THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 525/20

In the matter between:

HESTONY TRANSPORT (PTY) LTD **Applicant**

and

PM VENTER N.O. **First Respondent**

NATIONAL BARAINING COUNCIL FOR THE

ROAD FREIGHT AND LOGISTICAL INDUSTRY **Second Respondent**

HLATSWAYO MFANIMPELA TRUEBOY **Third Respondent**

Heard: **6 November 2024**
Delivered: **13 November 2024**

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant seeks to review and have set aside an award delivered by the first respondent (arbitrator) wherein the dismissal of the third respondent (employee) was found to be substantively unfair, following which the applicant was directed to reinstate the employee retrospectively.

[2] The employee opposes the review application.

Background

[3] The applicant conducts its business in the road logistics sector and operates a fleet of trucks transporting goods. The employee was employed as a truck driver and was dismissed on 25 April 2019 having been found guilty of gross negligence. It was alleged that the employee caused damage to the vehicles foot brake lines pursuant to his alleged excessive braking whilst driving the vehicle on 8 April 2019. The cost of the damage was just over R4 000-00.

[4] Unhappy with his dismissal the employee referred a dispute to the second respondent. The employee did not contest the procedural fairness of his dismissal and therefore the only issue before the arbitrator was whether the employee's dismissal was substantively fair.

Grounds on review

[5] The applicant's first ground on review was that the arbitrator ought to have found that on the common cause facts, the probabilities favoured the applicant's version, that being that the employee's actions caused the damage to the vehicle's brakes. Alternatively, and again relying on the common cause facts, it was submitted that the arbitrator failed to appreciate that the applicant put up a *prima facie* case of misconduct on the employee's part, whereafter the evidentiary burden (not onus) shifted to the employee to provide a reasonable alternate explanation, which according to the applicant, the employee failed to do.

[6] Mr Posthuma, acting on behalf of the applicant, submitted that the following facts were common cause:

6.1 The employee was the only driver of the vehicle at the time.

6.2 An inspection was carried out on the vehicle's brakes on 7 April 2019, following a compliant raised by the employee.

6.3 The inspection revealed that the brake lines were not damaged.

6.4 After the employee drove the vehicle on 8 April 2019, the vehicle's brake lines were found to be damaged.

[7] Mr Du Preez, acting on behalf of the employee, denied that the arbitrator ought to have favoured the applicant's version based on all the facts before him. While it was submitted that the vehicle's foot brake lines were indeed damaged, the facts before the arbitrator demonstrated, on a balance of probabilities, that the employee did not cause the damage. According to Mr Du Preez, on 7 April 2019, the employee reported certain faults with the vehicle's foot brakes, and trailer brakes.

[8] In an inspection, conducted on 8 April 2019 and before the employee commenced his duties, there was no proof that the foot brakes had been checked. In this regard I was referred to the mechanic's report, which served before the arbitrator. The report itself offers no proof that the employee's compliant in respect of the vehicle's foot brakes was attended to. The report lists all the employee's complaints, and next to each complaint is an adjacent section meant to be completed by the mechanic who conducts the inspection, and which ought to outline what the mechanic did on the vehicle in order to address each of the employee's complaints.

[9] While the report listed the employee's complaint regarding the vehicle's trailer brakes and foot brakes, the mechanic only recorded the fact that the vehicle's trailer brakes were adjusted. Put differently, the mechanic failed to record any action he had taken in respect of the issues raised in relation to the vehicle's foot brakes. It was also common cause that the mechanic was not called to testify at the arbitration and that none of the witnesses called by the applicant at arbitration, had firsthand knowledge of whether the mechanic did indeed assess the vehicle's foot brakes as

complained of. From these submissions, Mr Du Preez argued that while it was accepted that the vehicle underwent an inspection on 8 April 2019, it was placed in dispute that the employee's concerns raised in respect of the vehicles foot brakes, had been attended to.

[10] In addition, Mr Du Preez raised the point that at arbitration, submissions were made that sometime in March 2019, the very same vehicle did not pass a roadworthy test following a finding that its axel brakes did not conform to the regulatory norm. None of the applicant's witnesses, were in a position to confirm whether that particular problem had since been resolved.

[11] In his award, the arbitrator records both of the above complaints raised by the employee.

[12] The arbitrator found that there was insufficient evidence to accept the version that the complaint raised by the employee on 7 April 2019 and in respect of the foot brakes, was attended to when the vehicle was inspected on 8 April 2019. The arbitrator rejected the argument by the applicant's witnesses, which sought to suggest that despite the omission in the report, on a balance of probabilities, the attending mechanic would have assessed the foot brakes and, if need be, corrected any fault with same. On this score, the arbitrator mentions that the applicant's two witnesses who sought to convince him over this very issue; were based at the applicant's Bloemfontein offices, whereas the mechanic who conducted an inspection on the vehicle on 8 April 2019, and who completed the report under review, did so at the applicant's premises in Johannesburg. Without the mechanic who inspected the vehicle being called to testify, the arbitrator found that there was no admissible evidence which demonstrated that the employee's specific complaint was attended to.

[13] With regard to the 2019 roadworthy report, the arbitrator similarly found that there was no admissible evidence to support the version that the concerns raised in that report had since been addressed and repaired. The arbitrator makes the point that the evidence of the applicant's witnesses, in respect of this issue were, on their own version, speculative.

[14] While the arbitrator's above findings cannot be faulted, perhaps more importantly for purposes of this review application, there is nothing before this court to conclude the arbitrator's findings were unreasonable in light of the evidence before him.

[15] Once the arbitrator did not accept that the complaint raised by the employee, on 7 April 2019, and with respect of the vehicle's foot brakes, had been attended to or that the issues recorded in the 2019 roadworthy report had likewise been attended to; the inference or probabilities that the employee caused the damage to the brake lines, was not there for the simple taking. Nor on the facts accepted by the arbitrator, did the applicant establish a *prima facie* case of misconduct whereby shifting the evidentiary burden to the employee to provide a reasonably alternate explanation.

[16] For these reasons, the applicant's further argument that the arbitrator erred in that he failed to consider that it could only have been the employee's excessive braking which caused the damage to the brake lines; stands to fall.

[17] The applicant goes further to argue that the arbitrator failed to consider that *"despite the brakes being damaged, the employee nevertheless drove the truck in a manner that could reasonably be expected from a professional driver".*

[18] In support of this, the applicant submits that the arbitrator erred in rejecting a report the applicant submitted which demonstrated that on 8 April 2019, the employee exceeded the speed limit of 85km per hour on 3 occasions at the start of a downhill. This, according to the applicant, would have meant the employee would have had to apply his foot brakes excessively while travelling downhill in order to slow the vehicle down. According to the applicant, a driver exercising reasonable care would not have let that eventuality occur.

[19] Mr Du Preez submitted that at arbitration both parties agreed, alternatively it remained undisputed, that the vehicle was *"govind"*, meaning that when the vehicle exceeded the speed limit of 85km per hour, the engine brakes immediately caused the vehicle to slow down. Therefore, as was argued by the employee at arbitration,

on those instances where he exceeded the speed limit he would not have had to use his foot brakes, as the engine brakes would automatically be triggered resulting in the vehicle slowing down.

[20] The employee's first witness corroborated the employee's version to a large extent. That witness testified that when the vehicle exceeded the speed limit, the engine's brakes would automatically slow the vehicle down and therefore it was unclear how the foot brakes were damaged by traveling above the speed limit on 3 occasions. The applicant's same witness stated that the employee's braking report, for 8 April 2019, did not point to any sudden or harsh braking on the employee's part.

[21] The arbitrator found that on the 3 occasions on which the employee exceeded the speed limit, he travelled either 86 or 87 km per hour and that on the unchallenged version of the employee (which was corroborated by the applicant's own witness); exceeding the speed limit on these occasions, could not have caused damage to the brake lining. The arbitrator's finding is not unreasonable given the evidence before him.

[22] Linked to the above ground on review, the applicant further attacks the award on the basis that the arbitrator misunderstood or misconstrued the purpose of submitting a second braking report in respect of another driver. The arbitrator concluded that a comparison between the other driver's braking report and that of the employee's concluded that the other driver, on a particular day, used his brakes more frequently when compared to the employee on 8 April 2019. The arbitrator found that the brakes of the other driver's vehicle had not been damaged, which in turn brings into question the applicant's argument that the employee's excessive braking was the cause of the foot brakes being damaged.

[23] The applicant submits that the arbitrator erred in that there was no evidence before him which spoke to the condition of the second driver's brake lining. The arbitrator merely speculated that the brake lines of the comparison driver's vehicle were not damaged despite applying brakes more frequently as compared to the employee on 8 April 2019. More importantly the applicant submits that the arbitrator failed to take into account that the purpose of submitting the comparison report was

to demonstrate that the employee applied his brakes for longer periods of time when compared to the other driver, thereby causing friction which could lead to the reasons why the brake line was damaged.

[24] I accept that it does appear as though the arbitrator misunderstood the purpose of introducing the second driver's braking report as testified by Mr Joubert. However, identifying an error in itself is not axiomatic to the award being considered unreasonable.

[25] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[1], the Supreme Court of Appeal held that:

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[2]

[26] I am not of the view that the arbitrator's misunderstanding of the comparison braking report nor his speculation about the condition of the second driver's brake lines; elevates his findings into a band which is considered unreasonable. The arbitrator's omission does not somehow obfuscate or nullifies his findings that there was insufficient evidence to demonstrate that the employee's complaint raised on 7 April 2019 in respect of the foot brakes were addressed and/or the issues around the vehicle's brakes, recorded in the March 2019 roadworthy report, were likewise attended too. Against this backdrop, and on an overall conspectus of the evidence before the arbitrator; his failure to properly consider the comparison braking report, does not render his findings that the applicant failed to establish any negligence on the employee's part resulted in the damage; as unreasonable. Moreso based on the fact that the employee testified that the specific complaint he raised in respect of the

[1] 2013 (6) SA 224 (SCA).
[2] Ibid at para 25.

foot brake, if not addressed, would have caused the same friction Joubert testified too.

[27] Lastly, the applicant submits that the arbitrator's decision to reinstate the employee was unreasonable. The arbitrator finds that there was no reason not to award the employee reinstatement. This, according to the applicant, demonstrates that the arbitrator did not exercise or properly exercise his discretion over the issue of remedy as prescribed in the LRA and simply afforded the remedy requested by the employee.

[28] Firstly, when the arbitrator finds there is no reason before him not to award reinstatement, he does appear to have exercised his discretion in respect of the remedy awarded, contrary to what the applicant suggests. Secondly, the applicant fails to set out the facts before them, which had he considered, would have rendered reinstatement impractical or intolerable. The allegation of the employee's lack of remorse and/or a breakdown in trust does not come to the applicant's aid. The arbitrator did not find the employee guilty of the offence he was dismissed for. This is not a case where the arbitrator found the employee guilty of the charge but went further to find that the sanction of dismissal was too harsh.

[29] For the above reasons, I find that the review application stands to be dismissed.

Order

1. The review application is dismissed with no order as to costs.

M Naidoo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr A Posthuma from Snyman Attorneys

For the Third Respondent: Mr T Du Preez

Instructed by: KWINC Attorneys