



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

CASE NO: JR 1661/11

In the matter between:

NTSIMBINI JULY DUBE

First Applicant

And

**SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

KERRY DRISCOLL (N.O.)

Second Respondent

GAUTENG COACHES (PTY) LTD

Third Respondent

Heard: 20 June 2014

Delivered: 27 January 2015

Summary: (Review - dismissal).

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an opposed review. At the hearing the applicant appeared in person. The only record of the arbitration proceedings are the transcribed notes of the arbitrator which were only filed in January 2013 despite being available in September 2011. The applicant claimed that he had attempted to obtain the digital record of the arbitration proceedings from the bargaining Council but the council staff he dealt with had refused to provide him with it. His explanation is puzzling to say the least, as it appears in terms of the record lodged by the first respondent with the registrar of the Court that a recording of the hearing on a compact disc did form part of that record. The only record provided of the oral evidence was the transcribed notes of the Commissioner, which the third respondent filed.
- [2] In this regard, the employer had also requested that the application be dismissed in view of the applicant's tardiness in finalising an adequate record. While the matter might well have been dealt with on this basis, I believe it would be more satisfactory to address the substantive merits of the application, such as they are.
- [3] The applicant, Mr J Dube was dismissed following a hearing on 10 March 2011 which he failed to attend. He was charged with failing to issue a ticket to a passenger on 21 February 2011 and for arriving late for his shift on 4 March 2011 causing disruption in the service.

The arbitration award

- [4] After hearing evidence from both parties, the arbitrator concluded that the applicant's dismissal had been both substantively and procedurally fair.
- [5] In relation to the issue of substantive fairness, the arbitrator's reasoning may be summarised as follows:
- 5.1 She rejected the applicant's claim that he was effectively being charged with theft and that the employer had failed to prove he had stolen any money. The charge was clearly simply one of failing to

issue a ticket, which meant nothing more less than a failure by the driver to ensure that a passenger had a valid ticket. Consequently it is not necessary for the employer to show that he had actually taken money from a passenger without issuing a ticket. The arbitrator found the applicant's version of what happened changed from saying that the passenger in question had refused to pay to saying that the incident he was talking about happened in the afternoon of the same day and not in the morning as claimed by the bus inspector, Mr Banda, who testified for the company. It was common cause that the procedure in the event of a passenger refusing to pay was that the driver should stop the bus, but the applicant explained that he had not done so because he had reported the incident to a commuter representative on the bus. The arbitrator found it difficult to accept that if this was the case why that person did not come forward when the inspectors boarded the bus and accused him of carrying a passenger who did not have a ticket. On the other hand, she found the evidence of Banda both consistent and reliable.

- 5.2 In relation to the second charge, the arbitrator found that the applicant had not challenged the evidence of Mr Mokoena that he had been late for the shifts in question. The disruption caused by his lateness was compounded when he drove past waiting passengers and would have left them stranded had Mokoena not taken steps to make him return to collect them.

[6] The applicant did not attend the disciplinary enquiry held on 10 March 2011 which led to his dismissal even though it had been postponed from the 8 March 2011. He was first notified of the charges on 5 March 2011. The arbitrator found that the applicant had given no reason for failing to attend the arbitration hearing. The chairperson of the enquiry, Mr Botes testified that he had been present when the first notice was handed to the applicant, who refused to sign it and said he would not attend the hearing. The applicant's explanation for not signing the notice was that he had not been issued with a report slip concerning the charges. The arbitrator felt that there was no requirement in the disciplinary code to provide

such a document, but in any event if this was an issue the applicant should have raised it at the hearing. Botes also testified that the hearing had been postponed to give him another opportunity to state his case and that he had asked other employees to try and persuade him to make use of the opportunity. The applicant argued that he ought to have been given seven days' notice of the enquiry, but the disciplinary code only required reasonable notice to be given. The arbitrator concluded that the applicant had decided he would not attend any disciplinary hearing despite being given two opportunities to do so. She was not convinced the employer had acted unreasonably in the circumstances or that the procedure followed was unfair.

Grounds of review

- [7] In his founding affidavit, which he attested to before his attorney who had initially represent him at the arbitration, the applicant sets out six grounds as the basis of his review application. He did not supplement these grounds in any way in his supplementary affidavit. Four of these, merely repeat standard grounds of review without any reference to the facts of the matter, the award or the evidence. A fifth ground of review concerns the alleged misconduct by the arbitrator in the conduct of the proceedings by allowing the employer to be represented by an attorney contrary to an agreement that neither party would have legal representatives present. The applicant claims as a result of this he was at a disadvantage in dealing with the matter. A sixth ground of review, which in truth was really a ground of appeal, was simply that the employer had failed to provide any evidence that he was guilty of misconduct. I have treated this as a ground of review on the basis that the applicant is saying that there was no evidence before the arbitrator on which she could have rationally based her findings.
- [8] The other four grounds of review in the applicant's founding papers, which were not substantiated with concrete factual allegations were that: the arbitrator failed to apply her mind; committed misconduct in relation to her

duties; committed a gross irregularity in the conduct of the proceedings and, or alternatively, exceeded her powers.

Evaluation

- [9] As already mentioned above, the applicant set out his grounds of review in the broadest terms and, strictly speaking, he ought not to have been permitted to expand on those grounds at the hearing of the review application. Nonetheless, as the respondent's representative was generous enough not to take issue with the completely and adequate founding papers, the applicant was given an extensive opportunity to ventilate his criticisms. However it must be said that it was necessary to remind him that the Court was confined to the record of the evidence that was before the arbitrator and that the review hearing was neither an appeal nor an opportunity to present fresh evidence.
- [10] In relation to the finding on the first charge, the applicant essentially repeated his evidence which was reflected in the arbitrator's notes of the hearing. The essence of this is that he ought never to have been found guilty of failing to issue a ticket because in fact when the inspectors brought the passenger to him she paid for a ticket and he issued it. According to him, he should have been charged with failing to make the passenger pay the fare: by saying that he failed to issue a ticket it suggested that he had taken the passenger's money and pocketed it. It appears from the arbitrator's notice that when the applicant was cross-examined on how it came to the knowledge of the inspectors who boarded the bus that a passenger did not have a ticket he said that he had reported the non-payment to them, but did agree that they had brought the passenger to him and she had paid for a ticket. In his evidence in chief, he had said that he did not stop the bus as he was supposed to if a passenger did not pay the fare because there were people at the front of the bus that he could report to. Under further questioning, the applicant indicated that the person he was referring to was a commuter representative, who would report such things to the management. On his own version, there was nothing to suggest that he had asked for this person's support when the inspectors boarded the bus.

- [11] In his evidence in chief, the applicant said that it was a female passenger who did not have any more funds on her tag and he had told her he would fill in her tag when they got to Ennerdale, but she must pay for the journey from the point she embarked until Ennerdale, which is what she refused to do. Under cross-examination when it was pointed out to him that the slip filled out by the inspector had been issued after the inspectors had boarded the bus at Ennerdale at 05h38, he then dramatically changed his version to say that the incident had taken place in the afternoon. Up to that point in his evidence, it appeared common cause that he was also talking about the same incident having taken place in the morning.
- [12] Based on what was before her, on the available record, I cannot say the arbitrator's conclusions in relation to this charge were ones that no reasonable arbitrator could have arrived at.
- [13] In relation to the charge that he was late for work and disrupted the shifts, the applicant made no specific reference to this charge in his founding affidavit, other than to baldly assert that there was no evidence of any misconduct. In the review hearing he affirmed that he had not been late as he had arrived at 16h00 in time to take Mokoena's shift, in exchange for Mokoena covering for his earlier shift at 15H00. He had even mentioned this to the Despatcher who had accepted that he was not late, an issue he did not mention in the arbitration hearing. Effectively, the evidence of Mokoena was that the applicant should have phoned by at 14H30 to say he would be late for the 16H00 shift, but he only phoned at 15H30. Mokoena had to arrange another driver to cover that shift. However by 16H15 the applicant had still not shown up and Mokoena decided to take a bus to cover the 17h00 shift. The applicant then arrived and took the bus, but Mokoena had to arrange another driver to cover that shift and put Mokoena on the 18h00 shift which entailed fetching passengers from Fourways to take them to Springs/Sebokeng. When he arrived at the pick-up point in Fourways, he ignored the waiting passengers and had to be called back. Mokoena testified about the seriousness of shifts running late and the disruptive consequences such as having to arrange other drivers. Botes had pointed out that if a shift was late the company could lose its subsidy for that shift.

- [14] Neither in the arbitration, nor at the hearing did the applicant contest these events or the disruptive consequences of his lateness, except he claimed he had arrived at 16h00. In the circumstances, I do not think the applicant was able to show that the arbitrator could not have reached the conclusion that he was guilty of this charge.
- [15] On the issue of the disciplinary proceedings allegedly proceeding improperly in absentia, the applicant contended that the employer should have produced the slips showing he had been given notice of the hearing, though he agreed this was not something he had demanded at the arbitration hearing. The applicant did not really point to evidence that might have explained why the employer would have delayed the enquiry until 10 March 2011 instead of proceeding on 8 March 2011. The postponement was inconsistent with the applicant's version that it wanted to rush the hearing without giving him a chance to prepare. I cannot really fault the arbitrator's finding that he had enough opportunity to state his case and that the charges were not so complicated that more time to prepare was necessary.
- [16] The applicant maintained that the arbitrator had insisted on proceeding with the case even though he wanted someone to represent him and the arbitrator refused to postpone the hearing. The unsigned pre-arbitration minute records that the parties had agreed each party could be legally represented. In the employer's answering affidavit, it agreed with applicant's claim that the parties had agreed that legal representative would not be present at the arbitration hearing as he would not be represented by his attorney, who had been present at the pre-arbitration meeting. The employer further claimed in the answering affidavit that, in keeping with this agreement, it was represented by its regional manager, Mr K Myburgh, who was not a lawyer. The applicant did not file a replying affidavit to contest Mr Myburgh's role despite his original averment that the firm was represented by an attorney in the proceedings. During his submissions in reply, the applicant eventually conceded that there was no merit in this ground of review.

Conclusion

[17] The applicant has failed to show that the grounds of review he raised, including those which were not properly substantiated in his founding papers or which were cast in the form of an appeal, are ones that demonstrate misconduct on the part of the commissioner, or that her findings are ones she could not have reasonably reached on the evidence before her.

[18] Accordingly, the review application stands to be dismissed.

[19] I appreciate that the employer has done more than it was required to do in providing some form of record of the evidence of the proceedings, and that it may, with some justification feel that it should be awarded costs for having to defend a claim with so little merit. However, I believe the applicant may genuinely, if mistakenly, believed that the first charge against him was tantamount to theft and wanted to rectify that. Consequently, I am disinclined to award costs against him in this instance.

Order

[20] The application is dismissed.

[21] No order is made as to costs.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: In person

For the First Respondent: N Koulountis of Koulountis Inc.

LABOUR COURT