



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 95/16

In the matter between:

POWER PLANT HIRE CC

Applicant

and

**THE COMMISSIONER FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

**COMMISSIONER SELO NANISO
(NO)**

Second Respondent

SAEWA

Third Respondent

DAVID KOMAKO

Fourth Respondent

Heard: 21 November 2017

Delivered: 24 November 2017

Summary: (Review – unfair dismissal – highly selective assessment of evidence leading to unsustainable findings)

JUDGMENT

LAGRANGE J

Background

- [1] The fourth respondent in this matter, Mr D Komako ('Komako') was dismissed on 24 August 2015 after being found guilty of a number of charges relating to an incident in which the trailer on a front end loader which he had been driving round a corner crashed causing damage to the wall and trailer. He had claimed an air brake failure on the trailer had caused it to jack-knife when he was turning the corner. The employer believed the accident was caused by Komako speeding.
- [2] Komako was charged with gross negligence, not following company policies and procedures, damaged company property and gross dishonesty. The arbitrator found that the applicant had not been shown to have been driving the loader at an unsafe speed and accordingly was not guilty of negligence. Further, although company procedures required machines to be checked before they are used, the arbitrator found on the evidence that the loader was checked at the beginning of the shift by a colleague of Komako, and that checks on machinery are normally conducted at the start of a shift. Consequently, Komako could not be held responsible for not checking the loader again when he started using it later in the day. The arbitrator concluded that Komako had caused damage to the trailer and a wall but concluded that this was an accident which could have happened to anyone.
- [3] A further charge of dishonesty related to an allegation that Komako had tampered with an air pipe (a so-called 'Suzy pipe') serving the air brakes on the trailer in order to justify his explanation that the air brakes on the trailer failed and caused the accident. In this regard, the arbitrator accepted that it had been demonstrated that if the pipe was not properly connected it could become loose on its own. The arbitrator rejected polygraph evidence supposedly confirming Komako had been dishonest in his account of the event. The arbitrator found his dismissal was substantively unfair and ordered his reinstatement.

Grounds of review:

- [4] The thrust of the applicant's case against Komako was that, he had been speeding and had disconnected the pipe coupling after the incident in order to disguise the true cause of the incident. The applicant contends that in concluding that the machine had been checked by his colleague, thereby excusing Komako from checking the machine, the arbitrator completely ignored the fact that there was undisputed evidence in a written statement of Komako that he had checked the machine himself before he used it. This evidence was adduced in the arbitration and was not disputed by Komako. Further, the contention that a machine was only checked once in the morning at the start of a shift and not by any operator before they started using it was never put to the applicant's witnesses, yet the arbitrator accepted this as standard procedure.
- [5] The applicant submits further that given that the accident occurred shortly after Komako started using the machine, it is simply untenable as a matter of logic that the accident arose shortly after he had supposedly checked it, owing to a disconnected pipe. In this regard, it is noteworthy that Komako had told one of the employer's witnesses that when he had checked the machine before using it on the day in question, the pipe was connected. The arbitrator also failed to consider the evidence that even if the suzzy pipe was disconnected there was still an air reserve tank that would have enabled the trailer to brake. In addition, he did not deal with undisputed evidence that the trailer would not have been able to move if there was insufficient air passing from the front-end loader to the trailer through the pipe because the trailers brakes would lock. '
- [6] The applicant contends that the arbitrator appeared to have misconstrued the importance of the front-end loader having to idle before pulling off so that enough air pressure could build up to release the trailer breaks. He also ignored the evidence that the trailer was unloaded at the time of the accident and that workshop tests after the accident found the brakes were working properly. Critically, there was also undisputed evidence that the day after the incident the vehicle was taken six times on the same route with the trailer. During these 're-runs' it made no difference whether the

pipe was connected or not because the front-end loader and trailer still came to a halt using the brakes of the front-end loader alone. The arbitrator failed to even consider this critical evidence.

- [7] Instead, the Commissioner's reliance on the mere possibility that the Suzy pipe may have become disconnected assumed unduly exaggerated importance in his reasoning, to such an extent that he ignored all the other evidence that tended to show that the accident as described by Komako would still not have occurred in the manner it did even if the brakes had failed.
- [8] The applicant also contends that the arbitrator failed to explain why he preferred the evidence of Komako over the corroborating evidence of a number of witnesses led by the applicant.
- [9] Having considered the evidence and the grounds of review, I am satisfied that:
 - 9.1 The arbitrator was highly selective in the evidence he chose to regard and disregard, to the extent that no reasonable arbitrator could have reached the findings he did on the evidence before him
 - 9.2 The arbitrator also discounted evidence of the employer's witnesses without a reasonable justification for doing so and effectively approached the case on the basis of a criminal standard of proof.
 - 9.3 Had the arbitrator not misdirected himself to this extent he would have been compelled to conclude that Komako's version suffered from serious inconsistencies and inherent improbabilities apart from being simply irreconcilable with other undisputed evidence such as the results of the post-accident tests conducted on the front end loader and trailer.
- [10] In consequence, his finding should be substituted with a finding that the applicant was guilty of negligently causing the damage to property and was most probably dishonest about the air brake pipe being disconnected. In the circumstances, his dismissal was substantively fair.
- [11] The respondents did not oppose the application and merely attended the court hearing.

Order

- [1] The arbitration award issued by the Second Respondent under the auspices of the First Respondent under case number GAJB 17841/15 is reviewed and set aside to the extent that the Second Respondent found the Fourth Respondent's dismissal was substantively unfair and awarded him compensation.
- [2] The Second Respondent's finding that the Fourth Respondent's dismissal was substantively unfair is substituted with a finding that his dismissal was substantively fair.
- [3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

W Bekker Instructed by
Nothnagel Attorneys

RESPONDENT:

No appearance.

LABOUR COURT