

**AT THE SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL**

**IN THE MATTER BETWEEN:**

**TAWUSA obo THEMBI MOSES MAKHUBELE**

**APPLICANT**

**AND**

**GREAT NORTH TRANSPORT**

**RESPONDENT**

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**ARBITRATION AWARD**

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CASE NUMBER:

RPNT370

DATE/S OF ARBITRATION:

4 February 2011  
4 March 2011  
29 April 2011

CLOSING ARGUMENTS SUBMITTED BY:

20 May 2011

DATE AWARD SUBMITTED:

8 June 2011

NAME OF COUNCIL COMMISSIONER:

Jan Stemmett

HEADNOTE:

Dismissal for misconduct – bus driver failing to park bus overnight at designated place – sanction of dismissal inappropriate and substantively unfair – employee re-instated without retrospective effect.

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## **1 DETAILS OF HEARING AND REPRESENTATION**

- 1.1 The arbitration was conducted at Giyani, Limpopo Province, on 4/2/2011, 4/3/2011 and 29/4/2011
- 1.2 The Applicant was represented by Mr Cornelius Chiloane, a Union organiser and the Respondent was represented by Mr Solly Mahanyele, IR Superintendent, Nkowankowa. Mr O Manthata acted as interpreter. I am indebted to them all for their assistance.
- 1.3 Seven witnesses testified and a bundle of documents was handed in. The proceedings were digitally recorded.
- 1.4 The parties submitted their closing arguments in writing by 20/5/2011.

## **2 THE ISSUE**

- 2.1 The dispute concerns the alleged unfair dismissal of the Applicant, Mr Thembi Moses Makhubele, a bus driver employed at the Respondent in Giyani.
- 2.2 The Applicant was dismissed on 23/6/2009 after he was found guilty of the following charges:
  - 2.2.1 Failing to stop for an Inspector on 3/6/2009.
  - 2.2.2 Unauthorised trip on 24/5/2009.
- 2.3 The dismissal was confirmed after an appeal hearing on 14/10/2009.
- 2.4 The Union disputed the substantive fairness of the Applicant's dismissal on the grounds that the Applicant is not guilty of the alleged misconduct. It was claimed that the Inspector had initially indicated for the Applicant to stop but before he could do so, the Inspector had waved him on again. It was also submitted that the Applicant did not operate the bus on an unauthorised trip but had permission to park the vehicle at Dzumeri.

- 2.5 The Union also disputed the procedural fairness of the Applicant's dismissal, on the grounds that the Union had asked the Respondent to suspend all disciplinary steps pending an unfair labour practice dispute that was referred to the Bargaining Council, concerning the Respondent's alleged discrimination against Union members in respect of disciplinary charges.
- 2.6 The Union was seeking the Applicant's re-instatement with retrospective effect.
- 2.7 The Respondent submitted that the Applicant was guilty of the alleged misconduct and that the dismissal was substantively and procedurally fair.
- 2.8 In terms of the Labour Relations Act 1995 (LRA) and the rules of the Bargaining Council, I have to determine whether the Applicant is guilty of the alleged misconduct and whether the dismissal is substantively and procedurally fair. If not, I have to determine what relief the Applicant is entitled to.

### **3 PRELIMINARY ISSUES**

No preliminary issues were raised in this arbitration.

### **4 SUMMARY OF EVIDENCE AND ARGUMENT**

4.1 The following witnesses testified in the arbitration:

- 4.1.1 Mr Ndomane Reison Ndhlovu, an Inspector of the Respondent stationed at Giyani.
- 4.1.2 Mr John Johnny Ngobeni, Mr Ndhlovu's Mobile Driver.
- 4.1.3 Mr Matsobane Pition Nyapele, a Senior Inspector stationed at Nkowankowa.
- 4.1.4 Mr Sondag Nelson Molewa, an Inspector stationed at Nkowankowa.
- 4.1.5 Mr Kazamula Jackson Ngobeni, Operations Supervisor at the Giyani Depot of the Respondent.

4.1.6 Mr Kheanego Edward Ramalepe, Depot Manager of the Respondent in Bushbuckridge. He was also the Chairperson of the Applicant's disciplinary enquiry.

4.1.7 Mr Thembi Moses Makhubele, the Applicant.

4.2 It is common cause that the Applicant had commenced employment with the Respondent on 17/7/2006 and that he was employed as a bus driver in Giyani. At the time of his dismissal on 23/6/2009, he was earning R1249.00 per week.

4.3 It is also common cause that on 3/6/2009, the Applicant was the driver of a bus on the Dzumeri route in the Giyani area in the Limpopo Province.

#### **CHARGE 1: FAILING TO STOP**

4.4 Mr Ndhlovu testified that while he was standing at the Mbambeni and Nkomo crossing, he had indicated for the bus driver (the Applicant) to stop the bus, by holding out his clip-board and raising his open left hand. The driver acknowledged the instruction by flashing his indicators. The Applicant reduced speed and Mr Ndhlovu lowered his hand and commenced writing the time on his inspection sheet. However, the Applicant accelerated and carried on travelling towards Giyani.

4.5 Mr Ndhlovu and his driver, Mr Johan Ngobeni, followed the bus until it stopped at Sikhunyani, three kilometers further on. Mr Ndhlovu did not approach the bus but wrote a report, which was later handed in at the arbitration. After a while, the Applicant drove on towards Giyani.

4.6 Mr Ndhlovu testified that he did not approach the Applicant when he stopped the bus at Sikhunyani because he suspected that if the Applicant had committed any ticket irregularities, he would have had an opportunity to repair his wrong doing by then.

4.7 Mr Ndhlovu also testified that he became cross because the Applicant had made a fool of him.

- 4.8 During cross examination, it was put to Mr Ndhlovu that if the Applicant had done a quick issue of tickets during the last three kilometers of the trip, this could have been ascertained from the ticket issuing machine. Mr Ndhlovu responded that he did not accuse the Applicant of quick issuing tickets. He also did not check for hand written emergency tickets or tickets in the hands of passengers. He was only concerned with the fact that the Applicant did not stop when instructed to do so.
- 4.9 Mr Ndhlovu confirmed that he and the Applicant had issues before. He stated that the Applicant knew him and that he had stopped the Applicant on previous occasions.
- 4.10 Mr Ndhlovu's driver, Mr Ngobeni, confirmed Mr Ndhlovu's version that Mr Ndhlovu had signaled for the Applicant to stop, that the Applicant had flashed his indicators but then accelerated and drove on.
- 4.11 The Applicant testified that he had seen Mr Ndhlovu's signal to stop, that he (the Applicant) had indicated his intention to stop but he then saw Mr Ndhlovu lowering his board and waving his right hand for the Applicant to move on. He later saw the vehicle of Mr Ndhlovu and Mr Ngobeni following him and stopped at Sihunyani for passengers. When he pulled away, he hooted for Mr Ndhlovu, who lifted his arm and smiled. He was surprised to find that he was charged afterwards.
- 4.12 Mr Ndhlovu denied that he had signaled for the Applicant to pass and Mr Ngobeni also stated that he did not see Mr Ndhlovu indicating for the Applicant to pass.
- 4.13 The Applicant testified that he did not have a good relationship with Mr Ndhlovu, especially after he had lodged a grievance against Mr Ndhlovu for coming into the Applicant's bus and shouting at the Applicant that he would make sure that the Applicant would be dismissed.

4.14 During cross examination, the Applicant denied that he had failed to stop because he had committed irregularities. He reiterated that Mr Ndhlovu had an ulterior motive since the Applicant had lodged a grievance against him before the incident.

**CHARGE 2: UNAUTHORISED TRIP**

4.15 It is common cause that before April 2009, the bus driven on the Dzumeri route was kept overnight at Mzilela, the designated “sleeping ground”, from where it commenced the trip back to Giyani the following day.

4.16 Mr Kazamula Jackson Ngobeni testified that in the beginning of April 2009, the Applicant had approached him and told him that he had a problem at his home near Dzumeri. He asked permission to park the bus there overnight, at the Dzumeri satellite police station, which was also close to the Dzumeri tribal office. According to Mr Ngobeni, he consented to the request, but the permission to park at Dzumeri was only for one night.

4.17 Both Mr Ngobeni and the Applicant testified that Dzumeri is approximately 14 kilometers from the normal sleeping ground at Mzilela.

4.18 Approximately 3 weeks later, Mr Nyapele found the bus overnighting at Dzumeri and reported this to the Respondent. It was established that the Applicant had parked the bus at Dzumeri. Mr Ngobeni’s evidence was confirmed by Mr Molewa. However, Mr Molewa testified that the distance from Mzilela to Dzumeri is 21 kilometers.

4.19 The Applicant was subsequently charged with operating a vehicle on an unauthorised trip.

4.20 During cross examination, Mr Molewa conceded that the bus was parked at a safe place at the satellite police station at Dzumeri, but he reiterated that this was not the designated sleeping place.

- 4.21 Neither Mr Nyapele nor Mr Molewa investigated whether the Applicant had permission to keep the bus at Dzumeri. When they were cross examined about this aspect, both stated that they were not aware that Mr Ngobeni had granted such permission.
- 4.22 The Applicant testified that he was given permission by Mr Ngobeni to park the bus at Dzumeri police station for an indefinite period, not only for one night. This was disputed by Mr Ngobeni.
- 4.23 The Applicant also testified that he had parked at Dzumeri many times and that other supervisors knew about this arrangement. Some of them had given the Applicant lifts from Dzumeri and had seen the bus there. He suspected that Mr Ngobeni was afraid to lose his job, hence Mr Ngobeni claimed that he had only given permission for one night. He may also have been influenced by Mr Ndhlovu, not to tell the truth.
- 4.24 During cross examination, the Applicant conceded that the sleeping ground is determined by the Respondent, not by the drivers, and that the designated sleeping ground was at Mzilela.
- 4.25 When it was put to the Applicant that the Respondent was losing a lot of money because the bus travelled an extra 28 kilometers per day from Dzumeri to Mzilela where the route started, the Applicant stated that he had never thought of that. He only knew that he was permitted to park at Dzumeri. No one ever suggested that he should pay for the extra kilometers the bus travelled.

### **CLOSING ARGUMENTS**

- 4.26 It was submitted on behalf of the Respondent that the Applicant was trained in all rules and procedures, that he knew that he had to stop when Mr Ndhlovu waved for him to do so and that failing to stop was a dismissible offence in terms of the Respondent's disciplinary code.

- 4.27 The Respondent denied that the Applicant had filed a grievance against Mr Ndhlovu and stated that Mr Ndhlovu had a reason to give false evidence against the Applicant. When Mr Ndhlovu lowered his clip board, this was not a signal that the Applicant could drive on. The Applicant was aware of the instructions in this regard.
- 4.28 It was further submitted on behalf of the Respondent that the distance from Dzumeri to Mzilela was not 14 kilometers but 20 kilometers. The Applicant only had permission to leave the bus at Dzumeri for one night but took advantage of the Respondent and caused additional costs for the Respondent. The other supervisors who allegedly knew about the fact that the Applicant usually parked at Dzumeri, were not called to testify.
- 4.29 It was submitted that the Applicant was guilty of operating a vehicle on an unauthorised trip, which was also a dismissible offence. The employment relationship was broken down and that the Applicant could no longer be trusted.
- 4.30 It was submitted on behalf of the Applicant that Mr Ndhlovu had been negligent by failing to confront the Applicant after he had allegedly failed to stop. He also failed to investigate whether any ticket irregularities were committed by the Applicant, when he had an opportunity to do so at Sikhunyane. Mr Ndhlovu deliberately failed to execute his duties because he wanted to charge the Applicant.
- 4.31 It was further submitted that there was no real evidence to prove that the Applicant had deliberately refused to stop or that he had committed any other irregularities.
- 4.32 In respect of the second charge of the alleged unauthorised trip, it was submitted that Mr Ngobeni had given the Applicant permission to park the vehicle at Dzumeri police station for an indefinite period. Mr Ngobeni did not record the permission he had given in the occurrence book, nor did he tell his colleagues.

4.33 The Union also cited other cases where drivers were permitted to keep the buses overnight at places which were not designated sleeping grounds. However, these details were not submitted in evidence and the Respondent did not have an opportunity to respond thereto.

4.34 It was also submitted that the Applicant should have been charged with failing to park the bus at the sleeping ground, instead of operating a vehicle on an unauthorised trip. The Applicant had a clean disciplinary record and should not have been dismissed.

## 5 FINDINGS

5.1 In a dismissal case, the employer bears the onus of showing that the dismissal was fair. Thus the starting point for a commissioner in assessing the versions presented by the parties during the arbitration hearing is to determine the extent to which the employer's version is more probable than not. In ***Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC) at 544***, the Court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probability was sufficient.

5.2 In ***Mbehele & another v Strange Cleaning Services CC (2001) 22 ILJ 2746 (CCMA) at 2751 D-G***, it was held that in dealing with the issue of assessment of probabilities that:

*“The arbitrator needs to first look at the version of the employer and decide whether the version is probable. In other words, could such a thing really happen? If the arbitrator is satisfied that the version of the employer is probable, he must thereafter decide if the version of the employee is probable. If he similarly decides that the version of the employee could have happened, the arbitrator must thereafter decide which version is more probable, by comparing the opposing versions.”*

**CHARGE 1: FAILING TO STOP:**

5.3 After considering the two versions in the case before me, I find that the Respondent has failed to discharge the onus of proving that the Applicant had intentionally failed to stop, for the following reasons:

5.3.1 It is possible that the Applicant could have misinterpreted Mr Ndhlovu's lowering of his clip board as an indication that he was no longer required to stop.

5.3.2 When the Applicant failed to stop and accelerated, Mr Ndhlovu made no effort to indicate to the Applicant that he still wanted the Applicant to stop. He did not wave his hands or make any other move that could have indicated to the Applicant that he was still required to stop.

5.3.3 Later, when Mr Ndhlovu caught up with the Applicant at Sikhunyane, he did not confront the Applicant about his failure to stop.

5.3.4 There is a possibility that Mr Ndhlovu may have been motivated by the grievance laid against him by the Applicant, to charge the Applicant with failing to stop.

5.4 I therefore find that on a balance of probabilities, the Applicant is not guilty of failing to stop, as described in paragraph 2.2 above.

**CHARGE 2: UNAUTHORISED TRIP:**

5.5 After considering the evidence and arguments presented to me, I find that on a balance of probabilities, Mr Ngobeni had only given the Applicant permission to keep the bus at Dzumeri for 1 night and not for an indefinite period. The reasons for my finding are as follows:

5.5.1 It is improbable that Mr Ngobeni would have made a concession for the Applicant to keep the bus at a place which is 14 kilometers removed from the designated sleeping ground, for an indefinite period, without seeking the approval of Mr Ngobeni's superiors.

- 5.5.2 The Applicant probably took a chance when nobody checked where he was keeping the bus and kept on parking it at Dzumeri because it was conveniently close to his home.
- 5.5.3 The Applicant did not call any of the supervisors who allegedly knew of the arrangement, to testify at the arbitration.
- 5.6 I am not convinced that the Applicant is guilty of operating the bus on an unauthorised trip. The appropriate charge, as contained in the Respondent's disciplinary code, is failing to park the bus at the sleeping ground. The fact that the Applicant had done so on several occasions is an aggravating factor but does not constitute the offence of operating the bus on an unauthorised trip.
- 5.7 I find that the only transgression the Applicant is guilty of, is failing to park the bus at the designated sleeping ground. The additional kilometers the bus had travelled each day and the fact that this had happened on several occasions, are aggravating factors.
- 5.8 The factors which a Commissioner must take into account when deciding whether dismissal is an appropriate sanction or otherwise, are stated in ***Sidumo & Another v Rustenburg Platinum Mines (Pty) Ltd & Others (2007) 28 ILJ 2405 (CC)***, (at paragraph 78) as follows:

*"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 basis of the employee's challenge to the dismissal 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.*

*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 and his or her long-service record."*

- 5.9 It has been accepted that the factors listed in *Sidumo* are not exhaustive and there are other factors which the commissioners may take into account, including the provisions of the Code of Good Practice. See ***Worldnet Logistics (Cape) (Pty) Ltd v Maritz N.O and Others (2009) 30 ILJ 1144 (LC) paragraph 25.***
- 5.10 In Item 3(4) of the Code of Good Practice contained in Schedule 8 of the Labour Relations Act, 1995, the following is stated: "*Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, dismissal will not be fair if it does not meet the requirements of section 188.*"
- 5.11 The offence of failing to park a bus at its sleeping ground, only carries the sanction of a final warning in the Respondent's Disciplinary Code. I suspect that this is the reason why the Applicant was charged with operating a bus on an unauthorised trip, which is a dismissible offence in terms of the Code.
- 5.12 After considering all the evidence and arguments, I am not convinced that the employment relationship has been rendered intolerable as a result of the Applicant keeping the bus at Dzumeri instead of the designated sleeping ground. Taking into account the mitigating factors, including the Applicant's years of service and clean disciplinary record, I find that progressive discipline should have been applied.

5.13 I accept the Respondent's argument that the Applicant has failed to show remorse. On the other hand, I also accept that he has been unemployed for two years after his dismissal and I am convinced he has learned a lesson.

5.14 The Applicant is seeking re-instatement with retrospective effect. However, he has committed an offence and has caused a loss for the Respondent. I deem it fair and equitable that the Applicant should be re-instated but not with retrospective effect.

## **6 PROCEDURAL FAIRNESS**

6.1 No evidence was presented at the arbitration concerning an arrangement that disciplinary steps would be held over pending another unfair labour practice dispute which was lodged at the Bargaining Council.

6.2 In its closing statement, the Union submitted documents and argument regarding this issue, but there is no reference to the case of the Applicant in any of the documents submitted. Furthermore, the Respondent had no opportunity to deal with the documents at the arbitration, nor were the submissions by the Union made during the arbitration proceeding.

6.3 After perusing the documents and argument of the Union in this regard, I cannot find any reason why the Respondent was compelled to suspend disciplinary action against the Applicant pending the outcome of the other unfair labour practice dispute.

6.4 I therefore find that the dismissal of the Applicant was not procedurally unfair.

## **7 AWARD**

7.1 I find that the Applicant is not guilty of failing to stop but that he is guilty of failing to keep the bus at the designated sleeping ground.

7.2 I find that the dismissal of the Applicant is procedurally fair but substantively unfair.

- 7.3 The Respondent, Great North Transport, is hereby ordered to re-instate the Applicant, Thembi Moses Makhubele, as a Bus Driver on terms and conditions that are not less favourable than those that applied at the time of his dismissal on 23/6/2009. The Applicant should resume his duties on 1 July 2011.
- 7.4 The re-instatement of the Applicant is not with retrospective effect and he shall not be entitled to be paid for the period from his dismissal until he resumes his duties.



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**COUNCIL COMMISSIONER**  
**JAN STEMMETT**

**8/6/2011**