by Mr Mnguni dated 26 June 2007, issued for the respondent outline the issue in dispute as one of a failure by the respondent to allocate the applicant to a particular bus route. A demand to be placed in a particular route has no basis on the arbitration award. The applicant failed to refer court to any company policy, regulation or any source of authority for that claim of a right. He must have failed because no such authority existed. Clearly therefore the pleaded case of the applicant has no basis capable of sustaining the cause of action sought to be relied upon.
- [19] The complaint about the sleeping arrangements within the Gautrain route has its own problems. Firstly, it is not a pleaded cause of action. The result is that the respondent was taken by surprise when it had to meet a case for which it was not forewarned and prepared. The approach by the applicant in this regard was nothing short of a trial by ambush. The conclusion is irresistible that the applicant was trimming his sails to suite the wind as the trial was progressing. If the applicant believed in the truth of this version he no doubt would have referred to it at the earliest available opportunity which presented itself in the letter written by Mr Mnguni for the respondent dated 26 June 2007. Secondly, if provision for accommodation, as an employment benefit, was not catered for in the employment contract

or in the company policy or in a collective agreement, a demand for such provision would be a mutual interest issue which belongs to collective bargaining. Unfortunately for the applicant a single employee may not constitute a strike. Even if the applicant were confronted with accommodation problems the remedy thereof did not lie in him leaving the workplace as he did.

[20] On either version of the applicant his application falls to be dismissed. What is of concern though is the manner in which the respondent reacted to the conduct of the applicant or rather a lack of such reaction. It is expected of an employer to act decisively with an absconding employee so as to avoid a stalemate as has happened in this matter. While the rationale underlining this application has no merits, the arbitration award stands as it is still valid and binding. The parties have allowed confusion to prevail since the award was received by them. It is only as a means of guiding the parties for their future conduct in this matter that it is recommended that the applicant should again tender his services to the respondent for re-employment, with no retrospective effect. He was 57 years of age in 2007. The respondent may be guided by its policy on the natural age of retirement and the issues on the public carriers permit in considering whether to re-employ him.

[21] The following order will therefore issue:

1. The application is dismissed.
2. No costs order is made.

DATE OF HEARING

: 17 AUGUST 2010

DATE OF JUDGMENT : 17 DECEMBER 2010

APPEARANCES

FOR APPLICANT

: Mr P JAFTA of JAFTA INC.

FOR RESPONDENT

: Mr P HOB DEN of tomilson mnguni james ATTORNEYS

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