IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1824/19

In the matter between:

SOUTH AFRICAN EXPRESS AIRWAYS SOC LTD
(IN LIQUIDATION) **Applicant**

and

TEBOGO MAFUJANE *N.O.* **First Respondent**

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **Second Respondent**

JOSE ARAUJO **Third Respondent**

Heard: **20 March 2024**

Delivered: **3 April 2024**

This judgment was handed down electronically by circulation to the parties and/or legal representatives by email. The date for hand-down is deemed to be 3 April 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] On or about 9 October 2017, the third respondent (employee) submitted a general declaration of interest form to the applicant (company). The declaration form required employees to respond to various questions by ticking or crossing “yes” or “no” next to

the question. Where he or she answered “yes”, the employee would be required to provide additional information.

[2] The question asked under section 6 of the declaration form was whether the employee had any “remunerative commitment” outside the company. Instead of responding by ticking or crossing “yes” or “no”, the employee left this question unanswered. It was common cause that the employee was a simulator instructor for Simaero South Africa (Simaero) since June 2014. The consequence of his failure to respond to the question was a death penalty – dismissal.

<u>The charges and dismissal</u>

[3] The charges which formed the reason for the employee’s dismissal were formulated as follows:

‘1. Contravention of Flight Operations Manual (FOM) Part one section 8 paragraph 8.22.1 and paragraph 8.22.2 and All Crew Notice 01 2018.

2. Dishonesty in that you failed to declare that you have alternative employment as per the Declaration of Interest form.’

[4] Paragraphs 8.22.1 and 8.22.2 of the FOM provide as follows:

‘8.22.1 All flight crew members who wish to conduct flying activities outside SA Express must obtain prior written permission from the Chief Pilot. Any alternative employment must be declared as required by HC policy.

8.22.2 A crew member who accumulates flight time outside of their employment shall maintain an accurate record of flight time and duty periods and shall provide copies thereof to all operators for whom such crew member conducts flights. Quarterly summaries must be provided to the Divisional Manager: Line Operations / Chief Pilot.’

[5] The All Crew Notice 01/2018 (ACN) is a reminder to all crew to ensure that their annual general declaration of interest forms are completed correctly and in full. The ACN reiterates the content of paragraphs 8.22.1 and 8.22.2 of the FOM. It provides that any flight data centre (FDC) member who wishes to conduct flying outside of the company must obtain prior written permission, that this permission may not be withheld “unnecessarily” and that it is to ensure that such alternative employment does not transgress labour laws, benefit competitor airlines or affect FDP periods. The ACN further expands on paragraph 8.22.2 of the FOM that the quarterly summary of flights

conducted outside of the company must be submitted to the Chief Pilot at the end of March, June, September and December. The summary includes "*any private (non-commercial) hours, DFE testing hours, simulator instruction hours etc – essentially any hours logged in a pilot logbook*".

[6] The company's code of ethics also prohibits employees from performing outside work or what it calls "a second job" without the company's express written permission. Consistent with the declaration of interest form, the code of ethics requires employees to declare their interest fully and in writing to management.

[7] The employee was found guilty of the allegations and dismissed. The chairperson cites grounding by the South African Civil Aviation Authority (CAA) due to non-compliance as a contributing or aggravating factor for imposing the sanction of dismissal. The chairperson continued:

'You failed to declare your afterhours flight activities as required and stipulated in the FOM. You failed to follow the rules of reporting as per the process. What makes it worse is that the company doesn't have a problem with afterhour's flight activities as long as there is no conflict of interest. That also the reason for the completion of the Declaration of Interest form that you also did not complete in full (sic). If the company knew you were training Cem Air staff, the company would have put a stop to it immediately.'

[8] The chairperson proceeded to deal with the issue of trust. He found that the employee did not trust Human Capital and the management team. The chairperson concluded that the trust relationship had broken down, that the employee "advantaged the opposition", put himself in a conflict of interest and failed to declare his flight activities in the declaration of interest form.

<u>The CCMA proceedings and award</u>

[9] Much of the evidence during the arbitration proceedings was on whether the provision of simulator training constituted flying. The commissioner dealt first with what constitutes flying activities. He concluded that simulator training did not constitute flying, that the employee did not conduct any external flight and consequently that he did not accumulate flight time. Based on the above, the commissioner found the employee not guilty of charge 1.

[10] The commissioner dealt with charge 2 as follows:

'It is alleged that the applicant was dishonest. He failed to declare that he has alternative employment. Allan testified that the applicant deliberately failed to fill in section 6 of the general declaration of interest. Dishonesty as defined by The Merriam-Webster's Collegiate Dictionary 3rd Kindle version is *lack of honesty, a disposition to defraud or deceive*. In his testimony the applicant testified that he was not sure as to how to fill in section 6. The onus was on the respondent to prove on a balance of probability that the applicant was dishonest. None of the factors mentioned in the definition were traversed or explored by the respondent in pursuance of proving that the applicant was dishonest in not filling section 6 of the general declaration of interest. The charge does not stick.'

[11] Having found the employee not guilty on both charges, the commissioner proceeded to consider evidence relating to the alleged breakdown of the trust relationship and the appropriate relief. He found that reinstatement with retrospective backpay was appropriate.

[12] Aggrieved by the commissioner's decision, the company launched these proceedings in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the award.

<u>The review test</u>

[13] The test to review an arbitration award is as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*,[2] and has been expanded upon extensively in subsequent judgments[3]. It is well established that in determining whether an award is liable to be reviewed and set aside, this Court is required to determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. This is a stringent test that ensures that awards are not lightly interfered with.[4]

[1] Act 66 of 1995, as amended.

[2] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

[3] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) at paras 16 – 20; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 33; *Makuleni v Standard Bank of SA (Pty) Ltd and others* (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at paras 3 – 4.

[4] *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.

[14] In *Duncanmec (Pty) Ltd v Gaylard NO and others*[5], the Constitutional Court clarified that:

'[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[15] In *Makuleni v Standard Bank of SA (Pty) Ltd and others*,[6] the Labour Appeal Court held that the award may be reviewed and set aside only if the conclusions are untenable.

<u>Evaluation</u>

[16] The company contends that the commissioner failed to properly apply his mind to the evidence and misconceived the nature of the enquiry, that his finding that the employee was not guilty of dishonesty is unreasonable, that he did not bring an independent mind to bear on the matter and that an award of reinstatement and back pay is unreasonable.

[17] It is not in dispute that the Chief Pilot, Allen MacCaulay (MacCaulay), was aware that the employee was conducting simulator training for Simaero. The time the employee spent training these pilots was accounted for and recorded in his personal flight logbook, which was submitted to MacCaulay and the company. The evidence of MacCaulay was as follows:

'But then additionally, we've got a mechanism where pilots are supposed to, particularly if they're doing external work, they're supposed to submit a quarterly summary to the chief pilot so that the chief pilot has an overview of their internal flying as well as their external flying in order to ensure the legalities of the flying.'

[18] It is not in dispute that the employee submitted his logbooks as required by the company recording his commitment to Simaero as a simulator instructor. MacCaulay continued that:

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[5] (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

[6] (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) .

'And also in certain instances, as in the case of Joe Araujo, he has training qualifications and does do training activities outside of the company which, by and large, unless it's a conflict of interests, the company has no issue with. But we do need to have a view of it, so that we can prove to IATA when they come and audit us, as well as the Civil Aviation Authority, that in fact we've got an oversight of what our crew members are doing and the fact that they are then legal.'

[19] The employee contended that the company could have asked him to complete the form fully and that it was the responsibility of human resources to ensure that the form was completed fully. Refilwe Campbell, the company's Human Capital Business Partner, agreed that this could have been done. The employee also contended that he accepted his responsibility for failing to complete the form fully and testified that he had no intention to deceive the company about his activities as a simulator instructor for Simaero.

[20] The employee contended further that his conduct must be viewed in light of the fact that since 2014, he has been submitting his logbooks to the Chief Pilot. As a result, so he submitted, the company was always aware that he was a simulator instructor at Simaero.

[21] The first and second grounds for review relate to the merit of the charges. The critical issue, as Mr Cassim submitted, is the failure to obtain prior written permission from the Chief Pilot before "flying" and the failure to declare his remunerated commitment outside the company. This, so the company contends, shows that the employee is untrustworthy and dishonest and he should not be rewarded for this conduct.

[22] The code of ethics provides that employees may not perform outside work without the company's express written permission. The company then submitted that the employee was moonlighting and referred this court to two judgments – *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation and Arbitration and others*[7] (*Bakenrug Meat*) and *Vilakazi v Commission for Conciliation, Mediation and Arbitration and Others*[8] (*Vilakazi*).

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[7] (2022) 43 ILJ 1272 (LAC); [2022] 4 BLLR 319 (LAC).
[8] [2023] ZALCJHB 319; (2024) 45 ILJ 369 (LC).

[23] The employee did not have prior and express written consent before being engaged to provide simulator training outside the company, as set out in the code of ethics. However, the company was at all material times aware that the employee was engaged by Simaero as a simulator instructor. The logbooks submitted by the employee disclosed this critical information. The employee's curriculum vitae in possession of the company also disclosed that he is a simulator instructor for Simaero. Accordingly, his external work was no secret. The alleged dishonesty in this case is the failure to declare or answer "yes" or "no" under section 6 of the declaration of interest form. The two judgments referred by the company – *Bakenrug Meat* and *Vilakazi*, are distinguishable on the facts. In those cases, the employers did not know of the employee's external activities, which were also found to be in conflict of interest. In *casu*, the information relating to the employee's external work had been within the company's knowledge and record since 2014. It was brought to the company's attention by the employee through his completion of the logbooks. The submission that the employee was moonlighting has no merit and falls to be rejected.

[24] The employee testified that he had no intention to deceive. The onus was on the company to show that the employee's failure to declare under section 6 was intended to withhold information about his external work. This, the company could not possibly have proved because it has been aware of the employee's external work. The commissioner considered the definition of dishonesty and understood that the company bore the onus of proving the charge. He found that the company failed to prove the charge. This decision is reasonable and there is no basis to interfere with it.

[25] The company raised a misconduct review ground that the commissioner was not impartial, that he did not conduct the proceedings fairly and that his conduct gave rise to a perception of bias. The company purports to list various instances in the transcript in which the commissioner misconducted himself. In one primary instance, the employee refused to answer a question because he said that he already answered it. The commissioner expressed the same sentiments that the question was asked and answered. The company then complained that the commissioner was defending the employee from answering the question. The commissioner was of the view that the company's representative was levelling accusations against him that he was defending

the employee. It is clear from the discussions between the commissioner and the company representative that the commissioner was simply indicating that the question was answered and that the issue should be addressed in closing arguments, rather than repeating the same question. This ground has no merit.

[26] The test for a reasonable apprehension of bias is high, as confirmed by the Constitutional Court in *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Limited Seafoods Division Fish Processing*, that:[9]

'… the Court as a starting point presumes that judicial officers are impartial in adjudicating disputes … it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other hand, the presumption is not easily dislodged. It requires a "cogent" or "convincing" evidence to be rebutted.'

[27] In the present case, the company did not raise any complaint against the commissioner's conduct during the proceedings. The commissioner, though not a judicial officer, is presumed to be impartial and the company must adduce cogent and convincing evidence to dislodge the presumption. It has failed to do so. The instances complained of are far from raising any apprehension of bias. The commissioner's robust approach did not exceed or overstep the bounds of a fair procedure in his conduct of the proceedings. This ground is dismissed.

[28] The fourth ground is an attack on the award of reinstatement and back pay. Although the company refers to an extract in the transcript where MacCaulay testified that the trust relationship has broken down, the company only limited its challenge to the amount of back pay awarded due to the delayed start of the proceedings and extended breaks during the proceedings. The company then concluded by submitting that "*the extent of the backpay and reinstatement, given the fact that the relationship of trust has irretrievably severed are grossly unreasonable in the circumstances*". The basis of the alleged breakdown of trust is not pleaded. The challenge on the order of reinstatement, if any, is very weak.

[29] In arriving at a decision to dismiss the employee, the chairperson of the disciplinary hearing relied on factors such as conflict of interest, working for a competitor and grounding due to non-compliance. There was no conflict of interest as Simaero was not

[9] [2000] ZACC 10; 2000 (3) SA 705 (CC).

an airline and therefore not the company's competitor. The company was not grounded because of the employee's engagement with Simaero and therefore this reason was irrelevant.

[30] Regardless, the commissioner considered and dealt with the evidence led by the company and MacCaulay on the trust relationship and remedy and the legal principles on the issue. He found that the evidence led by the company failed to establish that the employee was guilty of the charges. Therefore, any evidence of an alleged breakdown of trust based on the allegations the employee was found not guilty of is, in my view, irrelevant and of no consequence to the enquiry on the appropriate remedy.

[31] In *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*[10], the Constitutional Court reaffirmed the principle that reinstatement is the primary remedy that follows a finding of substantively unfair dismissal.[11]

[32] The employer bears the burden to demonstrate that the primary remedy of retrospective reinstatement should not apply, or should be limited.[12] The company failed to plead with sufficient particularity why the award of full back pay is unreasonable. An allegation that the employee delayed the start of the proceedings and took longer breaks without more, is not sufficient for this court to interfere with the award of retrospective reinstatement. Accordingly, the commissioner's decision to reinstate the employee with full back pay is not unreasonable.

[33] There is no basis to interfere with the award. The conclusions reached by the commissioner have been substantiated with reasons, which demonstrates that he applied his mind to and properly conceived the issues and evidence. This application therefore falls to be dismissed.

[34] In the premises, the following order is made:

<u>Order</u>

1. The application is dismissed.
2. There is no order as to costs.

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[10] [2018] ZACC 44; (2019) 40 ILJ 87 (CC).

[11] Ibid at para 46; see also: *Booi v Amathole District Municipality and Others* [2021] ZACC 36; (2022) 43 ILJ 91 (CC).

[12] See: *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Adv. N.A. Cassim SC with Adv. K Naidoo
Instructed by	:	Cox Yeats Attorneys
For the Third Respondent	:	Adv. A.N. Snider SC
Instructed by	:	Nowitz Attorneys