IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: JR2353/05

In the matter between:

EQUITY AVIATION (PTY) LTD	Applicant
and	
SATAWU obo THOGA, S	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
MUDAU R. N.O	Third Respondent

JUDGMENT

Bhoola J:

Introduction

[1] The applicant seeks to review and set aside an arbitration award issued by the arbitrator ("the arbitrator") under the auspices of the Second Respondent under case number GA36149/04 on 15 August 2005 ("the award").

Background

[2] Thoga was employed by the applicant as a GSO driver. His duties involved driving and positioning a motorised vehicle containing a staircase mounted on top of it, onto the passenger doors of aircraft to allow for disembarkation of passengers and airline crew. This motorised unit is colloquially known as a "passenger step". Thoga was dismissed on 11 October 2004. The procedural fairness of his dismissal was not in issue.

[3] The charges against Thoga arose from an accident that he caused on 23 September 2004 when he drove a passenger step into an aircraft used for cargo by one of the applicant's clients, SAFAIR. The passenger step damaged the inner rubber lining of the aircraft door. The applicant conducted an internal investigation into the accident following which Thoga was charged with malicious damage to an aircraft and not following standard operating procedures. He was dismissed following a disciplinary enquiry. The outcome of the disciplinary enquiry form reflects that Thoga pleaded guilty

and was found to be guilty and dismissed. He referred a dispute concerning his unfair dismissal to the second respondent. An arbitration was held before the third respondent. Thoga's dismissal was held to have been substantively unfair and the applicant was, *inter alia,* ordered to reinstate him.

Grounds of review

[4] Mr Hollander, appearing for the applicant, submitted the conclusion reached by the arbitrator was not one that a reasonable decision maker could reach in that he failed to apply his mind to material evidence before him and committed gross irregularities. This is apparent from the following categories of review:

Category One :

(1) The failure to have regard to the fact that Thoga pleaded guilty.

(2) The criticism leveled against the applicant for not calling the supervisor.

Category Two :

(1) No reasonable basis exists for the conclusion that dismissal was unjustified.

(2) The arbitrator expected the applicant to rebut a version that was not put to its witnesses, i.e. that damage to the aircraft was minimal.

I deal with each of these below.

Admission of guilt

[5] Thoga had pleaded guilty to the charges at the disciplinary enquiry but recanted in the arbitration, stating that he only meant to admit that he was involved in the accident, not that it was his fault. However he conceded in cross examination that he had caused the accident, as appears from the following extract from the record:

"RESPONDENT REP: MR *THOGA, you said that you agree that you caused the accident.*

MR THOGA Yes."

[6] In the light of this admission the case before the arbitrator refined itself to a narrow issue relating to fairness of the sanction. However the arbitrator failed to draw a negative inference from the obvious volte-face, and failed to mention in his award that overwhelming evidence of guilt existed. In so doing he failed to apply his mind to the evidence on the fact of guilt, particularly in the light of the fact that it was common cause on the pleadings (in other words there was no challenge to the allegation in the Founding Affidavit that he had pleaded guilty at the disciplinary enquiry). He also failed to apply his mind to Thoga's own evidence as to how the accident occurred, which was as follows:

"RESPONDENT REP: So *how come that (sic) you bumped the door of the aircraft?*

MR THOGA: I do not know what transpired but I think the captain opened the door before they stopped……

MR COMMISSIONER: Wait. Your answer to the question is that the captain opened the door when?

MR THOGA: Before the steps stopped".

……
RESPONDENT REP: So *when did the .captain open the door?*
MR THOGA: Maybe he opened the door while I was *attempting to apply the jack and then before ....(.INAUDIBLE) ... it is then I told MR .. (INAUDIBLE) to stop it seems as if (INAUDIBLE)... hit the rubber"*

[7] The arbitrator accepts Thoga's version on the probabilities. In other words, Mr Hollander submitted, he gives the benefit of the doubt to Thoga despite his unexplained volte-face to the effect that all he had intended to do in the disciplinary enquiry was to admit that he had been involved in the accident but not that he caused it. This is a material issue that goes to his credibility and also affects his version that he was supervised by Mokokoane when the accident occurred. It was submitted, therefore, that the arbitrator failed to appreciate and apply the rules of evidence and that he ought to have drawn a negative inference against Thoga and not accepted his version in the circumstances.

[8] The arbitrator correctly took the view that the applicant bore the duty to prove the fairness of the dismissal, but erred in considering the evidence before him. There was no basis for him to conclude that the accident occurred due to no fault of the employee. It was submitted by the applicant that, on the contrary, there was no basis for such a conclusion in that the aircraft was stationary and the employee was driving the vehicle which collided with it. It has never been suggested that the aircraft was anything other than stationary. Furthermore, while it is contended in the first respondent's Supplementary Heads of Argument that the employee did not plead guilty to the charges at the disciplinary hearing, it must be noted that in the first respondent's Answering Affidavit in the review application, it is not denied that he pleaded guilty to the charges, notwithstanding the fact that he did not depose to a confirmatory affidavit. This constitutes an admission and instructions would have been obtained from Thoga in this regard. However, Thoga did not file a Confirmatory Affidavit and although this point was initially taken by the applicant, it did not persist with it at the hearing.

[9] Counsel for the first respondent, Mr Mphahlani, in opposing the review, submitted that the admission of guilt forms the crux of the applicant's case but does not support it. Thoga has consistently denied that he pleaded guilty - his evidence was at all times that he was involved in the accident but did not cause it. Moreover, it was never put to him in the arbitration that he was lying about not having pleaded guilty.

Failure to call Mokokoane

[10] The arbitrator also failed to draw a negative inference or criticise the first respondent for failing to call Mokokoane as a corroborative witness. If he had been called, Mokokoane could have assisted in explaining why Thoga had revised his version and changed his plea. Instead, the arbitrator criticised the applicant for failing to call Mokokoane in the following terms:

"... The Applicant said that he was marshaled. Nothing was brought to my *attention to discredit the applicant's evidence. Mokokoane was not called to testify at the arbitration proceedings. "*

and

"I was confronted with two conflicting set *of evidence. I have to give the applicant the benefit of the doubt, more so when the respondent failed to adduce evidence from Mokokoane who would bring to light* a *number of issues, e.g. whether or not the applicant was marshaled, whether or not he testified at the hearing."*

[11] The arbitrator, in drawing these conclusions, failed to consider that the applicant presented its case as it saw fit and based on the evidence that was contested in cross examination. It was never put in cross examination to the witnesses for the applicant, Swartz and Mzyk that Thoga's version would be that he was supervised by Mokokoane at the time. Accordingly, in the absence of an indication that the issue of supervision was in dispute, the applicant closed its case without calling Mokokoane. If any criticism was to be leveled by the arbitrator, it should have been leveled at the first respondent for not putting Thoga's version to the applicant's witnesses and then not calling Mokokoane to substantiate this version. Thoga for the first time testified in his evidence-in-chief that he was supervised. The arbitrators' conclusion is not reasonable in the circumstances where the first respondent bore the burden of rebutting this fact. The arbitrator committed a gross irregularity in criticising the applicant, and it was submitted that no reasonable decision maker in his position could have arrived at this conclusion.

Sanction

[12] The arbitrator disagreed with the chairperson of the disciplinary hearing that dismissal was appropriate in the circumstances. The pertinent part of his award reads as follows:
"In view of the decisions of the courts that dismissal must be used as *the last resort, I fail to understand how the chairperson of the hearing arrived at* a *dismissal after hearing the* same *evidence that I also heard".* Whilst it is now settled law in terms of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) that an arbitrator need not defer to the chairperson of the disciplinary hearing in respect of the appropriate sanction, there still has to be a reasonable basis for arriving at an alternative conclusion. Contrary to the arbitrator's finding, there was in fact ample evidence before him to justify the dismissal of Thoga. This included:

(i) a previous written warning dated 29 June 1998 for a similar offence.
(ii) an illustrated training document entitled "Positioning a passenger step at the rear passenger door" provided to Thoga for training purposes.
(iii) a circular issued to staff, including Thoga, warning that a zero tolerance approach would be followed for speeding.
(iv) a similar circular sent to the first respondent advising of a zero tolerance policy with regard to speeding and failing to adhere to procedures.

(v) a memorandum dated 9 June 2004, three months before the accident which led to Thoga's dismissal, calling on staff to assist in bringing an end to "cowboy style" driving which leads to accidents.
(vi) a previous memorandum sent to the first respondent on 8 April 2003, albeit that it made reference to accidents caused whilst under the influence of alcohol.

Nature of the damage

[13] The arbitrator also concluded that the damage to the aircraft was "*minimal*". This conclusion is also a gross irregularity on the part of the arbitrator who somehow expected the applicant to factually rebut the evidence when the version was not even placed before its witnesses. It was submitted that when dealing with the facts of this matter, any damage to an aircraft caused by the staff of the applicant is a serious incident. The evidence in support of this contention under questioning from the arbitrator was clear:
"*MR. COMMISSIONER: And what informs that decision – what informs the decision to invoke? Depending on the nature* of *the incident investigating disciplinary action, any* of *the stages. What informs the decision to forget about the stages and invoke dismissal? MR MZYK: Severity - if it is aircraft accidents and it is very severe* we *will take - any aircraft accident is to the top* of *severity. If it is found guilty on gross negligence causing damage to an aircraft we take it to the most severe - that is the most severe offence - aircraft damage."*

[14] Myzk further, also under questioning by the arbitrator, set out the consequences to the applicant of accidents such as those caused by Thoga:
"MR MZYK: The company can lose its handling license on this one issue, aircraft accident…incidents. So *if aircraft accidents and incidents occur the CA can opt to revoke the company's handling license and that is the license for the company to bring services on the airport itself, and it is for new clients to have* a *record* of *aircraft accidents incidents, it is very hard to get new clients to come to EQUITY AVIATlON based on that record".*

[15] It was submitted that the applicant, through the evidence of Mzyk, more than justified why a dismissal was appropriate in the circumstances. Not only was the accident, whatever the magnitude, viewed in an exceptionally serious light, but Thoga had been warned of this on more than one occasion, and had received a previous warning (albeit that this had lapsed). Moreover, the accident was a threat to the very employment of the applicant's other employees had it lost its license, and such accidents impacted on the reputation of the applicant and its ability to obtain further work.

[16] In the light of this evidence, the conclusion of the arbitrator that he could not understand how a dismissal could be justified was not justifiable or reasonable. He ignored material evidence and committed a gross irregularity in arriving at this conclusion and in failing to consider the evidence of Mzyk in regard to the seriousness of the offence.

[17] Mr Mphahlani made the following submissions in opposing the review:

(a) The applicant's standard operating procedure requires an aircraft step driver to slow down before entering the parking bay, continue at a walking pace, stop 5 metres from the aircraft, test brakes to confirm their serviceability; approach aircraft at a snail's pace; another person must close the aircraft passenger door before the aircraft step is positioned and someone else must marshall the aircraft step into position. Thoga testified at the arbitration that he had followed the standard operating procedure in that he had slowed down while approaching the aircraft, and had stopped and tested the brakes. Mokokoane, his supervisor had marshaled the aircraft step into position, but while this was being done the captain opened the aircraft passenger door, resulting in the aircraft step accidentally bumping into the passenger door and causing minor damage.

(b) The applicant's evidence of malicious damage to the aircraft was exaggerated, inflated and/or unsubstantiated in that there was no evidence that Thoga had acted with malicious intent or wrongful intent. Swartz gave evidence that he did not know if the damage was deliberate. Thoga's evidence was that he had made a mistake and the accident was not deliberately caused by him. There was therefore no evidence before the arbitrator that there was "*malicious*" damage and that this justified the dismissal. Furthermore, it was common cause that the damage caused was minor. Swartz did not even attend the accident scene to inspect the damage. The applicant's second witness, Mzyk, could not say what the extent of the damage to the aircraft was. According to Swartz the only loss of revenue suffered by the applicant as a result of the accident was the payment of a penalty arising from the aircraft being delayed, but he is unable to assess the penalty. Likewise Mzyk did not know the monetary value of the damage.

(c) Swartz had conceded that his evidence was hearsay. In the arbitration the witness who allegedly told Swartz that Thoga did not comply with procedure in that he failed to stop 5 metres from the aircraft was not called. Also, the applicant did not call Otto to confirm Swartz's version that he accompanied Thoga to Swartz's office to fill out the accident form. The applicant moreover could have called Mokokoane to confirm the version that he had informed Swartz that Thoga positioned the aircraft step while the passenger door was being opened.

(d) Myzk was not a witness to the accident and his evidence too was hearsay in that witnesses Dreyer and Gani were never called. Mokokoane was not called to confirm Mzyk's version that he said he did not marshall Thoga. Dreyer was not called to confirm Myzck's evidence that he told him Thoga was speeding when he approached the aircraft. Gani was never called to confirm Myzk's version that he was in the parking bay at the time.

(e) The arbitrator correctly found that Thoga did not plead guilty at the disciplinary enquiry – he had merely admitted that the accident had been a mistake, and at the

arbitration he clarified that it had not been his intention to plead guilty. This is the crux of the applicant's case and it must fail on that ground.

(f) There is a reasonable basis for the conclusion of the arbitrator that in view of the trite principle that dismissal must be used as a last resort, he could not understand how the chairperson of the disciplinary hearing arrived at a dismissal after hearing the same evidence presented before him. The arbitrator was reasonable in finding that dismissal was too harsh a sanction in the circumstances given Thoga's lengthy period of service and his clean disciplinary record. Moreover, in circumstances where the applicant's disciplinary code provides for progressive application of discipline in that it recommends a written warning for a first offence, a final written warning for a second and dismissal for a third offence, it was not appropriate for the chairperson of the disciplinary enquiry to dismiss him and the chairperson was not called to justify the sanction of dismissal. Mzyk had, moreover, recommended corrective action.

Condonation

[18] A point *in limine* was raised by the first respondent in regard to the applicant's failure to seek condonation for late filing of the record and its non-compliance with Rule 7(A)(5) requiring certification of each copy of the record as true and correct. The applicant submitted that this point is disingenuous and has no merit in the light of the history of this matter which was as follows:

(a) The application was previously set down on an unopposed basis on the grounds that the first respondent's answering affidavit was out of time and that the first respondent had not applied for condonation;

(b) It was contended by counsel for the first respondent that its answering affidavit was not out of time in that, *inter alia,* the record was not properly filed and the applicant's Rule 7A(8)(a) and 7A(8)(b) notice was delivered late;

(c) Arendse AJ gave an *ex tempore* order condoning all non-compliance with the Rules of this Court inasmuch as there was any non-compliance;

(d) The court file did not record the *ex tempore* order;

(e) The first respondent persists with its view that notwithstanding the order of Arendse AJ there had been no condonation in respect of its non-compliance;

[19] After hearing the submissions of the parties on this issue the Court ordered that good cause had been shown for the granting of condonation .

The review standard

[20] It is by now trite that this Court is required to adopt an approach which requires evaluating whether the award was one that a reasonable decision maker could have reached : *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). Navsa AJ commented on the nature of a review for reasonableness as follows:

"[109] Review for reasonableness, as *explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does* so *in the limited sense that it necessarily entails scrutiny of the merits* of *administrative decisions. She states that the danger lies, not in careful scrutiny, but in 'judicial overzealousness' in setting aside administrative decisions that do not coincide with the judge's own opinions. This Court in Bato Star recognised that danger.* A *judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds* of *reasonableness as required by the Constitution.*

[110]To summarise, Carephone held that section 145 of *the LRA was suffused by the then constitutional standard that the outcome* of *an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section* 145 *is now suffused by the constitutional standard* of *reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that* a *reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."*

Merits of the review

[21] Insofar as the first respondent, relying on *Ntshangase v Speciality Metals CC* (1998) 3 BLLR 305 (LC) sought to contend that there was an unfair splitting of charges in that Thoga was charged with malicious damage to an aircraft as well as not following standard operating procedures when these are elements of the same charge, it is not necessary to determine the issue. The issue was never raised at the disciplinary hearing or the arbitration and cannot be raised at this belated stage.

[22] In considering the submissions and the pleadings in the light of the *Sidumo* test, I agree with the submissions made by the applicant on the grounds of review and am of the view that the review is justified in that it cannot be said that the arbitrators' finding is one that could be reached by a reasonable decision maker applying his mind to the material before him.

[23] The arbitrator makes no finding on the issue of whether Thoga pleaded guilty and subsequently recanted, although this is clear from the record. Moreover the arbitrator

adopted an inquisitorial approach and extracted evidence which may not ordinarily have been led. I agree with the submissions of the applicant in this regard. This is in my view a startling and glaringly obvious omission given that it is an issue in dispute. In so doing he failed to apply his mind to a material fact, which is a gross irregularity in the proceedings. This much is apparent from the record:

"APPLICANT REP: On …page 4 of the bundle it is written there that you pleaded guilty. Why did you plead guilty?
MR THOGA: They told me that I damaged the flight and I told them that I made an accident.
APPLICANT REP: Did you plead guilty?
MR THOGA: No, I told them that I made an accident".

Further, in cross examination the evidence was as follows:

"RESPONDENT REP:.. you referred to page 4 and you were denying that you pleaded guilty what is this that you..?
MR THOGA: I was not pleading guilty, all I was accepting was that yes, I was involved in an accident.
RESPONDENT REP: If you go to…..the document..what is the charge there?
MR THOGA: …..I damaged the flight.
RESPONDENT REP: So what ..(INAUDIBLE)?
MR THOGA: I did manage to hit the rubber of the aircraft…..I pleaded it as an accident.
RESPONDENT REP: The question is did you take it upon yourself to look at what you damaged after you have…(INAUDIBLE)the rubber door of the aircraft?
MR THOGA: Yes.
RESPONDENT REP: What was damaged there?
MR THOGA: That was the rubber on the left hand side."

[24] The only inference that can be drawn is that the arbitrator accepted that Thoga pleaded guilty. This would render the rest of his findings, i.e. that Thoga should nevertheless be believed on the probabilities, unreasonable and would on its own constitute sufficient grounds for this Court to set aside the award. The only finding he makes is in regard to Mokokoane's statement, which was admitted in evidence, when he states: "*What immediately came to mind after reading this statement is that the incident was not deliberate".* The statement read as follows:
"Driver Thoga being under pressure as aircraft arrived very early mistakenly place the schutte while the door was opened and left part of inner iron of step knocked the rubber of the door and dent the smaller part of the door edge. .."

[25] The arbitrator's finding is, in my view, clearly unreasonable in the light of this and the other evidence led. The issue of negligence cannot be considered to be relevant, and I agree with Mr Hollander that it was, at best, a red herring. The issue was not whether Thoga's conduct had been intentional or mistaken but whether he caused the damage, which he admitted. Combined with the evidence as to the seriousness of the misconduct, which was not disputed by the first respondent, this constitutes relevant

and material facts that were clearly not considered by the arbitrator in reaching the conclusion he did. In my view the arbitrator committed a gross irregularity in failing to apply the rules of evidence, and in failing, despite the glaringly obvious probabilities, to accept the version advanced by the applicant's witnesses at the arbitration. Moreover, he also misdirected himself in failing to take account of material evidence to the effect that although the damage to the aircraft was minimal, any type of damage to an aircraft, however minimal, has serious implications for the applicant as well as for issues of safety. Swartz testified that the rubber that was damaged by the step as a result of Thoga's conduct was critical in ensuring the pressurisation of the aircraft.

[26] The second critical ground of review is the absence of Mokokoane's evidence and in the light of his unexplained absence the implications for the first respondent's case are obvious. But again the arbitrator accepts Thoga's version that he was marshaled on the probabilities and rejects the direct evidence Myzk, which was not contested. In fact, he goes even further and finds that the applicant did not lead any evidence in support of its version denying that Thoga was marshaled. Mokokoane is, as Mr Hollander put it, the missing link in the first respondent's case, and in the absence of his evidence I cannot countenance how the arbitrator reasoned his way to the conclusion he did. In the circumstances I do not consider it necessary to deal with the additional grounds of review. My finding on the above two grounds is sufficient to dispose of the review. In light of the above I do not propose to deal with the issues of hearsay evidence raised by the first respondent nor the category two grounds of review raised by the applicant. Furthermore the arbitrator's finding on sanction obviously followed from the unreasonableness of his conclusions on the evidence and need not be dealt with. Given the lack of evidence as to sanction and mitigation I do not consider it appropriate to substitute the Court's decision on the substantive fairness of the dismissal for that of the arbitrator, and would remit the matter.

[27] In the premises, the Court makes the following order:

1. The arbitration award of the third respondent dated 15 August 2005 in case number GA 36149-04 is reviewed and set aside.
2. The dispute is referred back to the second respondent for arbitration *de novo* before a commissioner other than the third respondent.
3. There is no order as to costs.

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Bhoola J
Judge of the Labour Court of South Africa

Date of hearing: 4 February 2010
Date of judgment: 26 March 2010

Appearance:
For the applicant: Advocate L. Hollander instructed by Cliffe Dekker Hofmeyr Inc
For the first respondent: Advocate J S Mphahlani instructed by MM Baloyi Attorneys