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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1664/00

2002.05.31

In the matter between

TRANSNET LTD t/a METRORAIL Applicant

and

T HEFER Respondent

J U D G M E N T

NGCAMU, A.J: This is a review application in which the applicant seeks the review and setting aside of an arbitration award of the first respondent. The second respondent was dismissed by the applicant after having been found guilty of gross neglect of duty during the disciplinary hearing. The respondent referred the dispute for arbitration. After the

conclusion of the arbitration hearing the arbitrator ordered the reinstatement of the second respondent. It is this award that the applicant seeks to review.

The second respondent (whom I shall refer to as "the employee") was employed by the applicant as a train driver. On 15 October 1999 an accident occurred involving a train driven by the employee. Four people died in the said accident and nineteen were injured. The respondent was charged with the following offence:

"Gross neglect of duty in that on 15 October 1999, at approximately 15h56, you drove train number 9442 recklessly and negligently, without due regard to the property of Metrorail and the safety of its passengers, in that: you passed signal NDC806T at danger on the up-slow line between Crown and New Canada stations. You exceeded section 1 in speed and could not control the said train to stop within a safe distance. As a result of this serious neglect of duty you caused a collision which led to damage to property, loss of life and injuries."

A disciplinary hearing was held. The respondent was found guilty and he was dismissed. The respondent referred this matter to the Transnet Bargaining Council. The arbitrator

came to the following conclusion:

"I do not believe that the company proved gross neglect of duty on the part of the grievant. His dismissal on 11 January 2000 for this reason was accordingly unfair."

It was common cause that shortly before the accident the train was travelling at an excessive speed, and that the employee passed the signal "danger". The award has been attacked on various grounds. Second and third respondents oppose this application.

Mr Kennedy submitted, on behalf of the applicant, that the applicant is relying on misconduct and particularity on the part of the arbitrator. The applicant relies on the technical data obtained from the "black boxes" regarding the speed and application of brakes made by the employee. It does not appear from the arbitrator's notes that this scientific evidence was common cause. The applicant did not lead evidence of a scientific nature. The data analysis was handed to the commissioner. There was no agreement as to the status of this document. There is no evidence that the employee has admitted the contents of this report. In the absence of the admission of the report by the employee the applicant had to lead evidence on the data analysis. The applicant failed to do

this. The report was accordingly not proved before the commissioner.

In the circumstances I am of the view that the applicant cannot rely on the data analysis which has not been proved. The court is not in possession of the complete record in order to assess the evidence given by the witnesses. It is not open to the applicant to attack the commissioner on his findings on facts, in the absence of a complete transcript record. The applicant is required to file the record of the proceedings in terms of rule 7A(6) of the rules of this court. The court is entitled to dismiss the review in the absence of the record.

In *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO and Others* (2001) 22 ILJ 648 (LAC), at 651F-H, para.13, the court stated:

"In the absence of the transcribed record of the proceedings before the first respondent the court *a quo* was in no position to adjudicate properly on the application before it, and ought accordingly to have dismissed it."

The applicant only transcribed the written notes of the arbitrator, which in some instances is abbreviated. This does not give a complete picture of the evidence that was given.

I am of the view that the court is entitled to dismiss the

application on this point alone.

The parties made submissions on the evidence as recorded in the arbitrator's handwritten notes. There was no application for amendment of the grounds of review, to allege that the arbitrator committed a misconduct or irregularity in not keeping the record of the proceedings. If there was such an application I would have approached this matter in a different manner. In the event that I am not entitled to dismiss this case at this point, I then venture to proceed and consider other grounds raised by the applicant.

The employee testified that he dozed off. The arbitrator accepted the employee's version. The applicant's contention is that this is not possible because the train has a "dead man's handle", which has to be depressed all the time to keep the train in motion. The applicant contends that if the train driver falls asleep the "dead man's handle" will pop up and stop the train.

The applicant also relies on the fact that the employee told a colleague, Mr Neethling, and a physician, that he did not see the red light because he had been blinded by the sun. The employee explained that he was confused and shocked, and could have said that he was blinded by the sun. He however

could not recall what he had said. The employee further testified that he did not want to incriminate himself. The arbitrator considered this and found that this cannot be held against the employee.

The employee further testified that the spring of the "dead man's handle", for the train in question, was loose, and that you could engage the "dead man's handle" while asleep. There was no evidence to rebut this from the applicant.

Mr van Dyk admitted that the "dead man's handle" loses tension with age. His submission goes to the heart of the applicant's contention, that the "dead man's handle" requires pressure all the time. It confirms the evidence of Dr Bentley, when she testified that it was possible to perform any automatic actions while asleep.

The arbitrator applied his mind to the operation of the "dead man's handle" and concluded that it was possible to press down the handle in a state of sleep. The arbitrator may have made a mistake on the findings of fact on this, but this does not make the award reviewable. This may be unsatisfactory to the applicant. Not all the awards will be satisfactory. This was confirmed in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 9 BLLR 1011 (LAC) at 1041,

para.101:

"In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects, but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the grounds of review. Without such contemplation the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustified when regard is had to all the circumstances of this case and the material that was before him."

This is a case where the factual findings of the arbitrator cannot be disturbed. In my view in the absence of evidence rebutting that of the employee, regarding the handle, the arbitrator's findings cannot be attacked. It was upon the applicant to bring evidence in rebuttal. The applicant attacks the arbitrator for finding that the applicant had failed to prove gross negligence or any neglect of duty on the part of the employee after finding that the witnesses for the applicant were excellent.

It is significant to point out that the applicant does not

submit that it proved its case against the employee. The applicant submitted that Dr Bentley conceded that she was unable to say whether the operation of the "dead man's handle" could be performed by a driver in his sleep. Dr Bentley's evidence was that it was very likely that the employee would fall asleep, when driving, in the light of the number of hours the employee was working. It was not disputed that the employee worked a number of hours without sleep. It is therefore logical that such a driver would fall asleep, and one does not need an expert to prove this.

The applicant submitted that Dr Bentley's evidence should not have been accepted because she did not give evidence to the effect that the employee fell asleep. To my mind this submission misses the point. The onus was on the applicant to prove that the employee committed gross neglect of duty in that he drove recklessly and negligently. The employee raised a defence that he dozed off, and the spring of the handle was loose. The applicant has failed to rebut this evidence. The applicant had to prove that the employee's version was false.

The arbitrator's findings can be justified on the basis that the applicant failed to prove its case on the basis that the

employee was exhausted as a result of the number of hours worked, which was not disputed.

I am not satisfied, on the arbitrator's notes, that applicant made any attempt to prove gross neglect of duty, which was the gist of the charge. It was not even put to the employee under cross-examination that he neglected his duties. None of the applicant's witnesses also suggested this under oath.

The applicant submitted that the arbitrator committed an irregularity in not holding an inspection *in loco*. It is difficult to accept the applicant's version on this point. The arbitrator has filed an affidavit explaining that a suggestion of an inspection *in loco* was made before the opening statement. There is no evidence before me to indicate that the request was made later during the proceedings.

The applicant's problem on this point is caused by the fact that there is no record. I have no reason to reject the arbitrator's explanation, that he did not refuse to permit an inspection *in loco*. I therefore cannot find any irregularity. There was no proof of a refusal to permit the inspection.

The arbitrator further explained that an inspection *in loco* would have had no bearing on his findings. I cannot

criticise the arbitrator for this. He exercised his discretion based on evidence before him. The applicant cannot criticise the arbitrator for not allowing an inspection *in loco* when it cannot be proved that a request was made and refused. It is not sufficient to make a suggestion at the beginning of the arbitration and hope that the arbitrator will exercise his discretion. If the applicant felt that an inspection *in loco* was vital, a request should have been made.

The applicant has failed to show that it has not been afforded a fair trial as a result of the refusal by the arbitrator to permit an inspection *in loco*. (See *Gold Fields Investments Ltd v City Council of Johannesburg and Another* 1938 TPD 551).

Once it is accepted that the spring of the "dead man's handle" wears down with age, and that different locomotives have different tensions, it would not have assisted the arbitrator to go for an inspection *in loco* of any handle other than that of the train driven by the employee. There is no evidence that the handle to be inspected was that of the train that was involved in the collision.

In the light of this I cannot find any reason for interfering with the arbitrator's award.

I have indicated that I do not have the transcript record of the arbitration proceedings. I am unable to assess fully the evidence that was presented to the arbitrator to be able to make an informed decision. This is compounded by the fact that there is a dispute of fact raised by the parties in their affidavits.

In the circumstances, where there is a dispute of fact, I have to accept the respondent's version. (See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A); *County Fair v CCMA and Others* (1998) BLLR 577 (LC), at para.7D; and *Mondicraft (Pty) Ltd v PPWAWU and Others* (1999) 10 BLLR 1057 (LC), at 1059B-D).

On the evidence as recorded in the handwritten notes, and the arbitrator's award, I am not persuaded that the arbitrator committed any gross misconduct or irregularity in the proceedings. It therefore follows that the award in this matter cannot be disturbed.

O R D E R

In the circumstances the following order is made:

(a) The application for review is dismissed.

(b) The dismissal of the second respondent was unfair.

(c) The applicant is ordered to pay the respondent's costs.

ON BEHALF OF THE APPLICANT:	ADV KENNEDY
ON BEHALF OF THE RESPONDENT:	ADV VAN DYK