

SOUTH AFRICA / JUDGMENT

Wiggil Farming (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and Others (JR1520/23) [2024] ZALCJHB 324 (21 August 2024)

[2024] ZALCJHB 324

COURT

Labour Court Johannesburg

BEFORE

Ford

CASE / FILE NUMBER

JR1520/23

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FLYNOTES:

LABOUR

– Dismissal – Gross

misconduct –

Using

cellphone while driving tractor – Employer relying on road

traffic rule – Incorrectly found that employee

was not

guilty of misconduct where he pleaded guilty to misconduct –

Sufficient evidence that employee was guilty of

misconduct and not

gross misconduct – Written warning would have sufficed –

Dismissal was extraordinarily harsh

– Substantively unfair –

Applicant ordered to reinstate employee.

THE LABOUR COURT OF

SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: JR 1520/23

In

the matter between: WIGGILL
FARMING (PTY) LTD
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First
Respondent
PFARELO
MAMPHOGORO N.O.
Second
Respondent
UPSWU
obo MTOMBE VURAYAYI
Third
Respondent

Heard: 7
August 2024

Delivered: 21 August 2024
(This judgment was
handed down electronically by circulation to the parties' legal
representatives, by email, publication
on the Labour Court's
website and released to SAFLII. The date on which the judgment is
delivered is deemed to be 21 August
2024.)

JUDGMENT

FORD, AJ

Introduction

- [1] Gross misconduct is misconduct of an extremely serious nature. It is wilful in its intent and deliberate in its effect. It is conduct for which there is no justification. It can never, and should never be condoned, rationalised or accommodated. It is detestable in its construct and inexcusable in every conceivable context. It holds at its core the repugnant and abhorrent violation of workplace rules and standards, with much impunity and disdain. It demands an equal and disabling retort, achieved only by the imposition of a counter balancing act, such as the summary termination of employment.
- [2] This is an application to review and set aside the arbitration award of the second respondent ("the commissioner"), dated 12 July 2023. The commissioner found the dismissal of the third respondent, substantively unfair and ordered his reinstatement with back-pay.

[3] Unhappy with that decision, the applicant instituted review proceedings to set aside the commissioner's award.

[4] The application is unopposed.

The

facts

[5] On 2 July 2015, the applicant employed the third respondent ("Mtombe Vurayayi"), as a Tractor Driver earning a salary R3550.00 per month.

[6] On 23 January 2023, Mr. Clifford Wiggill ("Wiggill"), while doing his normal checks at the farm, passed Mtombe and saw him using his cell phone while operating the tractor. He confronted Mtombe, who apologised for the incident.

[7] Mtombe was, pursuant to the incident, notified to attend a disciplinary hearing where he was charged with various counts of gross misconduct, stemming from the same incident. The following charges were preferred against him:

7.1 Charge 1: Gross misconduct – Non-compliance with cell phone usage policy, by using a cell phone while operating a vehicle;

7.2 Charge 2: Gross misconduct - Placing a company asset at risk;

7.3 Charge 3: Gross misconduct – Placing your own as well as other fellow employees' lives at risk;

7.4 Charge 4: Gross-misconduct – Breaking the bond of trust between employer and employee.

[8] A disciplinary hearing was convened on 6 February 2023, and Mtombe was dismissed, after pleading guilty to the charges preferred against him.

[9] Mtombe challenged his dismissal at the CCMA, and on 12 July 2023, the commissioner found his dismissal to have been substantively unfair and ordered his reinstatement with back-pay.

The CCMA proceedings

[10] Wiggill testified in relation to the charges as preferred against Mtombe that he (Mtombe) was made aware of the rules, and that he signed for it. Further that it would not be correct if one could say the rule was null and void because the employer failed to bring such a rule to the CCMA. He testified that the traffic rules state that nobody was allowed to operate a vehicle while using a cell phone. He confirmed that Mtombe was not conveying any employees on the day of the incident, but that he was pulling a trailer.

[11] Mr. Leon Bodenstein, the applicant's second witness, corroborated the evidence of Wiggill, in all material respects.

[12] In his evidence before the commissioner, Mtombe did not deny using his cell phone on the day of the incident. He explained however that he was using it to check the time. He testified that pleaded guilty because he was scared.

[13] In assessing the evidence about Mtombe having used his cell phone while operating the tractor on the farm, the commissioner found as follows:

In the current matter it is common cause that the applicant was found using the phone while driving a tractor, the applicant himself did not dispute it in his evidence in chief. The respondent on the other hand through Mr. Clifford Wiggill and Leon contended that there was a workplace rule that prohibits the employees from using phones while driving. The respondent did not provide any workplace rule that prohibits the employees from using phones while driving, only relying on the Road Traffic rule. The Road Traffic rule prohibits a person of using a communication device driving on a public road not the farm, so the respondent was supposed to bring such workplace rule but failed. The applicant also contended that the respondent does phone him now and then while driving in order to give instructions, the respondent did not dispute such testimony in (sic) any stage. I am convinced that the respondent failed to show if there was a valid and reasonable rule at the workplace.

[14] In relation to the claim that Mtombe placed the respondent's employees and property at risk, the commissioner stated:

I am not sure on (sic) how did the applicant place the respondent's property and fellow employees at risk because there was no evidence brought before me of any accident caused by the applicant at the workplace. The respondent only spoke of speed warning which was not even brought to my attention.

[15] The commissioner found that misconduct was not established and that the dismissal of Mtombe was harsh.

Analysis

[16] Review proceedings operate from a two-stage process. It must firstly be determined whether the decision of the commissioner, having regard to the evidential material placed before him, is one falling within the bands of reasonableness. If it does, then an arbitration award passes the constitutional muster and if it does not, the award falls to be reviewed and set aside. The two-stage test enjoins this court to uphold an award that meets the reasonableness threshold, regardless of the arbitrator's reasoning.

[17] I have considered the arbitrator's reasoning and found it competing with the evidence that was placed before him. The commissioner incorrectly found that Mtombe was not guilty of misconduct, in circumstances where Mtombe himself pleaded guilty to misconduct. In addition, the commissioner somehow conflated the existence of the rule with the requirements of Section 1(a) of Regulation 308A of the Act[1], which states that:

“No person shall drive a vehicle on a public road, while holding a cellular or mobile telephone or any other communication device in one or both hands or with any part of their body.”

- [18] Whether or not the specific regulation applies to operating a vehicle on a farm, is immaterial to the question whether an employer can require compliance with such a rule within its premises. An employer is well within its rights to establish rules that are fair and reasonable and to expect compliance. There is nothing unreasonable in an employer introducing a rule such as the one it contends, was breached by Mtombe. The commissioner’s conclusions that the applicant failed to prove that the rule exists, because it was unable to produce a document in which the rule is stipulated, is perplexing to say the least. This difficulty was effortlessly overcome by the evidence of Wiggill and Leon. Moreover, there would have been no need for Mtombe to have offered an apology, if he did not appreciate his wrongdoing.
- [19] I have considered the record of the proceedings before the commissioner, and although not in agreement with the commissioner about the evidential conclusions he arrived at, I am in agreement with the outcome reflected in his award, and conclude, for different reasons, that the dismissal of Mtombe was unfair.
- [20] On the evidence before the commissioner, there is sufficient evidence that Mtombe was guilty of misconduct, but not gross misconduct, and certainly not misconduct that could result in his dismissal, for a first offence. The employer’s labelling of misconduct as “gross” does not in and of itself make it so. It is the nature and extent of the misconduct that renders it gross, not the employer’s labelling thereof.
- [21] The applicant in these proceedings, sought to convince this court that Mtombe was guilty of gross misconduct. For reasons set out herein, I disagree.
- [22] In Sidumo, the court reiterated the fact that the decision-maker should take the totality of circumstances into consideration. The court said:
- In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list[2].
- [23] It is, all things considered, immediately apparent, to me at least, that the incident giving rise to the dismissal of Mtombe could quite easily have been corrected, without resorting to his dismissal. A written warning would have sufficed. Dismissal in the circumstances

of this case, was indeed extraordinarily harsh.

[24] The incident that Mtombe was guilty of does not remotely meet the standard for gross misconduct set out in this judgment.

[25] Accordingly, having properly considered the evidence presented at the arbitration, I hereby set aside the decision of the commissioner and substitute it with the following order:

Order

1. The third respondent is guilty of misconduct and issued with a written warning valid for 6 months.
2. The dismissal of the third respondent was substantively unfair.
3. The applicant is ordered to reinstate the third respondent retrospectively with effect from 1 August 2023, with back pay in the

amount of R14,200 with interest.

4. I make no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms. L. Govender (Vermeulen Attorneys)

For the third respondent: No appearance

[1] National Road Traffic Act 93 of 1996

[2] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)

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Prepared on 12 October 2026 · Esheria