



Not reportable

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

CASE NO: JR 779/2011

In the matter between:

CONCOR MINING

Applicant

and

NUM obo SEKGWELE

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

DHELIWE MAVUMA (N.O.)

Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE, J

Introduction

- [1] The second respondent in this matter has applied for leave to appeal. His application for leave to appeal were some 8 months late owing sadly to the

passing of his attorney, Ms N Tshabalala. The circumstances occasioned by this make the application for condonation perfectly understandable and quite irrespective of the merits of the appeal I am willing to condone the late filing thereof.

- [2] The second respondent had been found guilty on the following charge and was dismissed:

"On the 24th November 2010 at about 13h15 you have violated safety rules.

Reckless Driving Company Machine ADT VOLVO which resulted in a near miss."

- [3] The arbitrator found that his dismissal was substantively unfair based on a finding that she found it "...impossible to declare that the applicant was guilty of exceeding the speed limit", and that the company had failed to discharge the onus of proving this. I found that the arbitrator had unjustifiably misconstrued the ambit of the charge on which the second respondent had been found guilty, and as a result this led her to ignore very material and undisputed evidence relating to the manner in which the vehicle was being driven under the conditions prevailing at the time.

- [4] I further found that:

"Had she considered the charge for which he had been dismissed, she would have been unable to escape the conclusion that even if there was scope of doubting if it had been proved that the vehicle was travelling in excess of 40km per hour, there was no reasonable basis for concluding that Sekgwele had been driving recklessly and at a speed which was excessive relative to the conditions he was driving in, given the undisputed evidence of Benn on these issues. Consequently, she could not reasonably have found in the light of the serious emphasis on evidence at the site, that it was inappropriate for the applicant to have dismissed Sekgwele in the circumstances."

- [5] In other words, as a result of misconstruing what she had to determine she also failed to consider relevant evidence that materially impacted on the reasonableness of her conclusion.
- [6] The second respondent argues that the court erred in deciding the matter on the basis of the charges against the second respondent. The second respondent also contends that the court erred by ignoring the real reason for the dismissal, which he contends was that the chairperson found he had exceeded the speed limit of 40 km/hr.
- [7] It is undoubtedly true that the chairperson of the disciplinary enquiry did pay considerable attention to speeding as evidence of reckless driving and even describing part of the charge as “reckless driving (speeding)”. However as the full ambit of the charge makes clear it was the second respondent “recklessly driving ... which resulted in a near miss” and the chairperson found the second respondent “guilty as charged”. The fact that he may have concluded that the employee was guilty as charged on a narrow basis relating to exceeding a speed of 40 km/hr, does not detract from his ultimate finding. The evidence before the chairperson, like that before the arbitrator, covered more than merely driving at an excessive speed, and the arbitrator, sitting on the matter *de novo* had to decide if the charge on which the second respondent was dismissed was proven, not whether the narrow basis on which the chairperson had reached that conclusion was correct.
- [8] Thus the factual findings of the chairperson as a basis for a guilty verdict, could not constrain the arbitrator in evaluating the same charge.
- [9] In the circumstances, I am not persuaded that it is reasonably possible another court might come to a different conclusion and the appeal ought to be dismissed.

Order

- [10] The second respondent's late filing of his application for leave to appeal is condoned.

[11] The application for leave to appeal is dismissed.

[12] No order is made as to costs.



R LAGRANGE, J
Judge of the Labour Court of South Africa
(In chambers)
30 November 2015

LABOUR COURT