IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR150/09

In the matter between:

AMPAGLAS HOLDINGS (PTY) LIMITED Applicant

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL First Respondent

DG LEVY N.O. Second Respondent

SOLOMON DWAYIDWAYI Third Respondent

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Fourth Respondent

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JUDGMENT

TIP AJ:

[1] The third respondent ("Dwayidwayi") was employed in January 2002 by the applicant as a machine operator. On 15 February 2008 he was issued with a final written warning valid for twelve months in respect of the following transgressions:

> *"1. Failure to report damaged equipment, i.e. centre roller;*
>
> *2. Negligent damage to equipment."*

[2] On 16 February 2008 Dwayidwayi allegedly committed essentially the same offence and was charged as follows:

> *"1. Negligent damage to equipment, i.e. scratching roller right round;*
>
> *2. Doing same offence in four days' time whereby he damaged the roller and putting on other person."*

[3] He was found guilty of the latter charge and dismissed. The damage to the roller amounted to approximately R44 000.00 and also caused an interruption of production, with the result that the completion of certain orders were delayed.

[4] Dwayidwayi was dissatisfied with his dismissal and referred a dispute to the first respondent. After an unsuccessful conciliation, the matter was set down for arbitration before the second respondent ("the arbitrator"). The arbitration hearing ran over three days on 7 July 2008, 3 November 2008 and 9 December 2008. On the last day, an inspection *in loco* was held at the applicant's premises. The award was delivered on 17 December 2008 and determined that Dwayidwayi had been unfairly dismissed. It was ordered that he should be reinstated and paid the equivalent of eight months' salary.

[5] The applicant is in turn dissatisfied with the conclusion reached by the arbitrator and has accordingly brought the present review proceedings. Although there were certain deficiencies with the record of the arbitration hearing, the decisive issues in this matter emerge with sufficient clarity from it and I am satisfied that I am indeed in a

position to make properly informed findings.

[6] In his capacity as operator, Dwayidwayi was in charge of a large machine which heated, compressed and extruded plastic onto a series of large rollers which formed the plastic into continuous sheeting. This sheeting was transported to another section where, at the end of the process, it was cut to size. It is important that the rollers should not be exposed to any damage because, if they are, that can result in continuous marking on the plastic sheeting which results in such sheeting being scrapped and, consequentially, a need that the damaged roller should be replaced.

[7] Precisely that took place on 13 February 2008. That event came before the arbitrator on the basis that, by agreement, he should determine it in lieu of an appeal hearing. Dwayidwayi's attitude to the damage on that day was that it was not his fault. He maintained that the damage had resulted on the afternoon shift after he had stopped operating the machine.

[8] The arbitrator did not accept that version and found on a balance of probabilities that the damage to the roller on that day had been caused by Dwayidwayi and that he should have advised his supervisor accordingly. The final written warning was therefore upheld as valid. The arbitrator remarked further that Dwayidwayi's credibility had been detrimentally affected by the manner in which he had sought to defend himself in relation to the damage on that day.

[9] On 16 February 2008 at approximately 12h30 Dwayidwayi called his supervisor and superintendent to look at a damaged roller on his machine. It was apparent that this damage had been caused by the roller stack having moved too close to the extruder element, with the result that a part of the extruder die had scratched the rotating roller. It is the roller which can move backwards and forwards, whereas the extruder is stationary. The movement of the stack of rollers is

electrically controlled by the operator through the means of a switch. Dwayidwayi had been thoroughly trained in the use of the machine and was fully informed about the operation of these components.

[10] The response by Dwayidwayi to this was that it could not have been he who caused the damage because he had at the time gone to the laboratory in order to check the colour. He also denied that he had moved the rollers towards the die.

[11] This description of the operation of the machine and the related events were fully dealt with in the evidence before the arbitrator. In particular, evidence was presented on behalf of the company that the only way in which the roller could have been damaged was if the roller stack had been moved closer to the die. This evidence was not challenged or disputed at the time that it was given. What was put on his behalf during the hearing of this evidence was that Dwayidwayi would testify that what had happened was not his fault, but the fault of the machine. In the course of his evidence, Dwayidwayi came up with the further explanation to the effect that there was a defect in the roller, being that the roller was not straight. There is no evidence to support this version and it was not put to the company witnesses.

[12] The pertinent portions of the award, where the arbitrator stated the essence of his reasoning, were condensed in the following passages in the award:

> *"As regards the damage to the roller on Saturday, 16th February 2008, [Dwayidwayi] was not present at the machine when the damage occurred. The supervisor agreed that the two of them had been busy correcting the 'off-square' after which the applicant took the first cut sheet to the Quality Control Department for checking. His packer called him to tell him that the machine was producing lines. It was suggested by the [company] that the roller might*

have been damaged before the 'off-square' was made and that, because the process was slow, it took a long time for the damaged sheet to reach the end of the line where it was cut into sections. This suggestion was not proved however and seems somewhat improbable. It was also suggested that [Dwayidwayi] should not have left his machine unattended but he was not charged for this and it is apparent that a supervisor was aware of the fact that he had taken a sheet to the Quality Control Department and did not comment on this fact.

"According to the notice of the disciplinary enquiry, [Dwayidwayi] was charged for scratching the roller. It is quite clear that he could not have done this as he was not there. I therefore find that he was not guilty as charged."

[13] The arbitrator then went on to conclude as follows:

"In conclusion there is no evidence that [Dwayidwayi] was directly or indirectly responsible for the damage to the roller as he was not present when it was damaged. The [company] has not provided any firm evidence of any act or omission on the part of [Dwayidwayi] that might have indirectly resulted in the damage to the roller. It is apparent that the damage occurred after the 'off-square' adjustment but precisely why the roller assembly moved against the extruder die is not known. I therefore find that there were insufficient grounds to find [Dwayidwayi] guilty as charged and thus his dismissal was accordingly unfair."

[14] Various defects in the award made by the second respondent have been set out in the review papers. In the course of the argument before me Mr Hutchinson, who appeared for the applicant, relied on three principal irregularities, which I deal with below:

[14.1] The first finding that is assailed in this way is the arbitrator's conclusion that the damage to the roller occurred at a time when Dwayidwayi was not operating the machine. According to the arbitrator, there was no evidence to support the applicant's contention that the plastic sheeting took a considerable time to move from the machine which Dwayidwayi was operating to the packer where it was cut and further processed. The arbitrator on this basis held that there was nothing to connect Dwayidwayi with the damage.

[14.2] It is of course so that the issue of damage to the roller arose after the packer had identified that there were problems with the plastic sheeting which was coming through from the machine in question. It was only at this stage that Dwayidwayi further reported that there was a problem to his supervisor, as well as the superintendent.

[14.3] At the same time it is clear on the record that, on his own version, Dwayidwayi had gone to the packer in order to check the colour on the sheeting that he was producing. There is no suggestion in his evidence that this had taken a significant period of time. Conversely, there was evidence before the arbitrator from Mr Burger, who was the company's mechanical maintenance manager, to the effect that the extrusion process was a slow one and that some products take more than an hour to move from the machine to the packer, whilst others take a shorter time depending on the speed that they are running. Although he did not attempt to give an estimate of the time applicable to the particular process upon which Dwayidwayi was engaged on that day, the arbitrator should not simply have concluded that the fact that Dwayidwayi was not at the machine when

the report of the fault was made by the packer meant that he could not have caused the damage. Moreover, Mr Burger made it clear that the operator is responsible for the functioning of the machine.

[14.4] In his argument on behalf of Dwayidwayi, Mr Motau contended that there was an additional ground upon which Dwayidwayi should be cleared, being that there was no evidence before the arbitrator as to when the damage had occurred in relation to shift times. That submission is not borne out by the evidence. Mr Qibi gave undisputed evidence that there was a two shift system, comprising a day shift and a night shift, with the day shift running from 06h00 to 18h00. As has already been noted, the incident took place at about 12h30, some 6½ hours into Dwayidwayi's shift. In my view, the suggestion that this damage could have been caused by somebody operating the machine during the night shift has to be entirely excluded from the reckoning of these events.

[14.5] In addition, the arbitrator was obliged to give proper weight to the evidence concerning how damage of this sort could have resulted. As dealt with more fully below, this is to the effect that it can occur only if the electrical switch is engaged, which would result in movement of the roller stack. That is a function that the operator would control.

[14.6] Weighing these matters on the probabilities, I am satisfied that the arbitrator misdirected himself by holding that, because the report of a fault had come at a time when Dwayidwayi was not at his machine, it followed that he could not have caused the damage.

[14.7] The second irregularity addressed by Mr Hutchinson conerns

the arbitrator's finding that the reason why the roller assembly had moved against the extruder die was *"not known"*. That is a most material finding and it is one which, in my view, runs contrary to the relevant evidence which had been clearly placed before the arbitrator. This evidence was straightforward, namely that the roller assembly could not move by itself.

[14.8] Moreover, the damage to the roller had clearly resulted from the roller being brought into contact with the extruder die. That mechanism and the causal connection between the contact and the damage were testified to in unmistakably clear terms. This went coupled with the evidence that the roller assembly can move only if the electrical switch is engaged. In the course of the case for Dwayidwayi suggestions were made that there were problems with the machine and that it had moved by itself in the past. The arbitrator himself noted that these contentions had not been put to the company witnesses. He should accordingly have disregarded them.

[14.9] A third and related feature of the evidence and the arbitrator's reasoning which was highlighted by Mr Hutchinson related to the inspection *in loco* which had been conducted on the last day of the hearing. The record clearly suggests that this was motivated by the arbitrator himself at a stage when evidence was being presented on behalf of Dwayidwayi concerning the possibility that the roller stack could move by itself.

[14.10] There is no dispute between the parties as to the result of this inspection, which objectively established that the roller could not move by itself. This was reconfirmed, fairly so,

by Mr Motau in his argument before me on behalf of Dwayidwayi where he clearly stated that it was not in dispute that the machine could not move on its own.

[14.11] Remarkably, the arbitrator did not place anything on record in respect of the result of the inspection *in loco* and he also had no regard at all to it in his reasoning and the conclusion that he reached that the case against Dwayidwayi had not been established. He should have done the contrary, namely to have full regard to the support that the inspection *in loco* had given to the evidence for the company and its destructive effect upon the attempts of the defence's case to contend that the damage to the roller could have taken place because it had gone into motion by itself, without any intervention on the part of Dwayidwayi.

[15] I agree with the submission made by Mr Hutchinson that these are material irregularities and that they went to the heart of the reasoning and conclusion reached by the second respondent. The review is accordingly found by me to be sound and the award must therefore by set aside.

[16] There is a supplementary consideration, being that the nature of the defence mounted in respect of the incident of 16 February 2008 is materially similar to that raised by Dwayidwayi in respect of the damage caused on 13 February 2008. As to the earlier incident, as I have set out above, the arbitrator had no difficulty in concluding that Dwayidwayi had not put up a credible version. That he reached the opposite result in respect of the damage caused on 16 February 2008 is surprising, given that there was clear evidence before him to show that a similar conclusion should have been reached in respect of the culpability of Dwayidwayi.

[17] Given the clear content of the pertinent evidence, it is my view that

this is an appropriate case for me to exercise my discretion in favour of substituting my own adjudication for the determination made by the arbitrator. Mr Hutchinson submitted that I should do so and I agree that I should. From the perspective of justice and fairness, there seems to me to be little reason to believe that any advantage should be expected from this matter being remitted for a fresh hearing, taking into account the further delay and costs that this would inevitably entail.

[18] Accordingly I hold that the award made by the second respondent should be reviewed and set aside and that I should substitute a finding upholding the initial disciplinary outcome. There is no reason why costs should not follow this result.

[19] I accordingly make the following order:

[1] the arbitration award dated 17 December 2008 under case number MEGA19913 is hereby reviewed and set aside;

[2] it is declared that the dismissal of the third respondent by the applicant on 25 February 2008 was fair and it is upheld;

[3] the third and fourth respondents jointly and severally are ordered to pay the applicant's costs in respect of the review application.

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KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 5 February 2010

DATE OF JUDGMENT: 19 March 2010

FOR APPLICANT: Adv E Hutchinson
instructed by Kirchmanns Inc

FOR THIRD AND FOURTH RESPONDENTS: Mr J Motau
of NUMSA