



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

CASE NO D 1124/12

In the matter between:

**UNITRANS PASSENGER (PTY) LTD
t/a GREYHOUND COACH LINES**

Applicant

And

TOWU obo KAMALRAHJ SINGH

First Respondent

JABU NGWANE N.O

Second Respondent

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

Third Respondent

Date heard: 4 November 2014

Date delivered: 13 January 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner found that the dismissal of the third respondent was substantively and procedurally unfair, and ordered his reinstatement.

The facts

- [2] Mr. Kamalrajh Singh (the employee) was employed by the applicant as a bus driver until his dismissal on 1 August 2012. The employee's dismissal followed on an incident that occurred on 25 June 2012 when a coach driven by the employee was involved in an accident in which a pedestrian was killed. The accident occurred at approximately 23h20 on the night of 25 June, in the Marburg area outside of Port Shepstone. The charge brought against employee was one of reckless and negligent driving. In particular, it was alleged that the employee had exceeded the 60 km/h speed limit that applied – the applicant alleged that at the time of the accident, the employee had been driving at 84 km/h.
- [3] The chair of the disciplinary hearing concluded that the employee was guilty of the offence charged and dismissed him. The dismissal was upheld after an appeal hearing conducted in July 2012. The employee disputed the fairness of his dismissal and the matter was referred ultimately to an arbitration hearing conducted under the auspices of the third respondent.

The award

- [4] At the arbitration hearing, the only substantive issue in dispute was whether the employee had been exceeding the 60 km/h speed limit at the time that the accident occurred. In support of the applicant's contention that the employee had exceeded the speed limit, the applicant's operations manager, Mr. Justin Mapumulo, gave evidence concerning an incident report that had been prepared

after the accident. The report appears to have been prepared by one Robert. The report recorded that the coach was approaching a green traffic light at which point a pedestrian walked in front of the coach. The driver had attempted to avoid hitting the pedestrian, but the front right-hand side of the coach collided with the pedestrian, who was declared dead on the scene. The pedestrian had been under the influence of alcohol.

- [5] The witness was also referred to a document in the form of a tracking device report. That report indicated that at 23h21:27 the speed of the coach was recorded at 84 km/h and at 23h23:13, at zero. The witness also referred to photographs of a speed limit sign in the area confirming that the speed limit was 60 km/h, and of a cautionary sign indicating traffic lights ahead in 300 metres.
- [6] In his evidence, the employee denied that he had been speeding and maintained that at the time of the incident, he was travelling at 60 km/h. He was aware that the coach had been fitted with a tracker device. It was also fitted with a tachograph device, but no report from that device had been made available. During cross examination, the employee conceded that the tachograph device would not indicate the speed at which he was travelling at any particular time unlike the tracker device, which relied on satellite tracking. The employee's main complaint during the course of his cross-examination appears to have been that the technician who fitted and serviced the tracking device had not been called to give evidence.
- [7] In his award, the arbitrator noted that the tracker activity report indicated a reading of 84km/h, but that no evidence had been led by the person who had compiled the data on the document, nor was there any evidence by the person who had installed the tracking device on the coach. On this basis the arbitrator concluded that the report *'remains therefore part of hearsay evidence which I herein reject. For this reason alone I make a finding that the dismissal of the applicant was substantively unfair.'* The arbitrator went on to consider the evidence in relation to the employee's disciplinary hearing and noted that the chairperson's decision to dismiss the applicant based only on the reading that

appeared in the activity report was irregular and thus unfair. Further, the chairperson, having invited the parties to submit arguments in relation to appropriate penalty on 3 July 2012 had not made any finding of guilt at the point at which she issued that invitation. On that basis, the arbitrator considered the employee's dismissal to have been procedurally unfair.

The grounds for review

- [8] The applicant has submitted a number of grounds for review. At the hearing of the application, it became apparent that the real issue in dispute relates to the arbitrator's exclusion from evidence of the tracker activity report. The applicant contended that the rejection of the report, which constituted relevant and admissible evidence, constituted misconduct in relation to the arbitrator's duties and had the result of a decision to which no reasonable decision-maker could come.

The applicable principles.

- [9] The legal principles to be applied are well established. This court is entitled to interfere with an arbitration award if and only if the decision to which the arbitrator came is one which falls outside of the band of decisions to which reasonable decision makers could come on the available material. The court is not concerned with the correctness of the decision. Insofar as a party might rely on the conduct of an arbitrator (for example, having regard to the relevant evidence and disregarding relevant evidence) this is not in itself a basis for review – this court is entitled to interfere only if the arbitrator's conduct resulted in an award which is unreasonable in the sense referred to above.
- [10] The relevant principles were summarised recently by the Labour Appeal Court. In *Head, Department of Education v Mofokeng and others* (JA 14 /2014, 1 October 2014) the court, per Murphy AJA, said the following:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However,

the Supreme Court of Appeal (“the SCA”) in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken

the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

Analysis

- [11] In my view, the arbitrator committed a gross irregularity in rejecting the evidence constituted by the activity report as uncorroborated and hearsay. It will be recalled that the arbitrator excluded the report on the basis first that the evidence of the person who had compiled the data in the report had not been led and secondly, that the person who had installed the tracker device in the coach had not been called to give evidence.
- [12] The starting point is s 138(1) of the LRA, which enjoins commissioners to conduct arbitration proceedings in a manner that deals with the substantial merits of the dispute with a minimum of legal formalities. Of course, this does not mean that commissioners must necessarily accept any and all evidence that is clearly hearsay. However, in the present circumstances, Maphumulo, the applicant's witness, had confirmed what the document was and explained that the document constituted a computer-generated report based on continuous satellite readings of the whereabouts of the coach at any particular point and the speed at which the coach was travelling.
- [13] That being so, the report was not tendered in evidence in circumstances where the probative value of that evidence was dependent on the credibility of a person other than the person giving the evidence. The commissioner ought to have had regard to Electronic Communications and Transactions Act 25 of 2000 and to the principle that the rules of evidence must not be applied so as to unconditionally deny the admissibility of a computer printout, even where the printout is not authenticated. The approach that underpins the Act is one which seeks to avoid all computer-generated evidence as hearsay, and to distinguish between

evidence which depends solely for its accuracy on the reliability and accuracy of the computer itself, as opposed to the credibility of a natural person. In the present instance, the report fell into the former category, and ought not to have been excluded summarily, as it was, on the basis of the rule against hearsay.

- [14] What is of particular concern is that the arbitrator did not suggest to the employer's representative, who was not a lawyer, that he would be making a negative inference from any failure to present the evidence of any person who fitted the tracking device to the coach, or of any person who had compiled the data contained in the report. There was no substantive challenge to the veracity report (but for the employee's evidence that he disputed it), no warning given to any of the witnesses, any of the party's representatives or at the stage where argument was invited. In any event, it is manifestly clear that no person had compiled the data in the tracker activity report - the document was computer-generated, based on satellite feeds. I also fail to appreciate what value would have been derived from the evidence of a technician who installed the tracker device on the coach.
- [15] As I have indicated, the relevant authorities require the court to consider not whether the exclusion by the arbitrator of the tracker activity report is in itself a basis for review – the exclusion must have had the result of an unreasonable decision. In this regard, it is clear to me that had the report been considered, no reasonable decision-maker could have concluded that the employee was not guilty of reckless and negligent driving. It was common cause that the vehicle tracking device reflected a speed of 84 km/h at 23h21:37 and that the accident occurred at or shortly after that time. The probabilities are overwhelming that at the time the accident occurred, the employee was seeking to cross the intersection while the light remained green and in doing so, exceeded the speed limit.
- [16] The issue of the arbitrator's findings in relation to procedural fairness was not convinced that any great length during the hearing of this application. However, a reading of the record and of the award reveals that at least one of the elements

of procedural unfairness found by the arbitrator related to the merits of the case and not to any particular procedural irregularity. Insofar as the arbitrator's finding is based only on the fact that the chairperson of the hearing had invited the parties to submit evidence in mitigation and aggravation of penalty prior to the conclusion of the enquiry, this does not in any way disclose any 'premeditated finding of guilty' of the arbitrator suggests. The Code of Good Practice requires only that an employee be given an opportunity to state his or her case in regard to any allegations of misconduct made by the employer, in an informal environment and with the assistance if appropriate of a representative. All of these elements were satisfied and there is simply no basis on the evidence for the commissioner's finding.

- [17] Insofar as an appropriate penalty is concerned, there would be little point in referring this matter back for rehearing, even only on the issue of sanction. All of the relevant material is before the court, and further delay in this matter is not desirable. The employee at the time of his dismissal had been employed by the applicant for some seven years, he has a family to support and is a sole breadwinner. On the other hand, at the time of his dismissal, the applicant was on a final written warning for speeding. The employee's conduct had fatal consequences and this must obviously weigh heavily against him. In my view, the only appropriate penalty given the nature of the employee's misconduct and all of the relevant circumstances is dismissal.

For these reasons, I make the following order:

1. The arbitration award issued by the third respondent under case number RPNT 1283 dated 15 November 2012 is reviewed and set aside.
2. The award is substituted by the following:

'The applicant's dismissal was substantively and procedurally fair'.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv F Van der Merwe, instructed by Hana Geldmacher Attorneys

For eth respondent: Mr. W Field, Bernadt, Vukic, Potash & Getz.