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**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

Case No. **JR 2060/09**

In the matter between:

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| **SOUTH AFRICAN AIRWAYS (PTY) LTD** | Applicant |
| and | |
| **AIRLINE PILOTS ASSOCIATION OF SOUTH AFRICA herein represented by SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION** | First Respondent |
| **TOKISO DISPUTE SETTLEMENT (PTY) LTD** | Second Respondent |
| **VAN DER MERWE N.O.** | Third Respondent |

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**JUDGMENT**

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**VAN NIEKERK J**

**Introduction**

[1] This is an application to review and set aside an arbitration award made by the third respondent ('the arbitrator'). The arbitrator's award was issued pursuant to a private arbitration conducted under the auspices of the second respondent. The arbitrator was appointed to determine a dispute between the applicant (SAA) and the first respondent (SAAPA) relating to international and domestic meal allowances, and in particular, increases in those allowances which SAAPA claimed were due and payable by SAA, calculated in terms of two collective agreements concluded

between the parties in January 1997 and December 1990. The January 1997 agreement was referred to as the 'international agreement' and the December 1990 agreement as the 'domestic agreement', regulating as they did meal allowances on international and domestic flights respectively.

[2] The arbitrator concluded that in terms of the agreements, SAA was obliged to calculate the requisite adjustments due to SAAPA's members in relation to the period October 2008 to 31 March 2009 in the case of the international agreement, and the periods October 2008 to 31 March 2009 and April 2009 to 30 September 2009 in the case of the domestic agreement.

[3] In these proceedings, the applicant contends that the arbitrator had no power either in law or under his terms of reference to compel SAA to comply with what it claims to be an invalid agreement. Alternatively, SAA contends that the arbitrator failed to apply his mind to the common cause facts and the non-variation clauses in existence, and seeks to have the award reviewed and set aside on that basis.

**Factual background**

[4] Part of the agreed terms and conditions of the employment by SAA of its pilots is that they are entitled to meal allowances when they are away from home. The domestic agreement applies to flights within South Africa; the international agreement regulates the allowance payable to pilots whose flights take them beyond the country's borders.

[5] Each of the agreements contains a prescribed methodology designed to keep the allowance rate up to date with changes in the applicable costs. This is done bi-annually for the domestic agreement, and once a year for the international agreement. The methodology for the former is basic; it has regard to meal cost changes *vis-à-vis* a set of standard menus. The methodology for the latter is set out in an annexure to the agreement and takes into account a number of factors, across a specified set of countries, comprising data such as weighted CPI, foreign exchange rates and projected room requirements. These data are gathered, discussed, and agreed by the parties. The annexure describes the method of

calculation and records the sources. It also contains notes relevant to the data and any particular notes bearing on the calculation for that year. The new allowance rate flows from that calculation process and the new annexure is then signed off by both parties for implementation by the company. Although the annexure changes in this way from one year to the next, the provisions of the underlying agreement remain constant.

[6] The two agreements were routinely implemented in accordance with their methodologies (with a few insignificant amendments) from inception until 2005, when SAA and SAAPA entered into two agreements, both in relation to what was referred to as 'globular international meal allowance', on 28 February 2005 and 2 December 2005 respectively. The first of these recorded *inter alia* the new international allowances for the year 1 July 2004 to 30 June 2005 and the second did likewise for the year 1 July 2005 to 30 June 2006. Separately, the domestic allowance was last adjusted for the period 1 April 2006 to 30 September 2006.

[7] The germane portion of each of the 2005 agreements is identically worded, and reads as follows:

> "*Both parties agree to review, and if necessary renegotiate, the current Domestic and International meal allowance methodology before implementation of the new rates ...*".

The interpretation and application of these words is what ultimately gave rise to the arbitration proceedings under review.

[8] Evidence was placed before the arbitrator that the immediate context in respect of the international agreement was that an SAA employee, Mr Sam Pretorius, had identified an error in the existing international methodology being that, in column 10 of the methodology, weighted CPI should not be added to weighted forex but that those two factors should be multiplied. This was the only methodology issue raised by SAA. In respect of the domestic agreement, there was a minor query concerning the position of pilots who had to spend time in Cape Town as part of a long haul route.

[9] The error identified by Pretorius was discussed at an international meal allowance meeting between the parties on 30 September 2004 and it was recorded in the minutes that: "*Management and SAAPA agreed that the methodology used over the past 7 years to calculate the annual adjustment to the International Globular Allowance is not a mathematical formula per se but an agreed to methodology, used to cover as many of the variables in the calculation as possible.*" The point raised by Pretorius was not specifically addressed.

[10] In spite of the agreement to review the methodology of the domestic and international agreements in terms of the agreements of 28 February and 2 December 2005, SAA applied the existing methodology for the purpose of concluding the new allowances. As far as the methodology was concerned, at the time that the December 2005 agreement was concluded, the position remained that the only issue which had been raised was the suggestion made by Pretorius.

[11] In its proposals for the 2006 annual negotiations, made in terms of the recognition agreement and dated 10 February 2006, SAA included the following: "*Clause 4.7. Meal Allowance – Annexure P6 to be re-negotiated to be brought in line with best international practices, for example, an hourly based system of calculation and payment.*" Annexure P6 is a reference to the regulating agreement and comprises the two meal allowance agreements. SAA's proposal thus set out an entirely different approach to meal allowances, but for various reasons the parties never reached that item during their negotiations. SAA did not implement any increase.

[12] The following annual cycle was similar. SAA tabled a new agenda in February 2007, which included the items from the previous year which had not been reached. Again, the parties did not get to any negotiations on any possible new agreement, because events were overtaken by a major restructuring at SAA. In September 2007 SAA put up a lengthy 'discussion document' which again included proposals for a new agreement on domestic and international meal allowances. No agreement was reached between the parties on these proposals.

[13] In the course of June and July 2008, Captain Harty (SAAPA's chief negotiator) took up the Pretorius point with Mr Chris Smyth (at the time General

Manager Flight Operations) and on behalf of SAAPA conceded that the company's point was absolutely right and stated that SAAPA would proceed on the basis of the methodology as thus corrected. Applying the corrected methodology, a spreadsheet with adjusted calculations was sent to Mr Smyth by Captain Harty. Despite this, and notwithstanding the further fact that no other methodology problems have surfaced from the side of SAA, the company has never engaged with these calculations and, as a result, no allowance adjustments have been implemented.

**The arbitration award**

[14] I do not intend to repeat content of the arbitrator's award, and record only the following. The arbitrator recorded the issues before him by referring to his terms of reference. These assume some significance in the light of SAA's contention that the arbitrator exceeded his powers. The dispute was defined as an alleged failure by SAA to:

1. implement increases to the Globular International Meal Allowance in accordance with the provisions of the globular International Meal Allowance Agreement dated 10 January 1997, and

2. implement increases to the Domestic Meal Allowance in accordance with the provisions of the domestic Meal Allowance Agreement dated 6 December 1990.

[15] The terms of reference also record SAA's contention that the dispute related to the interpretation and application of the agreement between SAA and SAAPA being the Globular Meal Allowance Agreement dated 28 February 2005. The arbitrator was to determine the issues in dispute by reference to the pleadings, and was afforded powers *inter alia* to make a declaratory order, an order of compliance with any provision of the international and/or domestic agreement, and/or the February 2005 agreement, provided that the agreements were found to be applicable.

[16] The case before the arbitrator was argued primarily it would seem on the basis that the February and December 2005 agreements had the effect of novating the 1990 and 1997 agreements. The arbitrator concluded that no novation had taken

place. The bulk of the award concerns the arbitrator's reasoning in relation to that conclusion. The arbitrator went on to find that at best, there was a variation of the agreements relating specifically to the methodology used to calculate adjustments to the international meal allowance and that the balance of the 1990 and 1997 contracts remained unaffected. The arbitrator states:

> *Thus, being mindful of the abovementioned requirement and the wording of these 2005 collective agreements, the applicant does not convince me, on a balance of probabilities, that a novation of the 1990 and 1997 agreements took place. Although I accept that a variation, specifically with regard to the aspect of methodology, took place, I cannot agree with the argument that a novation took place and that the obligations of the respondent with regards to the entire agreement has been extinguished.*
>
> *Having regard to the facts of the case, I am of the view that the agreements of 1990 and 1997 stand and must be applied. To question the methodology used in an agreement is one thing, and to novate an agreement is another. Tackling the methodology in this case cannot imply that novation of an entire agreement. At best there was a variation of the agreement relating specifically to the methodology used to calculate adjustments to the international meal allowance and the balance of the 1990 and 1997 contracts remained unaffected.*

[17] Having reached the conclusion that that there was no novation of the domestic and international agreements, the arbitrator went on to comment on a number of issues raised by the evidence. In doing so, he refers to the issue raised by Pretorius, and the subsequent discussion with Smythe. He says the following:

> *SAAPA then, after discussions were held with the current acting CEO (Chris Smythe), reached consensus on the amendment to the international agreement methodology where the calculation method was changed from an addition to multiplication. SAAPA then submitted its own calculations to the company but to no avail. The Company, in spite of SAAPA's response, refused to implement any adjustments in the meal allowance rates.*

[18] The arbitrator went on to say:

> *The fact that the Company has subsequently put proposals to SAAPA which the parties never negotiated, due to other priorities confirms the intention of the employer to reconsider the whole picture. Proposals for entirely different agreements based on an hourly rate were made by the employer. Giving effect to such proposals should however be done through the normal route of negotiations, where existing agreements are changed in a give and take process. To try and use the 2005 agreements that deal with one aspect of an existing framework as a short cut to implementing amendments is not acceptable. New agreements to regulate the payment of meal allowances have not been entered into by the parties.*

[19] The consequence of that conclusion was expressed in the following terms:

> *The employer does therefore have an obligation to calculate the annual rates for meal allowances and to adjust them, whether increase or decrease. This must be done in accordance with the existing agreements until those agreements are changed by the parties. The 1990 and 1997 agreements must be given force and effect because they still stand.*

**The grounds of review**

[20] The applicant's primary attack on the award can be reduced to the following. The arbitrator, having found that the parties varied both the domestic and international agreements, had no basis to make a determination compelling SAA to calculate the requisite adjustments due to pilots in terms of those agreements. Given that there was a variation, the arbitrator was necessarily required to determine whether the parties had agreed to a new methodology in respect of both collective agreements. On the evidence, they had not done so, and the arbitrator accordingly had no power, in law or under his terms of reference, to compel SAA to comply with what were no longer valid or legally binding agreements.

[21] In regard to the existence of any agreement on a new methodology, SAA contends that the correspondence between the parties demonstrated that it had not

agreed to a new methodology, and that the old methodology was flawed. Further, SAA had made a substantive proposal to renegotiate the methodology in line with international best practice. To the extent that the arbitrator relied in support of his findings on an agreement between SAAPA and Smythe, then acting CEO of SAA, the arbitrator's finding was misconceived in that SAAPA accepted that an oral agreement would not suffice, and that in any event, the discussion between Smythe and Harty were not negotiations for the purposes of the recognition agreement between the parties; the outcome of their discussion reduced to writing as required , and Smythe had no authority to conclude an agreement relating to unbudgeted expenses.

[22] In summary: SAA's grounds for review are predicated on the following argument:

(a) The arbitrator concluded that the parties had varied the domestic and international agreements by agreeing to review and/or negotiate a new methodology.

(b) Having done so, the arbitrator was necessarily bound to determine, on the evidence, whether the parties had agreed to a new methodology

(c) On the evidence, there was no agreement between the parties on a new methodology.

(d) Therefore, in finding that SAA was liable to SAAPA, the arbitrator enforced an agreement that did not exist.

SAAPA challenges (b) and contends that the extent of the variation was limited only to an undertaking to review and if necessary, negotiate a new methodology, and that the parties would continue to apply the existing methodology until it was replaced by an agreed substitute.

**The test to be applied**

[23] The parties are *ad idem* on the approach to be adopted by this court. Section 157(3) of the LRA reads as follows:

> *Any reference to the court in the Arbitration Act, 1965 (Act no 42 of 1965) must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.*

Since the arbitration proceedings under review were conducted under the provisions of the Arbitration Act, the court is required to apply the provisions of s 33 of that Act in the present proceedings. The grounds of review under s 33 are more limited than those that apply to non-consensual arbitration proceedings in reviews conducted under s 145 of the LRA. Despite some initial controversy, it is now well established that this court must apply the (narrower) s 33 grounds in review proceedings that concern private arbitration awards (see *Seardel Group Trading (Pty) ltd t/a The Bonwit Group v Andrews NO & Others* [2000] 10 BLLR 1219 (LC); *Eskom v Hiemstra NO & others* (1999) 20 ILJ 2367 (LC); *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* [2002] 3 BLLR 189 (LC)). When the court applies s 33 of the Arbitration Act, it must do so with due deference to the nature of a private dispute resolution process and the purposes that underlie it. In *Academic and Professional Staff Association v Pretorius SC N.O & others* [2008] 1 BLLR 1 (LC) this court observed:

> *The courts have, in dealing with reviews of private arbitrations, adopted a narrow approach. This approach confines itself to mainly issues related to procedural aspects of the arbitration. This approach is mainly informed by the fact that private arbitrations flow from the consent of the parties, who, through an agreement, determine the powers of the arbitrator* (at paragraph [59]).

[24] The rationale extends beyond considerations of consent to the purpose of the process itself. and In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (6) BCLR 527 (CC), O'Regan J, writing for the majority, said the following:

> *Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If*

> *courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33 (1), the goals of private arbitration may well be defeated* (at paragraph 236 of the judgment).

[25] To establish that an arbitrator exceeded his or her powers, it must show that the arbitrator rendered an award inconsistent with his powers, or put another way, that that which is awarded is greater than that which can permissibly be awarded (see Du Toit *Labour Law Through the Cases* at LRA 7-92 and *Amalgamated Clothing & Textile Workers Union v Veldspun Ltd* 1994 (1) SA 162 (A) at 169.)

**Analysis**

[26] With that background, I turn to the applicant's grounds of review, and in particular, to the contention that the arbitrator exceeded his powers. The arbitration agreement specifically contemplated that the arbitrator had to interpret the agreements in the light of their terms and any admissible evidence, and enforce any agreements that he found applicable. As is clear from the relevant passages of the award, the arbitrator firstly and correctly identified the central question being the interpretation of the key clause in the 2005 agreements, being the one concerned with the review and, if necessary, renegotiation of the methodology. It is clear from passages quoted above, read with the further reasoning in the award, that the arbitrator was acutely aware of the real issue in this case, being whether the 2005 agreements had the result that new agreements had to be negotiated. In effect, the arbitrator's finding amounted to the following: each of the 2005 agreements was self-standing and each of them created a variation, at best for SAA, only in respect of the methodology which was then to be applied to the 1990 and 1997 agreements, which remained in operation.

[27] Perusal of both the description of the dispute and the pleadings leaves no doubt that the arbitrator was required to do precisely what he did do, namely to determine the impact of the 2005 agreements on the pre-existing 1990 and 1997 agreements. It is clear to me from the terms of the award that the arbitrator

understood that in interpreting the 2005 agreement, he would have to choose between the conflicting contentions of SAA and SAAPA. It is also clear that having rejected SAA's case of novation and having concluded that the domestic and international agreements had been varied by the 2005 agreements, the arbitrator fully appreciated that the effect of the variation was limited – it obliged the parties only to review and if necessary negotiate a new methodology but without extinguishing the established methodology, pending the outcome of that review and/or negotiation. In my view, it cannot be said that the arbitrator misconstrued the questions. The fact that SAA is unhappy with his conclusions does not amount to the arbitrator having exceeded his powers.

[28] Turning to the second ground of review, SAA contends that the arbitrator had committed a reviewable irregularity, in the form of a gross irregularity in the conduct of the arbitration proceedings, in that he failed to apply his mind to the common cause facts and non-variation clauses in the relevant contracts when it came to assessing the exchange between Harty and Smythe in relation to the Pretorius methodology issue. It is not necessary for me to consider the question whether the award should stand even if the arbitrator failed to apply his mind to the evidence in the manner suggested (see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), and *Stocks and Stocks* (*supra*) for a discussion on what constitutes a gross irregularity in an arbitration conducted under the Arbitration Act). There is no substance in this ground of review simply because there is no connection between the arbitrators's dealing with this aspect of the evidence and his award. The issue regarding Smyth was explicitly identified in the pleadings in response to SAA's averment that SAAPA had done nothing in respect of the methodology review. In this award, the arbitrator dealt with the exchange between Harty and Smythe *en passant* – there is no indication from the terms of the award that any consensus between Harty and Smythe was relevant to the finding that SAA had failed to comply with the domestic and international agreements. It was certainly not SAAPA's case that the exchange between Harty and Smythe established a binding enforceable agreement. Accordingly, this ground of review falls to be rejected, and the arbitrator's award must stand.

**Costs**

[29] Adv Tip SC, who appeared for SAAPA, submitted that a punitive order as to costs would be appropriate. He contended that SAA's conduct, particularly having regard to SAAPA's concession on the Pretorius point was simply to stonewall, and that it had failed to engage in further discussions with SAAPA on the question of the computation of meal allowances. Secondly, he contended that by the time that this application was heard, SAA has significantly reduced the number of issues originally raised, and that its conduct in this regard should be viewed with opprobrium. Thirdly, Mr Tip submitted that in its papers, SAA used language concerning the arbitrator that in was intemperate to say the least, and that the court ought to express its disapproval of this conduct.

[30] While I accept that SAAPA conceded the Pretorius point, SAA's attitude has consistently been that the effect of the 2005 agreements was that new agreements on meal allowance were to be negotiated and that in the broader context, the concession made by SAAPA in the form of the Pretorius point is meaningless. Obviously, SAAPA has a different view, which is precisely why the parties referred their differences to arbitration. As it transpires, SAAPA's view has been vindicated. But it does not necessarily follow in refusing to implement the methodology as adjusted by the Pretorius point that SAA was acting in bad faith or in any other manner that might warrant a punitive costs order. SAA simply acted in a manner that was consistent with its interpretation of the legal position. In regard to matter of the number of issues raised, SAA has consistently raised as grounds for review that the arbitrator exceed his terms of reference and that he committed a gross irregularity in the proceedings. While SAA's points were refined (and usefully so) at various points in the course of the proceedings, the papers do not disclose the pursuit of irrelevant issues only to have them later abandoned, or any similar conduct that might warrant punitive costs. In relation to the terms in which SAA's appears referred to the arbitrator, I accept, as Adv Tip submitted, that this court, clothed as it is with a supervisory function in relation to the arbitration of labour disputes, is in a sense the custodian of the arbitration process and that it should deal firmly with conduct that is destructive of it. I don't dispute this - but it must equally be accepted that the arbitration process is often robust and that the language of review, cast as it is in

terms such as ‘gross irregularity’ and ‘misconduct’, notwithstanding the fact that they carry technical meanings, may convey and possibly promote a sense of robustness in the terms in which attacks are made on arbitration awards. There is obviously a line that ought not to be crossed – but in the present circumstances, while some of the language used is unfortunate, it does not warrant punitive costs. Finally, I would recall what remains the most influential exposition of s 162 of the LRA, despite it predating the LRA. In the judgment of what was then the Appellate Division in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A), he court held that where parties to a collective bargaining relationship are parties to litigation, the court should be slow to make costs orders against one or the other so as not to prejudice the nature of that relationship. SAA and SAAPA are parties to a long standing collective bargaining relationship. They are in dispute over the issue of meal allowances for pilots, a dispute that I sense extends beyond the immediate to the status of pilots and the extent, if any, to which that should impact on demands for conditions of employment that are better aligned with international norms and best practice. But as the arbitrator astutely observed, that is a matter for the process of collective bargaining. To the extent that a punitive order for costs in these proceedings might introduce a sour note into a process that has not yet begun, an order of this nature is not appropriate. But this does not mean that SAAPA should be deprived of its costs on the ordinary scale. SAAPA has substantially succeeded in its opposition to this application, and an order for costs on the ordinary scale is appropriate.

I accordingly make the following order:

1. The application is dismissed, with costs, such costs to include the costs of two counsel.

**ANDRE VAN NIEKERK**

**JUDGE OF THE LABOUR COURT**

Date of application: 29 October 2010

Date of judgment: 2 November 2010

Appearances

For the applicant: Adv KS Tip SC, with Adv G Moeti, instructed by Webber Wentzel

For the respondent: Adv N Cassim SC, with Adv F Boda, instructed by Cliffe Dekker Hofmeyr Inc