



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1052/13

In the matter between:

**PASSENGER RAIL AGENCY OF SOUTH AFRICA
(PRASA)**

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

THEMBEKILE NSIBANYONI N.O

Second Respondent

NATIONAL TRANSPORT MOVEMENT

Third Respondent

GEORGE NDLOVU

Fourth Respondent

Heard: 1 August 2017

Delivered: 4 August 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator). In her award, the arbitrator held that the fourth respondent (the employee) had been unfairly dismissed by the applicant and ordered his reinstatement.
- [2] Despite initial opposition to the application, the third and fourth respondents' answering affidavit was filed late, with no application for condonation. A notice of objection was filed and to date, there has been no application for condonation filed. The application was thereafter enrolled for hearing on the unopposed motion roll in terms of an order granted by Lagrange J on 30 May 2017, and was dealt with on that basis.
- [3] The employee was employed by the applicant at the Maraisburg station as a ticket official. He was dismissed after a commuter was found in possession of an invalid train ticket at the Roodepoort station, in circumstances where he claimed to have bought the ticket from the employee in Maraisburg. The ticket had been sold earlier the same day and was referred to as a 'resold' ticket. The commuter positively identified the employee as the person who had sold him the ticket. The employee was charged with a number of offences including one of dishonesty and dismissed. The fairness of his dismissal was disputed and the dispute referred to arbitration.
- [4] In the arbitration hearing, two mutually destructive versions of the relevant facts were advanced. The employee stated that he had been working at the Maraisburg station alone and that being the only person on duty, he sold tickets to commuters as he was required to do. He disputed that he had resold the ticket to the commuter on the day in question, indeed he denied that he had ever seen the commuter prior to the arbitration hearing.

- [5] In her award, the arbitrator summarised the evidence, which comprised testimony by five witnesses for the applicant and two for the employee. The applicant's witnesses included Hele, an access controller, who testified that on 23 May 2012 he apprehended the commuter who was travelling on an expired ticket. The commuter told him that he had purchased the ticket at the Maraisburg station. The commuter, Mthembu, testified that after he was apprehended by Hele, he was taken to the Maraisburg station and asked to identify the person who had sold him the ticket. He identified the employee as the person from whom he had bought a single trip ticket on the same afternoon. He was not aware that the ticket given to him was a return ticket that had been issued much earlier in the day, since he was in a hurry and had not examined the ticket. The station manager, Ntyeneza, testified that he had gone to the Maraisburg station as part of the investigation into the incident and stated that the employee was at the ticket office window. The commuter identified him as the person who had sold him an expired ticket. He testified further that the employee was supposed to be working at the gate and not the ticket office. Further, contrary to the applicant's policies, the employee had failed to declare money in his personal position. In his view, the employee had fraudulently resold the ticket for personal gain. The next witness, Jordaan, an investigator in the applicant's employ, stated that when he investigated the incident concerned, he found money in the employee's position contrary to the applicant's policy which required employees working with money to declare money of their possession, and that he was also concerned that the employee had given the keys to the ticket office to a person not employed by applicant. He testified further that the employee said that he had done the commuter a 'favour' by selling him the expired ticket. The last witness to testify for the applicant was the chairperson of the disciplinary hearing. During cross-examination, he explained why the commuter did not testify to the internal disciplinary hearing – his employer would not release him. The employee's evidence at the arbitration hearing amounted to a denial that he was obliged to disclose his personal money, and that he was not entitled to be in the ticket office. He stated that he had

kept accurate records of money collected and that he had never before seen the commuter who accused him of selling an expired ticket.

- [6] In her analysis of the evidence, the arbitrator rejected the applicant's version. She did so for what would appear to be the following reasons. First, she thought it improbable that there would have been no one in the ticket office – in other words, she accepted the employee's version that at the relevant time, he was working in the ticket office and entitled to be there. Secondly, the arbitrator thought it significant that the commuter had not given evidence at the internal disciplinary hearing. She says the following:

5.6 It is therefore surprising why the commuter did not testify during the disciplinary hearing. It is further not clear why the chairperson of the disciplinary hearing found it proper to dismiss the applicant without the evidence of the key witness, being the commuter who supposedly bought the ticket from the applicant.

- [7] On this basis, the arbitrator went on to make credibility findings against all of the applicant's witnesses and to reject the applicant's evidence 'in its totality'. She made the finding of unfair dismissal and issued the order of reinstatement on that basis.
- [8] This court is entitled to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicant contends for the latter, on the basis reflected above. The courts have been clear that the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).
- [9] The Labour Appeal Court has affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before

the 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 (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence. However, when an arbitrator fails to have regard material facts it is likely that he or she will fail to arrive at a reasonable conclusion (see *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 197 (LAC)).

- [10] In *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 ILJ 923 (LC), Myburgh AJ undertook a comprehensive review of the application of these principles. He noted that where an arbitrator is required to resolve a factual dispute, the arbitrator is required to undertake a balanced assessment of the credibility, reliability and probabilities associated with the evidence (see *Sasol Mining (Pty) Ltd v Ngqeleni NO & others* (2011) 32 ILJ 723 (LC)). Arbitrators are obliged to weigh all of the relevant evidence and probabilities before drawing inferences and making findings (see paragraph [65] of the judgment, and the reference to *Minister of Safety and Security & another v Madikane & others* (2015) 36 ILJ 1224 (LAC)). As Myburgh AJ notes, consistent with the authorities referred to above, a failure properly to determine a factual dispute or draw inferences or make factual findings does not in itself constitute a basis for review – the decision to which the arbitrator comes must be substantively unreasonable.
- [11] The applicant contends that the arbitrator's award is reviewable because the arbitrator committed misconduct or a gross irregularity in the conduct of the proceedings under review by making findings that are not sustained by the evidence, by ignoring relevant evidence and in particular, by rejecting the evidence of all of the applicant's witnesses without any proper basis. The applicant further contends that the

arbitrator failed to comprehend that the arbitration proceeding was a hearing *de novo* and that the arbitrator committed a reviewable irregularity by making a finding of procedural unfairness in the absence of any reference to or analysis of the evidence to sustain that finding.

[12] I deal first with the arbitrator's rejection of the evidence of the applicant's witnesses on the basis that the commuter did not testify at the disciplinary hearing. This is a wholly irrational basis on which to reject the evidence of five witnesses, whose evidence, as it appears from the record, is internally and externally consistent. It is trite that an arbitration proceeding is a hearing *de novo*. The fact that the commuter did not give evidence at the internal disciplinary hearing was entirely irrelevant. It is certainly not a basis on which to reject the evidence of all of the applicant's witnesses, or to call their credibility into question. On this basis alone, the arbitrator's award stands to be reviewed and set aside. Whether the applicant was entitled to be in the ticket office at the time he was confronted with the allegations of misconduct is similarly no basis on which to reject the evidence of all five of the applicant's witnesses. Even if it were more probable than not that the applicant was entitled to be in the ticket office, that finding goes only to the limited issue of the contention that he had no right to be there – it is not a sufficient basis to uphold the employee's version in its entirety given the weight of the evidence against him, especially in relation to the dishonest act of reselling a ticket.

[13] More fundamentally, what the arbitrator had before her was a material dispute of fact. The arbitrator did not apply any of the principles relevant to the determination of a factual dispute. She simply elected to disbelieve all of the applicant's witnesses and to make credibility findings against each of them in circumstances where there is no reasoning apparent from the award to sustain these findings, nor any basis on the record to do so. It does not appear from the record, even if I were to accept that the arbitrator was not impressed by the evidence of Tyengeza, that the arbitrator was entitled to call into question the credibility of the remaining four witnesses. There is also no attempt by the arbitrator to make any assessment of the inherent probabilities of the versions that served

before her. That evidence included a version by the commuter that the employee had sold him and expired ticket, a version that was sustained by the direct evidence of Jordaan, who also testified that the employee admitted to him that he had sold the ticket to the commuter as a favour.

[14] In short, the arbitrator's failure to take into account all of the material evidence before, her failure properly to assess the credibility of the witnesses who testified at the proceedings under review and her failure properly to assess the inherent probabilities of the respective versions that served before her, renders the award one to which no reasonable decision maker could have come on the available material. The outcome of the proceedings cannot be sustained on the basis of the record, regardless of the arbitrator's misdirection. The evidence overwhelmingly points to the employee's guilt. In my view, the arbitration award accordingly stands to be reviewed and set aside.

[15] There is no merit in referring this matter for rehearing. The arbitration award under review was issued more than three years ago. Further, the record is sufficient for the court to a decision on the merits and to substitute the arbitrator's award. I have no hesitation in concluding that on the probabilities, the employee committed the acts of misconduct with which he was charged and that his dismissal was justified. Finally, in relation to costs, there is no reason why costs ought not to follow the result.

I make the following order:

1. The arbitration award issued by the second respondent on 30 April 2013 under case number GAJB 30373/12 is reviewed and set aside
2. The award is substituted by the following:

‘The applicant's claim of unfair dismissal is dismissed’.
3. The third and fourth respondents, jointly and severally, are to pay the costs of these proceedings, the one paying the other to be absolved.

André van Niekerk
Judge

APPEARANCES

APPLICANT: Mr. P Masebo, Werksmans Attorneys

LABOUR COURT