IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

REPORTABLE

CASE NO: D3/07

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION OBO MR BB MLOTYWA APPLICANT

AND

SPOORNET (CUSTOMER SERVICE AND PRODUCTION KWAZULU NATAL REGION) 1ST RESPONDENT

TRANSNET BARGAINING COUNCIL 2ND RESPONDENT

ARBITRATOR P.C. HAUCH FENGER 3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction1

[1] This is an application to review and set aside the arbitration award issued by the Third Respondent (the arbitrator) under the auspices of the Transnet Bargaining Council under case number B.0 SATAWU/SP (CS&P) KZN 9519. The review application is brought in terms of section 33 (1) (a), (b) & (c) of the Arbitration Act No. 42 of 1965 (the Act). In terms of the award the arbitrator found the

dismissal of the Applicant (the employee) to be both substantively and procedurally fair and accordingly confirm the dismissal by the First Respondent.

Background facts

[2] Initially, 5 (five) charges of misconduct were proferred against the employee but three of the charges fell away when he was found not guilty. He was however found guilty of charges 3 & 4 and dismissed for that reason. The dispute concerning his alleged unfair dismissal was referred to arbitration under the auspices of the Transnet Bargaining Council. The two charges which were proferred against the employee reads as follows:

Charge 3:

> *"That you in your capacity as Train Driver of train 9991 contravened TWR 130 by shunting into the section Mkhuze-Nkonkoni without the prescribed authority from the Train Control Officer."*

The policy upon which this charge was based on reads as follows:

> *"Shunting movements to be controlled by fixed signals and hand-signals 130 when a train or shunting locomotive is required to move in the wrong direction on any running line, or from one running line to another, or to shunt into or out of sidings connected with running lines, and fixed signals are provided for the purpose such signals must be operated. In addition, the prescribed hand-signal or oral instructions must be given to the driver where fixed signals are not provided for the purpose the driver*

must be orally instructed, and thereafter the necessary hand-signals must be exhibited."

Charge 4:

"That you refused a lawful instruction given by the Train Control Office that controls the Track Warrant Section when he informed you to bring your train to a stand still and wait for a Section Manager."

[3] At the time of the incident that led to the charges against the employee, Mr Strydom who was the first witness to testify on behalf of the First Respondent was the section manager (clearing operation), responsible for the investigation of the incident that occurred on 4th of July 2006, at Isihlepu inter-loop, where two 37 class locomotives had to be re-railed.

[4] His testimony was largely based on the report that he wrote after the incident that brought about the charges against the employee. On the day in question the employee had been brought to relieve another driver to drive the construction breakdown train at Isihlepu station.

[5] Mr Strydom further testified that after the derailed locomotive was put back on the line, he specifically informed the employee to obtain a token from the radio control to depart to Mkhuze and to leave the damaged locomotive there and return to Isihlepu with another token, as his authority to occupy the running line between Isihlepu and Mkhuze. He stated that he informed the employee to obtain the token because he was the rail incident commander (RIC) responsible

for clean-up operation, at Isihlepu station. He informed the employee to obtain the authority from the train control officer (TCO), to depart from Isihlepu to Mkhuze.

[6] The train control officer, controls trains via the track warrant system which at that time was between Enseleni to Golela. In terms of this system all the First Respondent's locomotives are equipped with radios which are used whenever the train driver has to communicate with the train control officer.

[7] The token as I understand it from reading the record is a form of authorization by the train control officer, authorizing the train driver to move from one point to the other. The process of obtaining the token entails the driver speaking with the train control officer by firstly identifying himself or herself through amongst other things indicating his or her pension number and the locomotive number. Having fully identified himself or herself, the driver is then given a token by the train control officer to depart from one point to the next.

[8] In the present instance the train control officer was Mr Naude. According to Mr Strydom he was therefore the one to authorize the employee to move from Isihlepu to Mkhuze, i.e. to issue the token. According to him the employee required a token to occupy the running line between Isihlebu and Mkhuze. He further indicated that because works on that line were under normal train working conditions and therefore no occupation was requested for the day. The total occupation was between Candover and Nkonkoni, where the ballast screening machine was working on that specific day.

[9] The concept, *"total occupation"* is when the rail line has been closed for the normal operation of trains on a certain part or portion of that line and once declared a total occupation area, the line is closed and no trains are allowed to enter that section until the platelayer has declared it safe and informed the train control officer about it.

[10] In relation to what happened after the derailed locomotive was put back on the line, Mr Strydom testified that he informed the employee to obtain a token from the radio control to depart to Mkhuze, to leave the damaged locomotive there and to return to Isihlepu with another token authorizing him to occupy the running line between Isihlepu and Mkhuze. When the employee left Isihlepu to Mkhuze he assumed that he (the employee) had obtained the necessary token as per the earlier instruction. It was when he received a telephone call from the section manager at Richards Bay that he then realized that the employee did not have authorization to occupy the line running between Isihlepu and Mkuze.

[11] The employee was then contacted by Mr Naude at the radio control centre who instructed him to stop his train at Mkhuze and not to move it until the arrival of the section manager. This instruction was according to Mr Strydom ignored by the employee who proceeded with the train from Mkhuze to Isihlepu. And this was again done without obtaining the necessary authority.

[12] After receiving the information that the employee had left without a token, Mr Stydom went to Mkhuze to stop his train, only to find on arrival that the employee had already left for Isihlepu. He proceeded to Isihlepu where on

arrival he found the employee. An argument between the two of them ensured and the employee refused to obey the instruction that he should leave the train. As a result of this Mr Strydom solicited the services of the asset protection unit who caused the employee to be removed from the train.

[13] In relation to the need for a total occupation, Mr Strydom testified that there was no need for that because he was in charge from the clearance marks at Isihlepu station.

[14] The second witness of the First Respondent was Mr Naude, the train control officer who was responsible for the Enseleni and Golela area. He was responsible for the Richards Bay track warrant system. In terms of the track warrant system any person who wanted to enter that section had to speak to him before entering. The person requiring entry would have to speak to him through the radio and provide their details including those of the train and the area where they are at the time of speaking to him.

[15] Mr Naude testified that on the day in question the employee was relieving another train driver. The employee spoke to him through the radio and required him to find from Mr Strydom about the arrangements at Mkhuze. When he reverted back to the employee to inform him that he was unable to get hold of Mr Strydom the employee informed him that he had already left Isihlepu station for Mkhuze. He then told him that he could not enter the area without a valid token and that he should immediately stop his train. He further testified that there was no occupation on that line and that if there was any he would have

been the first person to known about it. He also indicated in this regard that the employee never said to him that he should not read to him the token because the line was occupied.

[16] The employee who had been a train driver for six years testified on his behalf and stated that rule 130 relates to a situation when one is shunting in an area controlled by fixed and hand signals. He contended in his defence that rule 130 does not make any reference to the train control officer. According to him rule 130 provides that a train driver must be orally instructed and hand signals displayed to him when he performs shunting as a driver. The person who has authority according to him to give oral instruction and display hand signals is the supervisor, section manager or the person in charge of the driver.

[17] Mr Majola another train driver of the same experience as the employee testified on behalf of the employee. The essence of his testimony was to confirm what the employee had said about the application of rule 130 and emphasized that that rule applies to shunting which is controlled by hand and fixed signals. He further testified that the rail incident commander is normally appointed when there is an accident or an incident. The incident commander once appointed takes charge of the area including its safety.

1**Grounds for review**

[18] The Applicant challenges the arbitrator's award on a number of grounds, some of which overlap. At a general level the grounds raised by the Applicant include the contention that the arbitrator committed misconduct in relation to her duties,

committed gross irregularity, exceeded her power, and that the award was improperly obtained. It was further contended that the award was unjustifiable in relation to both evidence properly before the arbitrator and the reasons given for the award.

[19] The other grounds raised by the Applicant relate to the contention that the arbitrator failed to consider and evaluate the evidence placed before her, assess the credibility of witnesses, take into account relevant consideration and made findings which are not supported by evidence.

[20] As concerning the facts of the case, the Applicant complained that although the employee was found not guilty of the three other charges the arbitrator spent inordinate amount of time in the award discussing these charges in particular charge number five.

[21] A further ground of this review is that the arbitration award is unjustifiable if one has regard to the evidence properly placed before the arbitrator and the reasons stated the arbitration award.

[22] In relation to procedural fairness the Applicant contended that despite having found that the conduct of Ms Hanekom, of seating in during the hearing was improper, the arbitrator still found the dismissal to have been procedurally fair.

The applicable test

[23] This being a private arbitration, the review has to be considered in terms of the provisions of the Arbitration Act 42 of 1965 (the Act). The provisions of section

33 (1) of the Act upon which the employee relies on in this review reads as follows

> *"[1] Where –*
>
> *(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or as an umpire; or*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
>
> *(c) an award has been improperly obtained, the Court may, on the application of any party to the reference after due notice, to the other party or parties, make an order setting the award aside."*

[24] An irregularity in a private arbitration does not refer to the result or the correctness of the decision but rather to the reasoning process or the method of the arbitration proceedings. A mistake of law or fact does not necessarily lead to the conclusion that the arbitrator has committed gross irregularity. The authorities are however in agreement that it would be gross irregularity if the arbitrator misconceives the whole nature of the enquiry or the duties he or she is supposed to perform. See *Goldfields Investment Ltd & Another v City of Johannesburg & Another 1938 TPD at 560.*

[25] In *Standard Bank of SA v Mosime and others [2008] 10 BLLR 1010 (LC)* , the Court in line with the Supreme Court decision of *Telcordia Technologies v Telkom SA Ltd (2006) 139 SCA (RSA),* held that the narrow approach is to be adopted in dealing with reviews of private arbitrators. The basis of this is the recognition that the proceedings in private arbitration arises from the consent of the parties who through an agreement determines the powers of the arbitrator. See *Total Support Diversified Health System SA (Pty) Ltd and Another 2002 (4) SA 661 (SCA), South African Airways (Pty) Ltd v Tokiso and others case JR2618/04* and *National Union of Mine Workers & Others v Grogan NO & Another (227) 28 ILJ 1808 (LC).*

[26] In the *Standard Bank case* the Court further held that the critical question when dealing with complaints of irregularity is to determine whether or not the conduct of the commissioner presented a fair trial of the issues which were presented before him or her by the parties.

[27] The issue of "gross irregularity and *"exceeding powers",* by private arbitrators, received attention in *Telcordia Technologies* where the Curt quotes with approval from the judgment of Lord Steyn in the *Lesotho Highlands Development Authority v Impregelio SPA (2005) UKHL 43 para 24* wherein it was said:

> *"But the issue was whether the tribunal "exceeded its powers" within the meaning of s68 (2) (b) (of the English Act). This required the court below to address the question whether the tribunal purported to exercise a*

power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s68 92) (b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the current point, there was no more than an erroneous exercise of the power available under s48 (4). The jurisdictional challenge must therefore fail".

[28] The issue of misconduct on the part of the arbitrator was discussed in *Amalgamated Clothing and Textile Workers Union of SA v Veldspan (Pty) Ltd 1994 (1) SA at 169 (AD),* where it was held that the concept of misconduct as envisaged in the Arbitration Act 42 if 1965, does not extend to *bona fide* mistakes that may be made of law or fact by arbitrators. The Court may however interfere where the mistake is so gross that it manifests evidence of misconduct or partiality on the part of the arbitrator.

[29] It is apparent from the authorities that because of the liberty of contract and the autonomy of the parties in concluding the agreement to subject their dispute to private arbitration, the Courts should give due difference to the award. In this respect it was held in *Telecordia* **(**supra), at para 51 that:

"Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s33 (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise. If they wish to extend the

grounds, they may do so by agreement impose jurisdiction on the court. However as will become apparent the common law ground of review on which Telkom relies is contained by virtue of judicial interpretation in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgement below and the argument presented to us, it is incumbent on me to take the tortuous route."

[30] Whether an arbitrator exceeded his or her powers is determined with reference to the terms of reference agreed to by the parties.

Substantive fairness

[31] The defence of the employee as concerning the charge of refusing a lawful instruction issued by the train control officer that he should stop the train, is that it was ambiguous. It was further contended that the training control officer was at the same level as the employee and could therefore not be regarded as a superior to give instruction to him in circumstances where the person in charge was the rail incident commander. The other challenge to the instruction was that the train control officer did not have authority to issue an instruction in an area which had total occupation.

[32] The employee argued further in the alternative that should it be found that the train control officer had authority then regard should be had to the transcribed record of conversation between the employee and the train control officer. The employee relies specifically on the portion on the transcript where he said: *"I*

am ready to depart from Isihlepu to Mkhuze." The response of the train control officer to that statement was: *"pull in on the number three road, thank you man."*

[33] A similar argument was raised in relation to the instruction that the employee should stop the train once the train control officer became aware that he had already moved subsequent to the instruction he had given the employee earlier. The applicant's contention is that the train control officer told him to stop and wait until he gets hold of the railway incident commander. Later the train control officer reverted back to him and informed him that he could not get hold of the railway incident commander and therefore the issue of having to wait became impracticable according to him.

[34] In the award the arbitrator finds in relation to *"refusing a lawful instruction"* that the employee was issued with an instruction which was legitimate, reasonable and was essential to the safety of the employee and other employees who may have been working in that line on that day. In arriving at this conclusion the arbitrator reasoned that there existed no good reason why the employee chose not to abide by the instruction.

[35] As stated above the narrow approach to consensual arbitration confines the powers of the Court in review proceedings to determining whether or not the arbitrator committed a gross irregularity in relation to the arbitration process and not the correctness of the outcome. In other words the Court does not scrutinize

the correctness of the outcome of the arbitrator's conclusion but rather the processed used to arrive at that conclusion.

[36] It is apparent from the reading of the award that the arbitrator in performing her mandate of having to determine the fairness or otherwise of the dismissal considered all the evidence and the materials placed before her. She arrived at her conclusion after analyzing the evidence of the witnesses and focused on the evidence of the First Respondent's witness testimony being the party on whose part the onus to proving the fairness of the dismissal rested on. She after assessing their credibility, a matter that falls squally within her domain, found that they were all reliable and accordingly accepted their testimony as truthful.

[37] An objective analysis of the evidence before the arbitrator does not support the defence of the employee. The transcript of the radio discussion between the train control officer and the employee does not support the version that the train control officer could not give the employee the instruction in as far as the movement of the train was concerned because the two were at the same position. It is apparent, the role of the train control officer is key not only in terms of the running of the trains but ensuring safety of the trains, the drivers and others. And also if the employee believed that he was not obliged to take instructions from the train control officer then why did he phone him when he was told to do so by Mr Strydom who it seems on his version this is a person who could give him authority to move the train. The version of First Respondent that in terms of the track warrant system no driver could enter the area without the permission of the

train control officer was not challenged in any serious manner by the employee during cross examination.

[38] The version that the instruction that the employee should stop the train may have not been clear is not supported by what happened when Mr Strydom arrived at Mkhuze. The conduct of the employee when Mr Strydom instructed him to leave the train when he arrived at Mkhuze goes against the version of someone who may have indeed misunderstood the instruction to stop the train. The assistance of the asset protection unit had to be solicited to remove the employee from the train.

[39] The defence of the employee in relation to shunting movement is also not sustainable. Shunting movement means the wagon is moved from one line to another. This movement on its own creates a danger and therefore where there are no signals the train driver would need oral instruction in performing such a movement. The argument that the employee could conduct the shutting movement by receiving hand signals from the assistant driver is also not sustainable. The facts before the arbitrator indicates that the person with full knowledge of the movement of trains in the line is the train control officer.

[40] The rule regulating the shutting movement is an important rule and failure to comply with it has to be regard as serious taking into account the safety aspect associated with it.

[41] The defence of the employee that he needed no authority to move between Isihlepu and Mkhuze because there was total occupation is not supported by his

own version. The version of the First Respondent which was accepted by the arbitrator was that there was no total occupation in that area. This version is consistent with the engagement between the employee, Mr Strydom and Mr Naude. The defence of the employee does not make sense because if that was the case the question is why did he not inform Mr Strydom that he needed no authority from Mr Naude to move to Mkhuze because there was total occupation on that line. The same applies in ralation to the conversation he had with Mr Naude. If the employee's version was correct then the question is why did he not inform Mr Naude that it was not necessary for him to wait for Mr Strydom because there was total occupation.

[42] The complaint about the arbitrator having taken into account irrelevant evidence and considerations into account in arriving at her decision does not take the case of employee any further. This complaint is based on the contention that the arbitrator considered in her award evidence related to the charges which had fallen away. These charges had fallen away, because the employee was found not guilty at the disciplinary hearing. However, the reading of the transcript of what happened at the arbitration hearing indicates that evidence was led concerning aspects of those charges and to some extend there is an overlap between the evidence concerning failure to carry out a lawful instruction and the accusation that the employee drove the train without a token. This in my view serves to contextualize and provide background to what transpired on the day in question.

[43] In my view even if the arbitrator was to be faulted for the approach she adopted in dealing with evidence of charges that had fallen away, that does render her reasoning in arriving at the conclusion that the employee was guilty of the offences he was charged with and that the appropriate sanction was a dismissal was irregular.

[44] The key finding of the arbitrator is that the employee was guilty of failing to obey a lawful and legitimate instruction. She finds that this was a serious offence because the instruction had in it an aspect of safety. There is nothing in the record that suggests that the employee challenged the safety aspect of the instruction.

[45] I have already dealt with offence relating to the shunting process. The arbitrator makes a clear finding in this regard and again this to me serves as the core basis upon which the arbitrator's decision was based.

Procedural fairness

[46] The ground for procedural unfairness of the arbitration hearing is based on the complaint that Ms Hanekom, the HR who apparently has some relationship with the chairperson of the disciplinary inquiry sat in during the hearing. The arbitrator considered this issue and after applying her mind came to the conclusion that despite being extremely critical of the behavior of Ms Hanekom, she did not find the procedure to have been tainted by that conduct. Her reasoning in this respect is logical and makes sense in law. She reasoned that the allegations relating to the conduct of Ms Hanekom was never put to her during

cross examination by the employee's representative and therefore she did not have an opportunity to respond thereto.

[47] The same applies to the complaint that at one of the training session Ms Hanekom asked the lecturer how she should deal with a matter involving a shop-steward. The employee interpreted this question to be related to him although his name was not mentioned in the question. The arbitrator found that there was nothing wrong with Ms Hanekom asking the question and that she was simply making full use of the training process. It is apparent from the reading of the award that the arbitrator found that the question was not targeted at the employee.

[48] The employee did not substantiated the ground that the award was improperly obtained.

[49] Finally the arbitrator applied her mind in considering whether the dismissal sanction was appropriate in the circumstance of this case. She came to the conclusion that the dismissal was an appropriate sanction after taking into account the disciplinary record of the employee. I see no reason why costs should not follow the results.

[50] In the premises the review application is dismissed with costs.

Molahlehi J

Date of Hearing : 3rd November 2008

Date of Judgment : 18th May 2009

Appearances

For the Applicant : Mr Jafta of Jafta Incorporated

For the Respondent: Adv L R Naidoo

Instructed by : Navie-Green Thompson & Associates