Arbitration Award

Case Number: ***GAEK3785-22***
Commissioner: ***Eleanor Hambidge***
Date of Award: ***31 December 2022***

In the **ARBITRATION** between

Owen Paul Cook
(Union/Applicant)

and

ZENITH CAR RENTAL (Pty) Ltd t/a Avis Rent a Car & Budget Rent a Car
(Employer)

Employee's representative: ***Legal practitioner – Mr. Bongani Luthuli***

Respondent's representative: ***Legal practitioner- Mr. Nkosinathi Mbuyisa***

1. DETAILS OF HEARING AND REPRESENTATION

1.1. The alleged unfair dismissal as referred by Mr. Owen Paul Cook (Employee) involving Zenith Car Rental (Pty) Ltd t/a Avis Rent a Car & Budget Rent a Car (Employer) was initially heard on the merits on 12 September 2022 and was then finalized on 14 December 2022.

1.2. Throughout these arbitration proceedings, both parties were represented by legal practitioners, pursuant to a ruling wherein I concluded that it will be unreasonable for the Employee to present his case without legal representation and such right to legal representation was extended to both parties. Accordingly, Mr. Luthuli, an attorney, represented the Employee and Mr. Mbuyisa, also an attorney, represented the Employer.

1.3. The parties relied on their respective bundles of documents, as handed up and the arbitration proceedings were also recorded.

1.4. I further afforded both representatives an opportunity to submit closing argument in writing and such were received and taken into consideration. I am indebted to both legal practitioners for the quality of their respective closing arguments.

2. BACKGROUND TO THE DISPUTE

2.1. The Employee, a Rental Sales Agent, was dismissed on 30 March 2022, for gross insubordination by refusing to carry out a reasonable instruction in that he failed to present a Covid-19 vaccination certificate by 6 March 2022, as instructed.

2.2. At this arbitration, it was common cause that the Employer had adopted a Mandatory Vaccination Policy and that the Employee had applied for exemption from such policy, but the application for exemption was declined.

2.3. At the time of his dismissal, the Employee was performing his duties for the Employer at Oliver Tambo airport.

3. ISSUES TO BE DECIDED

Both the substantive fairness and the procedural fairness of the dismissal were placed in dispute. At the arbitration, the Employee sought compensation as the appropriate remedy when I had posed the question.

However, in the closing argument, it was argued by the attorney for the Employer that reinstatement is being sought, if the dismissal is found to be unfair.

4. SURVEY OF EVIDENCE and ARGUMENTS

I decided to only summarize the salient points of the testimony of the respective witnesses. However, all evidence, albeit not specifically referred to, was taken into consideration in arriving at the decision. All the witnesses testified under oath.

The Employer relied on the evidence of two witnesses and the Employee testified in support of his case.

Employer's case:

4.1 **Mr. Joe Mwase,** the risk executive, very well qualified and also the chairperson of the exemptions committee, testified that the Employer undertook a risk assessment, and said the Employer concluded a vaccination mandate. He also said that the Employer could not move the Employee to another area – i.e persons in the frontline could not be reasonably accommodated. He did not really consider PCR - testing as an alternative.

During the cross-examination, he could not produce any Covid Plan as required by the Consolidated Direction, nor could he show compliance with Annexure C of the Direction in providing the Employee with reasonable accommodation. It was also put to him that at the time the Employer had adopted its Mandatory Vaccination Policy, the Government was in the process of easing restrictions. This witness also conceded that there was no religious expert in the exemption committee and could not recall whether any application for exemption based on constitutional or religious grounds was indeed approved. He was adamant that the proof that the Employee had tested positive for antibodies did not form part of the exemption application.

4.2 **Mr. Bundhu t**estified that he found the Employee's conduct in refusing to be vaccinated despite a risk assessment, outcome of an exemption application, which was denied, to be unreasonable.

This witness also considered the rule reasonable in that it was introduced to curb Covid-19 infections at the workplace and was consistently applied.

4.3 **The Employee**, a Rental Sales Agent, testified to his interpretation of the Bible and said that due to his strong religious beliefs he could not be vaccinated. He also indicated that at the time the Employer had adopted its Mandatory Vaccination Policy, the Government was in the process of easing restrictions and thus the Policy came in very late. He further indicated that he had contracted Covid during November 2021 and said he had antibodies and therefore had immunity. He also alluded to the fact that herd immunity had been reached at the time to substantiate his stance on not being vaccinated. It was the testimony of this witness that he had applied for exemption and had premised such on religious objection and his conscience; his bodily and psychological integrity; and natural immunity. He said he had been unsure at the time as to what was required from him in the application for exemption and denied he was a high risk, which came to his attention at this arbitration for the first time. He rejected the reasons advanced for denying his application for exemption and said such reasons were paying lip-service only and considered the reasons for declining his exemption application to have been similar to that of other employees. He denied that a vaccination appeals committee was in existence. He further testified that he had been informed by managers that weekly PCR-tests are considered an alternative to being vaccinated. He made mention of his mother who had suffered a stroke to indicate the risks involved for him in taking the jab and pointed out that the Employer's Policy allows for reasonable accommodation. He also testified not to have been consulted at all. He said he never meant ay disrespect, nor was it his intention to undermine authority. In response to my question, he sought maximum compensation and said the trust relationship had been destroyed, by both parties.

During the cross-examination, the witness conceded that the Employer is both legally and morally obliged to keep the workplace as safe as possible to protect its employees, customers and stakeholders, but said it was the manner in which the Employer went about it, which was objectionable. He further conceded that once Covid-19 had been identified as a hazard, it was left to the employer to take adequate and necessary measures. He further admitted that he was told of the need to vaccinate in terms of the newsletter (page 27 of the Respondent's bundle); the outcome of the exemption application (page 40 of the Respondent's bundle) and the Policy which came into effect on 1 March 2022 and in hindsight, he indicated that he would have submitted

supporting documents to his application for exemption. He further conceded that he failed to mention in his exemption application that he had tested positive for Covid-19 antibodies.

During the re-examination he indicated that he thought the chairperson did not read his detailed statement, as submitted.

5. ANALYSIS OF EVIDENCE ARGUMENTS

In terms of section 192 of the LRA the Employer is to discharge the onus that the dismissal was fair and such onus is to be discharged on a balance of probabilities.

In this matter before me, the Employer elected to discipline and dismiss the Employee for alleged misconduct pertaining to gross insubordination for his failure to follow an instruction to vaccinate and I will therefore deal with this matter accordingly. The matter before me is therefore not a no-fault dismissal, where substantive and procedural fairness of the dismissal are often intertwined in that the Employer elected not to discipline and dismiss for incapacity (not being able to do his job anymore) or to retrench for operational requirements, due to the failure/refusal to vaccinate.

5.1 Procedural fairness:

5.1.1 I understood the allegation(s)pertaining to procedural unfairness were premised on the chairperson of such internal hearing not taking into consideration the letter from the Employee's Pastor wherein it attempted to amplify the Employee's exemption application previously launched on *inter alia* religious grounds. Furthermore, the entire exemption process and the reasons for declining the application for exemption were advanced as procedural defects, as well as the fact that no plan had been adopted by the Employer as required in terms of the Consolidated Direction of 11 June 2021 and that the risk assessment embarked upon only came to the attention of the Employee at this arbitration.

5.1.2 In the arbitration before me, the chairperson of the internal hearing was not called as a witness. However, nothing much turns on this, as an arbitration under the auspices of the CCMA/bargaining council is a hearing *de novo* and thus I am required to hear the evidence afresh. An arbitrator is not supposed to "review" the decision of the chairperson of the disciplinary enquiry (see in this regard the judgment by Honourable Judge Nkutha - Nkontwana in *Performing Arts Council of Free State v CCMA and others* (case number JR 82/18) (handed down on 27 May 2021). Thus, an issue whether a

chairperson of an internal hearing should have considered evidence and had failed to do so cannot be entertained as part of the perceived procedural irregularities, as such will be tantamount to a review of such decision. Under substantive fairness, this pertinent issue will be addressed. Likewise, the rest of the procedural defects as raised, will be dealt with under substantive fairness, to the extent that the CCMA has jurisdiction to entertain the issues raised.

5.1.3 In the leading judgment on procedural fairness, that of *Avril Elizabeth Home v CCMA and others (2006) 27 ILJ 1644 (LC),* a judgment handed down by Honourable Judge van Niekerk, the Court held that an internal disciplinary inquiry should not replicate the criminal justice model and the essence of a disciplinary inquiry is a dialogue between the employer and the employee and an opportunity for reflection before the decision to dismiss the employee is taken. The approach as adopted in the *Avril Elizabeth-judgment* has been endorsed in subsequent judgments, such as *Munnik Basson Dagama Attorneys v CCMA (2011) 32 ILJ 1169; Nitrophoska v CCMA and others (2011) 32 ILJ 1981 (LC)* and in *BEMAWU and others v SABC and others (J 2239/15)* handed down on 2 March 2016. Once again, the principle in the *Avril Elizabeth-judgment* was reiterated in the judgment of *UASA obo Fouche v CCMA (JR 119/12)* handed down on 19 August 2016. In a reported judgment, by the late Judge Steenkamp in *Dagane v SSSBC and others [2018] 7 BLLR 669 (LC)***,** the Court reinforced the principles, as enunciated in the *Avril Elizabeth-judgment.*

5.1.4 By adopting the approach as enunciated in the *Avril Elizabeth-judgment,* it is my finding that the chairperson had complied with the *audi alteram partem*-principle by affording the Employee an opportunity to be heard, which is the test for procedural fairness in a misconduct-matter.

5.1.5 Based on the above, I find the dismissal was procedurally fair in that the Employee was afforded an opportunity to state his version at the disciplinary hearing.

5.2 Substantive fairness:

5.2.1. The duties of an arbitrator are twofold in that I must first determine whether the misconduct was committed and thereafter decide whether dismissal was the appropriate sanction.

Was the misconduct committed?

5.2.2 As previously stated, the Employer elected not to deal with the Employee's refusal to vaccinate as a no-fault dismissal. Instead, the Employee was dismissed for alleged gross insubordination for his refusal to carry out a reasonable instruction by presenting a Covid-19 vaccination certificate. To

constitute gross insubordination, an employee's refusal to obey an instruction must be deliberate, and the instruction must have been reasonable and lawful.

5.2.3 As a point of departure, amongst the issues raised in the Pre-Arbitration Minutes by the attorney for the Employee is whether other than the Directives issued by the Minister, there was a law of general application justifying the limitation of rights in the Bill of Rights, which rights are considered sacrosanct. The Employee's attorney had argued that the *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces,* duly gazette on 11 June 2021, does not amount to law of general application in justifying the limitation of rights in the Bill of Rights and also advanced that the CCMA has the authority to assess and make determination on the reasonableness of the Employer's Mandatory Vaccination Mandate/Policy. A lot of reliance was also placed by the Employee's attorney on various CCMA awards, which were issued post March 2022.

5.2.3.1 I have a number of concerns with the approach adopted by the attorney for the Employee. Firstly, I consider the *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces of 11 June 2021,* which was in place at the time of the incident which led to the dismissal of the Employee, to constitute subordinate legislation. The Constitution provides that "national legislation" includes "subordinate legislation", made in terms of an Act of Parliament. The *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces of 11 June 2021* was issued in terms of Regulation 4(10) of the Regulations made under section 27(2) of the Disaster Management Act 57 of 2002. I also find that this particular piece of subordinate legislation is linked to the purpose of the enabling Act of Parliament. The *Consolidated Direction of June 2021,* after all, is aimed in preventing the escalation of Covid-19 in the workplace, and to alleviate, contain and mitigate the severity of the virus in certain workplaces.

Subsequently, such Consolidated Direction has been replaced with the *Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, dated 15 February 2022,* and was issued by the Department of Employment and Labour, and also constitutes subordinate legislation, for the same reasons as set out above. In terms of this Code, employers may continue developing and enforcing mandatory vaccination policies.

5.2.3.2 Secondly, as to the binding nature of other awards, I am not bound by other arbitration awards and at most, arbitration awards have persuasive authority only. In any event, Commissioners are not Judges and the perceived unconstitutionality of actions by Employers fall within the exclusive jurisdiction of the Courts.

5.2.4 Notwithstanding the above, in terms of the CCMA Guidelines on Misconduct Arbitration (Arbitration Guidelines), which was amended and came into operation on 1 April 2015 and which Arbitration Guidelines are binding on all arbitrators in terms of section 138(6) of the LRA, as amended, I am required to determine whether a dismissal for misconduct is unfair or not with reference to the following:

- Whether or not the Employee contravened a rule or standard regulating conduct in, or relevant to, the workplace;
- If a rule or standard was contravened, *whether or not such rule is valid or reasonable (my emphasis)*; the Employee was aware of such rule or could reasonably be aware of the rule or standard; whether the rule is consistently applied and finally, whether dismissal is the appropriate sanction.

5.2.5 As to the reasonableness of the Respondent's Mandatory Vaccination Policy, i.e whether the Employer was entitled to have adopted a Mandatory Vaccination Policy in the first place, I cannot fault the Employer for adopting a Mandatory Vaccination Policy. Adopting a Policy, such as this one, constitutes managerial prerogative. Furthermore, and importantly so, there is a duty on all employers to ensure the health and safety of their employees and stakeholders, as required in terms of the Occupational Health and Safety Act (OHSA), read together with its Regulations. Section 8 of the OHSA requires employers to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of employees. This legal duty extends to people who access the workplace. Section 14 of the OHSA further places duties on employees, amongst others, to "take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions, to co-operate with the employer's efforts to implement health and safety obligations, and to carry out lawful orders and obey health and safety rules and procedures laid down by the employer in the interests of health and safety [in the workplace].

5.2.6 Notwithstanding the above, as much as the Employer was entitled to adopt a Mandatory Vaccination Policy, employees must be informed that they have the right to refuse being vaccinated, based on medical and constitutional grounds. This has happened in the matter before me. The Employee was advised of his rights to apply for exemption and having applied for exemption, it was common cause, such application for exemption was declined.

5.2.7 Since it is my finding that the Policy and therefore the rule emanating from Policy, which requires an employee identified as a high risk, such as the Employee, to be vaccinated can be considered a

valid and reasonable rule, considering its rationale. I also find that the Employee must have been aware of such Policy and the rule emanating from the Policy which requires mandatory vaccination, since an e-mail (Avis Budget Vaccine Mandate) preceded the Mandatory Vaccination Policy. This, however, is not the end of the enquiry. I must still determine whether the Employee had breached the rule – i.e. whether indeed he was grossly insubordinate.

5.2.8 Having applied my mind to the totality of evidence led and also the closing arguments submitted, I am not convinced the Employee was grossly insubordinate when he had refused to be vaccinated, albeit the Employee must have been aware of the Employer's stance in this regard when the Policy was ultimately adopted on 1 March 2022, having been preceded by previous communication from the Employer on its Vaccination Mandate. Herewith my reasons for my finding that the Employee was not grossly insubordinate:

5.2.8.1 The Employee considered a weekly PCR-test as an alternative to vaccination, which I happen to agree with. In fact, on 1 March 2022, the employee had presented a negative PCR-test on 1 March 2022 in order to access the workplace, which is evident from his detailed statement in writing presented at the disciplinary hearing (page 10 of the Applicant's bundle). Such was accepted at the time. The Employee also undertook to wear a mask and to sanitize, which he has been doing all along. It can therefore be inferred that the Employee is not a reckless employee who has shown no appreciation whatsoever for the risks involved.

5.2.8.2 Furthermore, evidence was also led that the Employee had tested positive for Covid-19 antibodies. Such test results are dated 5 March 2022, one day before the cut-off date for producing a vaccination certificate. This information was tabled in the detailed statement presented at the disciplinary enquiry (page 11 of the Applicant's bundle) and not taken into consideration by the Employer at all. It can therefore be inferred that the Employee was no longer a threat to the safety of others as at 5 March 2022.

5.2.9 Based on the above, I find that the Employer failed to discharge the onus on a balance of probabilities that the Employee was grossly insubordinate when he had failed to present a Covid-19 vaccination certificate by 6 March 2022, as instructed. His actions were not that of an employee who was undermining authority and had intentionally and unreasonably refused to carry out a reasonable instruction. On the contrary, as previously stated, the Employee applied for exemption, which was declined and he was prepared to undergo weekly PCR-tests, which is considered an alternative to being vaccinated. He also undertook to wear a mask and to sanitize as he has been doing all along.

5.2.10 In passing, as to whether the exemption process was flawed in that no religious expert formed part of the exemption committee, I would be exceeding my powers to decide such issue. Likewise, whether the reasons advanced for declining exemption can be considered reasonable, it is not the role of the arbitrator, such as myself, to second-guess or decide the exemption application afresh. Suffice to say that the letter from the Employee's pastor, produced at the disciplinary hearing, in my opinion, does not take the matter any further.

5.2.11 As to the failure of the Employer to comply with Annexure C (Guidelines if an employer makes Vaccination Mandatory), which forms part of the *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces, dated 11 June 2021,* such failure impacts on the appropriateness of the sanction of dismissal, as discussed hereunder.

Was dismissal the appropriate sanction?

5.3.1 As an arbitrator, I am called upon to make a balanced and equitable assessment on whether dismissal was the appropriate sanction (see in this regard the Constitutional Court judgment in *Sidumo vs Rustenburg Platinum Mines Ltd and others [2007] 12 BLLR 1097 (CC))*. I must not decide the actual sanction afresh but decide whether dismissal was fair based on the totality of evidence before me. In *Vodacom (Pty) Ltd v Byrne NO and Others (2012) 33 ILJ 2705 (LC),* with reference to the separate concurring judgment of Judge Ngcobo in the *Sidumo-matter,* it was said: "… the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …"

5.3.2 Considering that I found the Employee was not grossly insubordinate, it follows that dismissal was not the appropriate sanction. In my opinion, the Employer was extremely punitive in its approach and in a haste to dismiss which is evident in by its non-compliance with item 3 of *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces, dated 11 June 2021,* which required that the risk assessment precedes that of the plan, if a plan was ever adopted at all and that such be consulted upon. It was the testimony of the Employee that the risk assessment only came to his attention at the arbitration.

Also, in terms of Annexure C to the Consolidated Direction (Annexure C constitutes the Guidelines if an employer makes Vaccination Mandatory), an employer is *inter alia* required to counsel an

employee who refuses to be vaccinated on any constitutional or medical ground and if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated. None of this happened during the tenure of the Employee's employment. Nothing tangible was placed before me that the Employer had considered reasonable accommodation before imposing dismissal and to simply argue at arbitration that reasonable accommodation[1] was not feasible is simply too little, too late.

The appropriate remedy, as envisaged in terms of section 193(2):

5.4.1 It is trite that reinstatement is the primary remedy (see in this regard the Constitutional Court judgment in *Booi v Amathole District Municipality and others (CCT 119/20; [2021] ZACC 36; [2022*) *1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC))*. In this judgment of the Constitutional Court it was also held that section 193(2) of the LRA, as amended demands that intolerability of continued employment relationship be considered before reinstatement is ordered and that a high threshold of intolerability is required for any departure from ordering reinstatement. In the matter before me, the Employer has strongly argued that the trust relationship has broken down, for obvious reasons since it considered the dismissal to be fair, a contention I disagreed with for the reasons set out above. However, in his testimony under oath, the Employee had conceded that the trust relationship has broken down and that both parties had contributed to such breakdown. I am therefore inclined not to order reinstatement but to rather exercise my discretion in ordering compensation.

5.4.2 In deciding on the quantum of compensation, I took into consideration the factors as listed in item 134 of the CCMA: Guidelines on Misconduct Arbitration, in particular, the extent of the substantive unfairness of the dismissal and the fact that the Employee has attempted to mitigate his losses, by finding alternative employment for the past three months. I also took into consideration that the Employee was in the employ of the Employer for three years and five months at the time of his dismissal. Having applied my mind, I therefore consider compensation in an amount equal to six months' remuneration to be just and equitable.

[1] For the purposes of the guidelines, reasonable accommodation means any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of People with Disabilities published in terms of the Employment Equity Act, 1999 (Act No.97 of 1999). This might include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours. In instances of limited contact with others in the workplace, it might include a requirement that the employee wears N95 mask.

6. AWARD

1. I find the dismissal of the Employee to be procedurally fair, but substantively unfair.
2. For the reasons set out above, I exercise my discretion to order compensation in an amount equal to six months' remuneration.
3. Both parties must submit within 3 days of receiving the award proof of the monthly salary of the Employee at the time of dismissal for me to quantify the compensation.

Signature:

Senior Commissioner: ***Eleanor Hambidge***

Sector: ***Motor***