



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA124/2013

In the matter between:

METRORAIL (PRASA)

Appellant

And

SATAWU obo NDLOVU

First Respondent

M S RAFFEE

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 26 March 2015

Delivered: 03 February 2016

Summary: Review of arbitration award – employee dismissed for misconduct for passing signal while driving a train without authority- arbitrator drawing inference that train derailed not because of malfunctioning but due to employee’s failure to adhere to rules. Arbitrator’s award falling within the ban of reasonableness – Labour Court’s judgment set aside – appeal upheld.

Coram: Ndlovu JA, Landman JA, and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

[1] This is an appeal against the whole judgment and order of the Labour Court (Masipa AJ) handed down on 15 August 2013, reviewing and setting aside the award of Mr M S Raffee (the arbitrator), acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (the third respondent). Leave to appeal was granted by this Court on petition.

[2] Metrorail ("the appellant") is a State owned entity responsible for the transport of passengers by rail in the country. Mr George Ndlovu (the first respondent), represented by the South African Transport and Allied Workers Union (SATAWU) was employed by Metrorail as a train driver from June 2000 until his dismissal on 12 August 2011.

[3] It is common cause that on 18 July 2011, the first respondent drove a train through a red signal at the appellant's Randfontein yard and, as a result, the train derailed. The following charges were preferred against the first respondent:

'3.1 Misconduct/ passed signal point at danger without authority

In that you in your capacity as train driver at Randfontein on the 18th July 2011, at approximately 04h48 at Randfontein yard you passed signal RFR 58 at danger, with train 0978 R9 without Authority.

3.2 Misconduct/Derailment

In that you in your capacity as train driver at Randfontein on the 18th July 2011, at approximately 04h48 at Randfontein yard you passed signal RFR 58 at danger, with train 0978 R9 without Authority, as a result motor coach 13418 derailed with four (4) wheels the whole front bogie.

3.3 *Misconduct/Train delays/Cancellation*

In that you in your capacity as train driver at Randfontein on the 18th July 2011, at approximately 04h48 at Randfontein yard you passed signal RFR 58 at danger, with train 0978 R9 without Authority, as a result trains delayed and cancelled as per the A STATS.

3.4 *Misconduct/damage to property*

In that you in your capacity as train driver at Randfontein on the 18th July 2011, at approximately 04h48 at Randfontein yard you passed signal RFR 58 at danger, with train 0978 R9 without Authority, as a result motor coach 13418 was damaged.

3.5 *Misconduct/Endangering lives*

In that you in your capacity as train driver at Randfontein on the 18th July 2011, at approximately 04h48 at Randfontein yard you passed signal RFR 58 at danger, with train 0978 R9 without Authority, as a result, you transgressed the train working rule number 4.'

[4] At the disciplinary hearing, the first respondent was found guilty as charged and was dismissed. The first respondent's appeal through the internal appeal process was also dismissed.

[5] First respondent referred an unfair dismissal dispute to the third respondent. The first respondent alleged that his dismissal was procedurally and substantively unfair.

[6] At the arbitration hearing it was common cause that:

6.1 the train derailed as a result of the failure by the first respondent to stop the train as directed by the signal;

6.2 the first respondent had applied the brakes. Mr KJ Mosia ("Mosia"), a technical supervisor in the appellant's Rolling Stock division, testified that after the derailment and when he inspected the train, he found the brake handle on the "on" position; and

6.3 the first respondent was still on a final written warning for a derailment that he caused six months earlier.

[7] At the start of the arbitration hearing, the first respondent's representative alluded to the fact that there was a "plea bargain" between the parties in terms of which, in the event of the first respondent being found guilty, he would not be dismissed but demoted to the position of "a driver". However, since the first respondent did not present any proof of the plea bargain, the existence of which was denied by the appellant, the arbitrator found the first respondent's dismissal to be procedurally fair.

[8] The only issue to be determined at the arbitration hearing was whether the train derailed because of faulty brakes or because of the first respondent's negligence.

[9] It was the appellant's contention that the derailment was because of negligence of the first respondent. Mr Tebogo More ("More"), an assistant manager (train operations) testified that after the train derailed, he had driven the train back to the place where the first respondent started and again back to the signal the first respondent passed and did not experience any problems with the braking system. Further, it was More's uncontested evidence that, before departing, it is the duty of the train drivers to check if there are any obvious faults/defects on the train, prepare a what is known as a "train set" which entails checking the vacuum pipes, the brake blocks and the pistons. The train driver is also obliged to test the effectiveness of the braking system by moving the train slowly out of the yard. If any fault/defect is discovered, the train driver must complete a form (T403 form) and report such fault/defect to the train control officer ("TCO"). According to More, the first respondent did not complete the form, indicative of the fact that there were no faults discovered on the train.

[10] Mosia testified that when he together with another person from Rolling Stock manually inspected the train they found nothing wrong with the brakes although they also found the brake handle on. Mosia further testified that they

could not retrieve any information from the black boxes¹ installed in the train since they were crashed when the train derailed. The first respondent's evidence was that after departing from the yard and as he drove closer to the signal, he noticed that the signal was red. He tried to stop the train but the brakes failed. He further testified that he was unable to test the effectiveness of the train's braking system, as the yard was too short a distance. This piece of evidence was never led at the disciplinary hearing.

[11] The arbitrator, relying on the evidence of More and Mosia, in particular, the evidence that there was nothing wrong with the brakes after the derailment, came to the conclusion that the appellant's version was more probable than the braking system was not defective. The arbitrator found that the derailment was because of the first respondent's negligence. In view of the first respondent's existing final written warning for the same offence, the arbitrator found the first respondent's dismissal to be substantively fair.

[12] The first respondent sought the review and setting aside of the arbitration award on the grounds that the arbitrator misconducted himself or committed a gross irregularity.

a. On 12 July 2013, the court *a quo* concluded that the arbitrator's decision was one a reasonable decision-maker could not reach. In this regard, the court *a quo* stated that:

'[30] ... It is clear that from the evidence presented before the Second Respondent, he failed to have regard to the evidence before him and thus committed a reviewable defect. He ignored material evidence placed before him which was that the Applicant's evidence was that he had applied the brakes, the brake handle was on as conceded to by both witnesses of the Second Respondent and that this meant that the Applicant had applied the brakes.

[31] More could not say whether the brakes failed and Mosia's evidence that brakes did fail. It became common cause that the Applicant had in fact applied the brakes. The technical evidence which the Second Respondent

¹ Black boxes are computers found in trains for the capturing of data relating to the times and movement of trains.

relied on and which he said was not challenged could not explain why the brake was on if the applicant had not applied the brakes. The Second Respondent had narrowed the issue before him to be whether the Applicant had applied the brakes. This being the case, once Norton conceded that this was the case, she inadvertently accepted that the Second Respondent failed to apply his mind to the issues in the case and as a result, his award was not that of a reasonable decision-maker.'

[13] The court *a quo* reviewed and set aside the arbitration award and ordered the reinstatement of the first respondent without any loss of benefits, and costs.

[14] The appellant's main grounds of appeal is that the court *a quo* erred in concluding that the issue to be determined was whether the first respondent had applied the brakes and also misdirected itself in concluding that the appellant did not adduce any evidence that the first respondent applied the brakes too late.

[15] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² the Constitutional Court held that:

'[110] To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to a fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[16] It is the appellant's contention that the issue for determination by the arbitrator was whether the train derailed because the brakes had failed. As correctly pointed out by counsel for the appellant, it was common cause at the arbitration hearing that the first respondent had applied the brakes. In light of it being accepted that the first respondent had applied the brakes, the

² 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC).

question is whether the train derailed because the brakes did not function effectively or because of the negligence of the first respondent.

[17] At the arbitration hearing, the appellant's version was that when the first respondent departed from the yard, the train's braking system was not faulty/defective because the first respondent had not reported any fault/defect. Further, it is the appellant's contention that after the derailment, the train's braking system was tested by both More and Mosia and it was found to be working. The arbitrator, having considered the probabilities concluded on the evidence of More and Mosia that it could be inferred that the train did not derail because the brakes failed.

[18] On the other hand, the first respondent's version was that despite applying the brakes the train did not stop because the brakes were faulty.

[19] The arbitrator was faced with two diametrically different versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,³ the court stated that:

[5] ... The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question

³ 2003 (1) SA 11 (SCA).

and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or the improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing the latter. But when all factors are equipoised probabilities prevail.⁴

[20] The arbitrator, having considered the probabilities of the parties' versions concluded that based on the evidence of More and Mosia, it can be inferred that the train derailed not because the brakes were not functioning.

[21] At the arbitration hearing, evidence was led that after the train was re-railed, More had driven the train back to the yard and after the inspection and measurements done by Mosia back to where the relevant signal was. In light of the manual checks done by Mosia which revealed that there was nothing wrong with the braking system, and in view of the fact that the first respondent did not report any defects, the logical inference to be drawn is that the brakes were in working order when the first respondent left the yard and did not engage the brakes timeously. The first respondent's version that the brakes failed is highly improbable if one takes into account that More drove the train without any problems after it derailed and that Mosia's inspection found the brakes in working order.

[22] Mosia also testified to the fact that because of the derailment, the three black boxes were crashed and the data therein could not be retrieved. Failure to produce the data from the computer boxes, which was the most reliable real evidence as to what led to the derailment is not fatal. In the absence of the real evidence in the form of the data from the black boxes, the appellant

⁴ At para 5. See also *Govan v Skidmore* 1952 (1) SA 732 (N) where the court stated at 734 C-D that: "... in finding facts and making inferences, in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* (3rd ed., para. 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

produced the best available evidence in the form of the evidence of More and the inspection of Mosia. In the absence of any report of defects in the braking system, a probable inference to be drawn is that the train derailed, not because the brakes were defective as alleged by the first respondent, but as a result of the negligence of the first respondent.

[23] I am therefore of the view that the inference drawn and the probabilities considered by the arbitrator, the arbitrator's decision that the first respondent's dismissal was not substantively unfair is one a reasonable decision-maker would have reached on the available information.

[24] Normally costs follow the cause. However, in the present instance, I am of the view that, in terms of the requirements of law and fairness,⁵ there should be no order as to costs of the appeal. .

[25] Accordingly, the following order is made:

1. The appeal is upheld with no order as to costs.
2. The order of the Court *a quo* is set aside and replaced with the following order:
 - “(1) The review application is dismissed.
 - (2) No order as to costs.”

Mngqibisa-Thusi AJA

Ndlovu et Landman JJA concur in the judgment of Mngqibisa-Thusi AJA

⁵ Section 179(1) of the Labour Relations Act 66 of 1995.

APPEARANCES:

FOR THE APPELLANT:

Adv J G Rautenbach, SC

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Inc

FOR THE FIRST RESPONDENT:

Adv J S Mphahlani

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LABOUR APPEAL COURT