IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: DA 10/05

In the matter between

Fidelity Cash Management Service **Appellant**

And

Commission For Conciliation, Mediation **1st Respondent**

And Arbitration

Bess Pillemer NO **2nd Respondent**

Anthony Conway **3rd Respondent**

JUDGMENT

Zondo JP

Introduction

[1] This is an appeal from a judgment of the Labour Court in a review application that was brought by the appellant against the respondents for the review and setting aside of an arbitration award that had been issued by the second respondent under the auspices of the Commission for Conciliation, Mediation and Arbitration

("**the CCMA**"), the first respondent in this appeal. The arbitration award was issued in terms of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") in respect of an unfair dismissal dispute between the appellant and the third respondent.

[2] In terms of the arbitration award the second respondent (**"the commissioner**") found that the third respondent's dismissal was substantively unfair and ordered the appellant to reinstate him "**in his employment on 19 August 2002 on terms and conditions no less favourable to him than those which applied on the date of dismissal.**" She also ordered the appellant to pay the third respondent an amount of R 66 013,00 (sixty six thousand and thirteen rand) which she said represented the third respondent's salary for the period from the 4th September 2001 (when he was dismissed) to 19 August 2002 (when he would be reinstated). The Labour Court dismissed the appellant's review application with costs but granted the appellant leave to appeal to this Court against that order.

The facts

[3] The appellant is a registered company. Its business includes ensuring the safe transporting of cash on behalf of clients who enter into contracts with it for this purpose. In August 2001 the appellant had service agreements with Cash Paymaster Services, Pick 'n Pay and NBS in terms of which it was required to ensure

that cash meant for or belonging to these companies which arrived at Virginia Airport, Durban, was transported safely from Virginia Airport to various delivery points.

[4] In order to discharge its obligations to its clients, the appellant had adopted certain procedures. It had a control room from which a controller or controllers would be able to monitor the appellant's vehicles as they went about to ensure service to the appellant's clients. The controller was required to be in constant contact with such vehicles through a radio. There was a manual, referred to as the control room manual, which, in part at least, explained some of the roles of personnel working in the control room. The control room manual also required "**the schedule crew to keep radio contact**" with the Radio Controller throughout the day confirming the schedule services. Two controllers were mentioned in this case. The one was Mr Strydom, the other, Mr Ross.

[5] Cash would be brought to Virginia Airport by an aeroplane. There would be a security guard in the aeroplane. The controller was required to be in contact with the security guard on the aeroplane before the aeroplane could land so as to inform him whether it was safe for the aeroplane to land. If the controller was of the opinion that it was not safe for the aeroplane to land, he would inform the security guard on the aeroplane accordingly and the aeroplane would not land.

[6] Fifteen or ten minutes before an aeroplane carrying cash could land

at Virginia airport, escort vehicles were required to be at the airport. These would be vehicles that would accompany the vehicle that would transport the cash from the airport to where it was required to be delivered. The position held by the third respondent in the appellant company was that of planner. Part of his duties was to prepare duty lists for a number of personnel including those in the control room. At all times relevant to this matter he had also prepared the duty list relating to so-called schedule crews. There was a dispute between him and the appellant whether this was part of his duty. The appellant maintained that it was part of his duty whereas his version was that it was the Branch Security Officer's duty which he carried out because the Branch Security Officer was neglecting. It would seem to be common cause that the planner's work station was the control room. The planner was the most senior person in the control room.

[7] Apart from the planner and the controller, there was also the Branch Security Officer. It would seem that the escort vehicles fell under the control of the Branch Security Officer. The Branch Security Officer was senior to the planner but the planner did not report to him. The planner reported, it would seem, to the Branch Manager.

[8] On the 8th August 2001 the third respondent, as planner, prepared the necessary duty lists to show which personnel were to perform what duties and where on the 10th August 2001. Normally, he

would have prepared such duty lists the 9th August but on this occasion he prepared the duty lists for the 10th August on the 8th August because the 9th August was to be a public holiday. In respect of the Virginia Airport he had assigned Messrs Molapo and Peters to provide the back-up at the airport on the 10th August. Later he changed this by dropping Mr Peters from that team because Mr Peters was required to appear in court that day. Mr Peters' replacement was a Mr Viviers. This meant that Messrs Molapo and Viviers would provide the back up at the airport.

[9] On the 10th August 2001 the third respondent's computer in the control room was not working. Accordingly, he spent quite some time outside the control room and in the office of one Miss Palla where he was typing some of his work which had to be typed. He seems to have arrived at such office at about 09h25. According to Miss Palla, he did not leave her office from that time until about 13h15. According to him, he did leave the office from time to time to go to the control room and to fax some of the schedules that he had typed. In the view I take of this matter, this divergence in the versions of the two does not make any difference.

[10] As to how much time the third respondent spent in Palla's office, there is also no unanimity between him and Palla. In this regard it seems to be common cause that the third respondent spent very little time in the control room. The third respondent was cross-examined extensively about how he spent the morning and

afternoon of the 10th August. With regard to the afternoon his evidence seemed to be unsatisfactory in certain respects but, having regard to the fact that he was not charged with being away from the control room without an acceptable explanation, I do not think that the fact that his evidence in this regard was unsatisfactory has any effect on the matter.

[11] During the course of the day on the 10th August – I think after 14h00 – the controller, Mr Strydom, apparently asked the third respondent as to who were supposed to provide back-up at the airport. The third respondent replied that it was Messrs Peters and Molapo. That Peters was one of the people required to provide back up at the airport was factually incorrect because he had been released to go to court and the third respondent had amended the duty list and had put Viviers in Peter's place. It was common cause that Strydom had an obligation to look at the duty list and satisfy himself as to who were supposed to provide the back-up at the airport and that, if he had done so, he would have discovered that Viviers and Molapo were the ones who were supposed to provide such back-up.

[12] Later in the afternoon on the 10th August an aeroplane carrying in excess of R1 million in cash landed at the Virginia airport without proper procedures having been observed. In particular the backup vehicle and personnel who were supposed to be there fifteen or ten minutes before the aeroplane could land were not there when the aeroplane landed. Strydom was supposed to have informed the

security guard on the aeroplane that the aeroplane should not land before such procedures had been observed but he failed to do so. The aeroplane, upon landing, was attacked by eight robbers who escaped with about R1,2 million in cash.

[13] Subsequently, the appellant launched an investigation into what had gone wrong. The internal investigator employed by the appellant was a Mr Prince. He asked certain of the appellant's personnel to undergo a polygraph test. The third respondent was also asked to undergo the test. In terms of clause 18.3 of the written contract of employment between the appellant and the third respondent the third respondent could not unreasonably refuse to undergo such test when asked by the appellant to undergo one. Mr Prince told the third respondent that he was not obliged to undergo the test. It would seem that the third respondent asked Mr Prince whether he was being accused of anything in connection with the robbery and Mr Prince told him that he was not being accused of anything.

[14] Mr Prince also admitted under cross-examination that he did not give the third respondent any reasons for the request that he undergo the polygraph test. Mr Prince admitted under cross-examination that it was unusual at the appellant's company for a planner to be asked to undergo a polygraph test. In fact Mr Watkins, who was one of the officials of the appellant who testified in the arbitration, also conceded that it was unusual for a planner to be asked to take a polygraph test. It is common cause that the third

respondent refused to undergo the test.

[15] In due course the appellant dismissed the controller for his failure to perform his duty which resulted in the robbery. It offered to demote the Branch Security Officer to a lower position but keep him in its employ. The Branch Security Officer accepted the demotion. According to the Branch Security Officer, the demotion resulted in a R 2000,00 drop in his monthly salary. The appellant also offered to demote the third appellant to a lower position which would also have meant a drop in the third respondent's salary. He was going to become an ordinary security guard. The appellant stated that, if the third respondent did not accept the demotion, it would institute disciplinary proceedings against him. The third respondent rejected the offer of a demotion and chose to face a disciplinary inquiry.

The disciplinary inquiry

[16] In due course the third respondent was called to a disciplinary inquiry. The allegations of misconduct that he was called upon to answer were framed as follows:

"1. **GROSS NEGLIGENCE**

2. DERELICTION OF DUTY: in that on the 10th August 2001 you failed to ensure that there was an escort vehicle at Virginia airport when the aeroplane landed at 15h20.

3. in that on Monday the 13th August you failed to comply with sec 18.3 of the contract of employment signed on the 29th of November 2000 by yourself.

4. FAILING TO COMPLY WITH INSTRUCTIONS: in that you failed (a) to be at the venue of disciplinary enquiry at the right time as stipulated on the LR2 issued to you on the 13th August 2001 (b) and as per verbal instruction to be at the manager's office on (sic) 18h30 on 16 August 2001."

[17] No particulars of the allegation in par 1 were given. The particulars relating to the allegation in 2 speak for themselves. The allegation of misconduct in 3 above related to the third respondent's refusal to undergo a polygraph test. The allegations of misconduct in par 4 are clear.

[18] The chairperson of the disciplinary inquiry was Ms Myers. She found the third respondent guilty of all the four allegations of misconduct and dismissed him. When she testified in the arbitration**,** Ms Myers gave no particulars relating to the first allegation of misconduct, namely, that of gross negligence. There were some warnings that had been issued against the third respondent previously. Ms Myers said that she did not take the warnings into account because the acts of misconduct of which she found the third respondent guilty were dismissable offences in themselves.

Conciliation process

[19] The third respondent was aggrieved by his dismissal. He regarded it as unfair. Not unexpectedly, the appellant regarded it as fair. A dispute arose between the appellant and the third respondent about the fairness or otherwise of the dismissal. The third respondent referred the dispute to the CCMA for conciliation. When the dispute could not be resolved through conciliation, he requested that it be arbitrated.

The arbitration proceedings

[20] When he made his opening statement at the commencement of the arbitration proceedings, the appellant's representative said that the evidence would show that the third respondent's duties included "**the proper monitoring attention, being involved in the activities of that department, ensuring that the department or control room was running in an effective or efficient manner and playing a role of report ensuring that senior personnel were aware in that department and if at any time the department was not running in a correct and efficient way. Our evidence will show that on the 10th of August 2001 and whilst on duty the [third respondent] did not comply with the requirement of his position. In fact the [third respondent] failed to properly monitor, control and play his required report back role in that department and that his failure to do so resulted in amongst other things the irregular functioning of that department which indirectly resulted in a robbery and which had massive impact on the [appellant] and our argument will be that by these actions the [third respondent's] relationship with the [appellant] has irretrievably broken down."** The appellant's representative went on to say that evidence would be led to show that the third respondent had "**two final written warnings two other warnings at the time of his dismissal**". He went on to say: **"(f)inally madam commissioner the [appellant] will show that the [third respondent's] action during this period namely failing to take the polygraph test and his general attitude towards the disciplinary proceedings enhanced the notion that his interest towards the best interest of the company were somewhat lacking**."

[21] From the above opening statement it will be seen that the appellant's representative did not refer to an allegation that the third respondent had failed to arrange for an escort back up or escort vehicle on the 10th August nor did he refer to an allegation that the third respondent gave Strydom an incorrect name of one of the two security personnel who would be responsible for the escort

back-up at Virginia Airport. It is also to be noted that the appellant's representative did not in his opening statement refer to an allegation of gross negligence or to one of dereliction of duty.

[22] After the appellant's representative had made his opening statement, the third respondent's attorney announced in his opening statement that he understood that the charge of gross negligence was a duplication of the second charge, namely, the one relating to the third respondent's failure to ensure that an escort vehicle was where it was supposed to be before the aeroplane landed and that it was one charge. The appellant's representative did not say that this was not correct. If the third respondent's attorney's understanding of the appellant's case against the third respondent was wrong, the appellant's representative would surely have put the record straight. He did not say that the third respondent's attorney's understanding was wrong.

[23] The failure on the part of the appellant's representative to say that the third respondent's understanding was wrong is very significant because, in an arbitration such as the one that happened in this matter, the parties do not exchange, and, in this case, did not exchange, pleadings that would enable each party to know what the other party's case is. In cases in which opening statements are made, they serve to inform both the arbitrator and the other side what one's case is. Accordingly, the failure by the appellant's representative to announce that the third respondent's attorney's understanding of the appellant's case was wrong has, in all

fairness, to be taken to mean that he was happy that the third respondent's attorney's understanding was correct.

[24] It would be completely unfair to allow the appellant to now say that that understanding of its case by the third respondent's attorney was wrong and it should be allowed to deal with the matter on the basis that the charge of gross negligence existed separately on its own and did not relate to the conduct covered by the second charge. Indeed, when one examines the appellant's heads of argument before this Court, one finds that in fact, even the second charge of misconduct was not pursued. I say this because the appellant no longer relies on the third respondent having failed to ensure that the escort vehicles were at the places where they were supposed to be at Virginia Airport before the aeroplane landed. Its heads of argument in this Court make no reference to that charge at all.

[25] The commissioner found the third respondent not guilty of any of the acts of misconduct of which the chairperson of the disciplinary hearing had found him guilty. The effect of that finding was that whatever disciplinary warnings that the third respondent had had at the time of his dismissal were irrelevant and could not be taken into account. In the light of her finding, the commissioner concluded that the dismissal was substantively unfair. As already stated above, she ordered that the appellant reinstate the third respondent.

Proceedings in the Labour Court

[26] The appellant was aggrieved by the arbitration award that was issued by the commissioner. It then brought an application in the Labour Court for the award to be reviewed and set aside. The review application came before Pillay J who dismissed the review application. She found that no proper basis had been shown for the Labour Court to interfere with the arbitration award of the commissioner in this matter. It is against that order of the Labour Court that the appellant now appeals to this Court.

The appeal

[27] The attorney who appeared for the appellant in this Court submitted in par 1.16 of the appellant's heads of argument that **"(t)he misconduct of the third respondent lies in two factors, being his unexplained absence from the control room for most of the day thereby not properly discharge his duties pertaining to the control and monitoring of Strydom in order to ensure that his instructions were properly carried out, and the careless statement by the third respondent as to who was on duty on the Virginia Airport escort initiated the entire problem in the first place. The third respondent also indicated that the airport was 'covered**."

[28] In par 3.4 of the appellant's heads of argument the appellant stated in the second last sentence: "**The misconduct lies in the failure to properly monitor the control room, by not being adequately present in the control room without a proper explanation. This is clearly misconduct which was proven**". In paragraph 1.20 of the appellant's heads of argument it is stated that **"(i)n addition the third respondent was instructed to undergo a polygraph**

test which the third respondent is compelled to do by virtue of his contract of employment (paragraphs 16.8 and 18.3) which the third respondent refused to undergo. The purpose of the polygraph test was a normal part of the robbery investigation, of which the third respondent was informed."

[29] In par 1.23 of the appellant's heads of argument the appellant stated that **"(a) failure or refusal to carry out operating procedures and the rules of the company is a dismissable offence in the appellant.**"

[30] In par 1.24 of the appellant's heads of argument a very important statement is made. There the appellant states:

> "**The third respondent was dismissed pursuant to the disciplinary hearing finalised on 23 August 2001, which disciplinary hearing concerned both the issue of the third respondent's misconduct relating to the control room and his refusal to undergo the polygraph**."

This statement in the appellant's heads of argument is not correct. While it is true that the third respondent's refusal to undergo the polygraph test was one of the acts of alleged misconduct for which he was dismissed pursuant to the disciplinary inquiry, it is not true that he was also dismissed in connection with "**misconduct relating to the control room**". The third respondent was not charged with nor found guilty of any misconduct of not being in the control room when he was supposed to be in the control room

nor was he charged with a failure to supervise or monitor the control room properly. He was charged with four alleged acts of misconduct. The first was gross negligence the particulars of which were never given. The second was that he had failed to ensure that there was an escort vehicle at Virginia Airport when the aeroplane landed at 15h20 on the 10th August. The third was his refusal to undergo the polygraph test. The fourth related to alleged failures on his part to arrive at venues of his disciplinary hearing on time or at all which were not pursued. As already demonstrated above, the matter must be approached on the basis that there was no free-standing charge of gross negligence because that allegation was covered by the conduct falling under the second charge. When the third respondent's attorney said this in the arbitration, he was not contradicted.

[31] From the appellant's heads of argument it will be seen that the appellant's case before us on the strength of which the appellant sought to justify on appeal the third respondent's dismissal relates to alleged acts of misconduct which are not those for which the third respondent was in fact dismissed. In other words on appeal the appellant seeks to justify the third respondent's dismissal on alleged acts of misconduct which did not form part of the allegations of misconduct of which he was found guilty in the disciplinary inquiry and for which he was dismissed.

[32] It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the

> fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.

[33] The appellant seems no longer to continue to justify the dismissal on the basis of the allegations of misconduct of which the third respondent was found guilty and for which he was dismissal. In these circumstances the appellant must be taken to no longer rely on the reasons for dismissal which were given at the time of the dismissal. If it was still relying on them, they would have formed part of its argument on appeal. Those reasons were not part of the appellant's argument on appeal. In the light of the above, the appeal falls to be dismissed on this ground alone, namely, that the reasons for dismissal which the appellant relies upon to justify the dismissal are not the reasons for which the third respondent was dismissed at the time.

[34] Ordinarily this conclusion should mark the end of this judgment. However, in case the appellant is still entitled to rely on the reasons for dismissal for which the third respondent was dismissed, I shall deal with the reasons for dismissal which were advanced at the time of dismissal. As I have already said above, the reasons for which the third respondent was dismissed are the acts of misconduct of which he was found guilty in the disciplinary inquiry and for which the sanction of dismissal was imposed. As the charge of gross negligence effectively fell away in the

arbitration, there is no need to say anything more about it. What is needed is to consider the allegation which was the second charge, the allegation that was the third charge and the allegation that was the fourth charge.

[35] Ms Myers, who chaired the disciplinary inquiry, also testified in the arbitration. Myers also dealt in her evidence with the third charge relating to the third respondent's refusal to undergo the polygraph test. She also dealt with the fourth charge relating to the third respondent's failure to arrive at certain venues for the disciplinary hearing at specific times. She provided absolutely no information with regard to the first charge, namely, gross negligence. It became clear during her evidence that in effect she regarded the second charge as the main charge. That is the allegation that the third respondent had failed to ensure that there was an escort vehicle available as back up at the airport before the aeroplane could land. It was in relation to the second charge that in her evidence she referred to the third respondent's evidence about where he was on the day of the incident. Since Myers was the person who made the decision to dismiss the third respondent, her evidence as to the reasons for the sanction of dismissal are the reasons on the basis of which the fairness of the third respondent's dismissal must be assessed.

[36] It is also important to point out that, when one has regard to in effect the three charges of misconduct for which the third respondent was dismissed, there is no charge among them that

relates to the third respondent not having spent a sufficient amount of time in the control room on the 10th August nor is there a charge relating to him having given Mr Strydom wrong information about the person who was to work with Molapo as back-up for the airport. That did not feature in the disciplinary charges that led to his dismissal. It seems to me that the reason for dismissal that requires serious consideration is the one relating to the alleged failure on the part of the third respondent to ensure that an escort vehicle was at the airport at the relevant time before the aircraft landed. However, before I can deal with that charge, I need to consider the third and fourth charges which, it seems to me, can be disposed off rather quickly.

The allegation relating to the third respondent's refusal to undergo the polygraph test

[37] In dealing with this allegation the terms of clause 18.3 of the third respondent's contract of employment with the appellant must be borne in mind. Clause 18.3 reads thus: "**As part of the company's disciplinary or investigation procedure, the employee may be required to undergo a polygraph test. He shall not unreasonably refuse to undergo such test.**" The provision of clause 18.3 can be mistaken to mean that the third respondent was obliged to undergo a polygraph test whenever the appellant required him to undergo one and that, if he refused, he would be in breach of clause 18.3 and, therefore, guilty of misconduct unless he

advanced a good reason for his refusal. That, is, however, not what clause 18.3 means. Clause 18.3 makes an employee's refusal to undergo a polygraph test an act of misconduct only where the refusal is unreasonable. Therefore, in my view, where the third respondent refused to undergo such a test, his refusal would only constitute misconduct if it was shown to have been unreasonable. Furthermore, with regard to onus, the onus would not be, and was not, on the third respondent to show that his refusal was reasonable but would be or was on the appellant to show that the refusal was unreasonable. If the appellant failed to discharge that onus, the refusal would not have been in breach of clause 18.3 and would not have constituted an act of misconduct on the third respondent's part.

[38] Under cross-examination Mr Prince was asked whether he had explained to the third respondent that the reason that he asked him to undergo the polygraph test was to deal with "**queries that your client may raise."** His answer was: "**No I did not mention that it was to do with clients. I said it was merely part of the investigation and that he is not the only one being subjected**." Mr Prince also said that he told the third respondent that he was not obliged to take the polygraph test. The third respondent's attorney suggested to Mr Prince under cross examination that, if he had explained to the third respondent his reasons for wanting him to take the polygraph test, the third respondent may have received the matter of the test differently. Mr Prince was then asked whether he took the cross-examiner's point and his answer was "**yes**". It was

also put to Mr Prince that to require a planner to undergo a polygraph test was unusual "**in the circumstances**" and he answered: "**That is correct**".

[39] Whether or not the third respondent's refusal in this case was unreasonable must be determined with reference to the time when it occurred. In this case the man who requested the third respondent to undergo the polygraph test testified that he had told the third respondent that he was not obliged to undergo the polygraph test. He also testified that he did not explain to the third respondent why the latter as a planner needed to undergo the polygraph test. Indeed, it was accepted that it was unusual for a planner to be asked to undergo a polygraph test. The investigator testified that he had told the third respondent that the latter was not being accused of anything. The reason that the investigator gave in the witness stand for asking the third respondent to undergo a polygraph test was that the appellant wanted to show the client that it would go to great lengths to prove the innocence of its employees. This does not appear to me to be a legitimate reason for the use of a polygraph test. Those who believe in the usefulness of a polygraph test believe that it is an instrument that can reveal dishonesty. Accordingly, its use for that purpose may be legitimate. But to use it for what I would call public relations purposes does not appear to me to be eminently legitimate. This, together with the fact that the investigator did not explain to the third respondent why he- being a planner- was being asked to undergo a polygraph test, the fact that he told him that he was not obliged to take the test lead me to

conclude that the appellant failed to show that the third respondent's refusal was unreasonable. In the light of this it seems to me that the commissioner's decision that the third respondent was not guilty of this allegation of misconduct is not only justifiable but also correct.

The allegation that the third respondent failed to arrive on time for his disciplinary hearing at the specific venues.

[40] This allegation related to two instances as set out in the notice of the disciplinary inquiry. I propose to deal with the allegation in respect of both instances a basis that is common to both. As I understand the position, the appellant did not pursue this allegation in the arbitration proceedings. In any event there was no merit in it. The third respondent should not have been charged with this allegation. Failure to attend your disciplinary hearing is not, generally speaking, an act of misconduct. It may be argued that it would be one in a case where it can be shown that it is part of the employee's terms and conditions of employment that, if he is charged with misconduct, he is obliged to appear in, or attend, his disciplinary hearing. This is not such a case. The reason why, generally speaking, an employee is not obliged to attend his disciplinary hearing is that a disciplinary hearing is there to comply with the *audi alteram partem* rule before the employer may take a decision that may affect the employee or his rights or interests adversely. An employee can make use of that right if he so chooses but he can also decide not to exercise it. However, if he decides not

to exercise that right after he has been afforded an opportunity to exercise it and a decision is subsequently taken by the employer that affects him in an adverse manner, he cannot be heard to complain that he was not afforded an opportunity to be heard.

[41] The fear that the employer may take an adverse decision against the employee without the employee stating his side of the story is the reason why employees normally attend their disciplinary hearings. All an employer can do, if an employee fails to attend his disciplinary inquiry, is to proceed with the disciplinary inquiry in the employee's absence and make such decision as he considers to be right in the light of all the evidence before him. Obviously, if it is no act of misconduct not to attend your disciplinary hearing, it cannot be one to arrive late thereat. The commissioner held that this allegation had no merit and was not pursued. In these circumstances it seems to me that the commissioner's finding in regard to this allegation is justifiable. Having dealt with the two allegations of misconduct which formed part of the reason for the dismissal of the third respondent, it is now appropriate to deal the allegation of misconduct which Myers regarded as the main charge.

The allegation that of "Dereliction of Duty"

[42] What this allegation relates to has to be gathered from the notice to attend a disciplinary hearing that was served on the third respondent. In that notice the third respondent was informed that the second charge he was facing was one of "**DERELICTION OF DUTY in that on the 10th August 2001 you failed to ensure that there was an escort vehicle at VIRGINIA airport when the aeroplane landed at 15h20**." This charge,

of course, was predicated upon it having been the third respondent's duty "**to ensure that there was an escort vehicle at VIRGINIA airport when the aeroplane landed at 15h20**." Both in the disciplinary inquiry and in the arbitration the third respondent's defence to this allegation was that it was not his duty as a planner to ensure that there was an escort vehicle at the airport when the aeroplane landed. The question is: Was it or was it not his duty?

Was it the third respondent's duty to ensure that there was an escort vehicle at the relevant time at the airport?

[43] In seeking to answer this question, it needs to be borne in mind that there was a written contract of employment between the appellant and the third respondent. Accordingly, an inquiry into what was or was not the third respondent's duty must begin with the contract of employment between the parties because a contract of employment is required to set out, among others, the duties of the employee and those of the employer.

[44] The employment contract between the two parties deals with the third respondent's duties in clauses 16.1 to 16.10. Those provisions do not contain anything that expressly provides that one of the third respondent's duties was to ensure that there was an escort vehicle at the airport before an aeroplane carrying cash could land. Nothing stated in clause 16 was relied upon by the appellant to say that this was one of the third respondent's duties. The provisions that may be wide enough include such a duty may arguably be clauses 16.2 and 16.3. Respectively they read thus-:

> "**EMPLOYEE'S POWERS AND DUTIES**
> **As an employee of the company [the third respondent]**

shall

16.1 …

16.2. efficiently perform all the reasonable duties ` that the company asks him to perform;

16.3. comply with all the company's reasonable written directives, rules and regulations."

[45] With regard to clause 16.2 it would still have to be shown that the appellant had asked the third respondent to perform the duty of ensuring that the airport vehicle was at the airport at the relevant time before it could be said that it was the third respondent's duty to ensure that. In other words clause 16.2 did not by itself impose this duty on the third respondent. It would only impose such duty if the third respondent was asked to carry out such a duty. Furthermore, clause 16.2 can only be a source of a duty that is otherwise not covered by the rest of the clauses of the contract of employment. This has to be so because there would have been no point for the parties to deal in clause 16.2 (in the terms in which clause 16.2 is framed) with a duty that is otherwise covered by another clause of the contract. That would be a superfluity. It is meant to cover situations which are not covered by other clauses of the contract.

[46] Furthermore, in order for a duty to be said to fall within the ambit of clause 16.2 it would have to be a reasonable duty. Whether or not a particular duty given to the third respondent was reasonable would depend upon a number of factors, including, the question

whether there was somebody else whose duty this was as well as whether, given the third respondent's other duties and responsibilities, it can be said that it was reasonable to add to his duties or responsibilities.

[47] It was never put to the third respondent that even if it was, generally speaking, not his duty to ensure that the back-up was at the airport at the relevant time in terms of other clauses of his contract of employment, he had been asked to perform such duty and once he had been so asked, he was, by virtue of clause 16.2, obliged to perform that duty. The appellant's failure to put this to the third respondent has the effect that it would be unfair to use it against the third respondent as he has not had a chance to deal with it. That this was not put to the third respondent is understandable because the appellant's case was that it was the third respondent's normal duty to do so. In these circumstances it seems to me that there is in law no proper basis to justify a conclusion that it was part of the third respondent's duties to ensure that a back-up vehicle was provided at the airport before the aeroplane could land. In these circumstances I am of the view that the commissioner was right in concluding that the third respondent had not been guilty of misconduct in this regard.

[48] Clause 16.3 is clear. If reliance was placed on clause 16.3 in support of such duty, a written directive, rule or regulation containing such a duty would have to be shown. The control room manual could arguably be relied upon as providing written

directives, rules and regulations as contemplated by clause 16.3 of the contract of employment which entail such a duty but, as I say elsewhere in this judgment, it does not.

[49] Clause' 32.2 and 32.3 read thus:

> "32.2 **In addition to all the above terms and conditions, the terms and conditions set out in The (sic) more detailed Personnel Policies and Procedures manual, as they are amended, Apply (sic) (copy is available on request).**
>
> **32.3This contract of employment shall constitute the entire contract between the company and the employee. No other employment contract or promises apply (sic)"**

In a way clause 32.3 appears to be in conflict with clauses 16.3 and 32.2. No evidence was led to the effect that the control room manual falls within the ambit of "**Personnel Policies and Procedures Manual"** contemplated in clause 32.2. Accordingly, this matter must be decided on the basis that the control room manual does not fall within the ambit of "**Personnel Policies and Procedures Manual."** If one approaches the matter on that basis, there is no doubt that it cannot be said that it was the third respondent's duty to ensure that there was an escort vehicle at the airport at the relevant time. However, even if it could be said that the control room manual can be said to fall within the Policies and

Procedures Manual as contemplated in clauses 32.3, I think the result would be the same.

[50] The control room manual as presented in the arbitration proceedings consisted of four pages. In the arbitration those pages were marked as A21, A22, A23 and A24. In the record in this Court those page numbers could be seen but the pages on which those numbers appeared were pages 130, 131, 132 and 133 of the appeal record. The third respondent signed the control room manual. However, it is impossible to say whether he signed to acknowledge receipt thereof or whether he signed to agree with its contents. At the beginning of the first page (A21 or 130) on the left hand side appear the words: "**Control Room Manual**" and on the right hand side appears the word: "**Action**". These words appear as if to indicate columns. Under the words: "**Control Room Manual** follows a narration under different topics or headings. Under the word "**action**" or in what appears to be an "**action**" column appear positions such as "**planner/controller**" or "**Radio Controller**" or "**Branch Security Officer**" or **Branch Manager**." In the column under the words "**Control Room Manual**" the duties or roles of the incumbents to the positions given under the "**action column**" are spelt out.

[51] Part of the introduction in the Control Room Manual reads as follows:

> "**This Control Room Manual is issued to all Control Rooms in branch offices and the contents must be**

> **adhered to, to ensure the effective monitoring regarding the delivery of services to clients**."

From the top left side of page A22 or A131 to the top of the next page, namely, A23 or 132 of the Control Room Manual the duties or roles are set out which seem to relate to the "**Planner/Controller**." The first sentence under "**Planner/Controller**" reads:

> "**The Planner/Controller has the overall responsibility for the effective functioning of the Control Room and for ensuring that other staff comply with the contents of this manual**."

The next sentence is very important. It reads: "**Specific responsibilities are clearly identified in the authorised job description.**" The reason why I say that this sentence is very important is because, quite clearly, the manual says in effect that, if the reader wants to see the specific responsibilities of the Planner and those of the Controller, he must go to the "**authorised job description**". In this matter the appellant failed to produce any job description that may have been given to the third respondent. The third respondent testified that he was never given any job description. No witness called by the appellant testified that he or she had personal knowledge that the third respondent had been given a job description. Indeed, the third respondent even said that he was not given any induction in the job of a planner when he took up that position.

[52] Underneath the sentence referred to above relating to the authorised job description, a list of what is referred to as daily activities is given and on the right hand column appear the words "**Planner/Controller**." The suggestion is that those are the "**daily activities**" of the "**Planner/Controller**" which are "**in addition**" to the "**overall responsibility**" for the Control Room given to the "**Planner/Controller**" and the "**specific responsibilities**" for each one of the Planner and the Controller as will be found in the authorised job description. I do not propose to set out those daily activities. However, I have studied them and there is nothing therein that says that the duty under consideration is that of the third respondent.

[53] After the daily activities of the "**Planner/Controller**", the roles and duties of the Radio Controller, the Branch Security Officer, Planner/Controller in respect of emergencies, those of the Branch Manager are set out. Under "**Emergencies**" and parallel to "**Planner/Controller**" at A23 or 132 of the manual the following appears in regard to operational staff shortages: "**When staff shortages are identified during the morning deployment the Planner must deploy alternative staff to daily schedules as recorded on the duty roster**".

[54] It needs to be noted that at page A22 or 131 of the Control Room Manual the daily activities assigned to the "**Planner/Controller"** include, in the first bullet point, that: **"starting times and escort duty lists to be maintained";** it goes further to say that the **"(s)tarting**

times list is posted in the notice board to ensure that staff members are aware of their start time for the following day. Contents of duty and escort duty lists are only discussed on the morning to which they apply." Nothing in this bullet point is to the effect that one of the planner's duties or activities is what he was alleged to have failed to do under the second charge in the disciplinary inquiry.

[55] In the second bullet point at page A22 or 131 the manual provides that the "**Planner/Controller's"** daily activities include to **"(p)ersonally supervise the deployment of staff in the morning to ensure that the requirements of daily schedules are met**." This seems to relate to directing staff to go and work in certain areas and not the duty that is under consideration.

[56] The third bullet point is important because at least two witnesses called by the appellant in the arbitration, namely, Mr Porter and Ms Myers, relied on it as conferring upon the third respondent the duty under consideration. It provides: "**It is important for the 'Planner/Controller' to be available to resolve problems that occur during the day to ensure that services to clients are not disrupted**". It is quite clear from this provision that it does not relate to the duty under consideration. Indeed, those witnesses who sought to rely on it in support of the contention that the duty under consideration was one of the third respondent's duties were unable satisfactorily to answer further questions under cross-examination on the point. The difficulty that those witnesses had in this regard was that it was common cause that the third respondent was within the building at all relevant times on the day of the robbery and that all concerned, including the controller, knew this and he could

have been contacted telephonically if anyone was looking for him or if there was a problem and nobody contacted him on the day in question. The other daily activities assigned to the "**Planner/Controller**" at A22 or 131 of the manual can simply not conceivably be relied upon as providing a basis for the duty under consideration.

[57] Part of page A23 or 132 of the manual deals with, or, relates to, the Radio Controller and not "**Planner/Controller**". The first two paragraphs therein read thus:

> "**The Radio Controller is responsible as per authorised Job Description and must, discuss any difficulties with duties with the Planner**.
>
> **Communication to or from vehicles and/or clients, which may have an impact on services, must be recorded in the Occurrence Book**."

It is significant to note that the quoted passage effectively refers one to the "**authorised job description**" if one wants to establish the responsibilities of the radio controller. This is in line with the fact that at page A22 or 131 the manual provides that the "**specific responsibilities**" of the "**Planner/Controller**" are clearly identified in an authorised job description. Accordingly, it seems that the production of the authorised job description applicable to the third respondent was important if the Court was to establish the duties or responsibilities of a planner, and, therefore, of the third respondent. I have already said that the appellant did not produce the authorised job description that should have been given to the third respondent.

[58] Under the topic "**Log Sheet**" and against the words "**Radio Controller**" at page A24 or 133 of the record the manual has among others the following paragraphs:

> "Before departure of the vehicle in the mornings the log sheet must be initiated by the Radio Controller including departing kilometres, personnel on b**oard and testing of radio signals.**
>
> **Emergencies of whatever nature must be radioed to the Radio Controller by the schedule crew and this will be recorded on the log sheet and an entry in the Occurrence Book.**
>
> **It is the responsibility of the schedule crew to keep radio contact through-out the day with the Radio Controller confirming the schedule services.**

Should the Radio Controller suspect any irregularities with a vehicle the previous client contact will be telephoned and also the next contact client to try to determine the physical location of the vehicle. If this cannot be determined the Branch Manager is informed and an Occurrence Book entry is made. The Branch Manager then informs the TSO who will then despatch Branch Security to investigate the incident. Branch Security must keep the Radio Controller informed on the progress of the investigation.

> **If the situation cannot be resolved by Branch Security the SAPS will be contacted if deemed necessary"** (underlining supplied).

[59] None of the provisions of the Control Room Manual referred to above provide a basis for the contention that the duty under

consideration was one of the duties of the third respondent. It seems to me that instead there are certain provisions of the manual which suggest that the duty under consideration may have been one of the duties of someone else such as the Radio Controller or the Branch Security Officer. The provision – quoted above - that the Radio Controller must "**initiate**" – whatever that means – the log sheet "**before the departure of the vehicle[s] in the mornings**" "**including departing kilometres, personnel and testing of radio signals**" seems to suggest that the Radio Controller must go to the vehicles before they depart and see to it that the personnel are there and that the vehicles are in good condition for the day. If the radio controller has to do that it can be expected that he should perform the duty under consideration instead of such duty being someone else's.

[60] There is also the provision that the schedule crew have the responsibility to "**keep radio contact throughout the day with the Radio Controller confirming the schedule services**." What this reveals is that, before the vehicles depart, the Radio Controller must view them as well as the personnel and, once they have departed, the schedule crew is required to keep radio contact with – not the planner – but the Radio Controller throughout the day and they must confirm the schedule services with him – not the planner.

[61] There is also the provision that, if the Radio Controller suspects any irregularities with a vehicle – which seems to me to include a

case where a vehicle is not where it is supposed to be at any given time– the Radio Controller is required to telephone the previous client's contact as well as the next client contact "**to try and determine the physical location of the vehicle**". The manual goes on to say that, if the physical location of a vehicle cannot be determined, the Branch Manager must be informed. Obviously, it is the Radio Controller who has to inform the Branch Manager. It does not say that he must inform the planner. If it was the planner's duty to ensure that the vehicles are where they are supposed to be, one would have expected the manual to provide for a role for him when a particular vehicle cannot be located. It does not.

[62] The Control Room Manual was the only document the contents of which could conceivably be said to include further terms and conditions of employment of the third respondent in addition to those terms and conditions, including duties, contained in his written contract of employment. In this regard it needs to be borne in mind that clause 32.3 of the contract of employment provides that **"(t)his contract of employment shall constitute the <u>entire</u> contract between the [appellant] and the [third respondent]. No other employment contract or promises apply**." In the light of this it seems to me that, subject to one qualification, what the third respondent's duties were must be found within the four corners of the third respondent's written contract of employment. The qualification I refer to is that, if a duty is not provided for in the written contract but is to be found in another source to which the contract does refer, then such duty will be the third respondent's

duty because such source can be treated as incorporated by reference into the contract of employment.

[63] Much oral evidence was led on behalf of the appellant in the arbitration proceedings in an attempt to show what the third respondent did, what he did not do and what his duties which, he had allegedly failed to fulfil on the day of the robbery. In so far as such evidence related to conduct which did not form part of the allegations of misconduct for which the third respondent was dismissed, such evidence cannot help the appellant's case in the determination of the fairness or otherwise of the dismissal. The evidence had to relate to the reasons for dismissal. The oral evidence that should have been led is evidence that could show that the third respondent was guilty of the allegations of misconduct for which he was dismissed. However, I am of the opinion that oral evidence to prove that the duty under consideration was one of the third respondent's duties was inadmissible on the basis that it offended the parole evidence rule as the contract of employment between the appellant and the third respondent – which set out the parties' contractual duties – was in writing. Indeed, it specifically provided that it was the entire contract between the parties.

[64] I have had occasion to deal with this rule in a judgment of this Court in **Denel (Pty)Ltd v Gerber (2005)26 ILJ 1256 (LAC)** at 1261I – 1266 C (paras 9 – 23 of the judgment). At 1262 (par 10) of the Denel judgment I quoted what Innes CJ said in **Beaton v Baldwin Bros 1920 AD 312 at 315**. There the learned Chief

Justice said:

> **"The general rule is clear: a party to a written agreement cannot vary its terms by parol evidence. But a party to such a writing, which it is sought to be used against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was given for another purpose. And when he has thus got rid of the writing, he may, if he can, establish another verbal contract as the true agreement."**

[65] At 1262J of the Denel judgment reference is made to the fact that in **Traub v Barclays National Bank Ltd 183(3) SA 619(A)** at 630 H the Appellate Division referred, with approval I may add, to what was said in Williston on Contracts (3ed) Vol 4 par 647. There the author said in part that **"(w)here the issue in dispute, even between third parties, is what are the obligations of A and B to one another, and those obligations are stated in a written contract, the parol evidence rule is applicable**." This is applicable to this case because the issue before the commissioner in relation to the second charge in the disciplinary inquiry was whether it was the third respondent's duty – which he owed to the appellant – to ensure that the escort vehicle was in the area where it was supposed to be at the airport before the aeroplane could land. As there was a written contract of employment between the appellant and the third respondent, the parol evidence rule applied

and oral evidence in regard to such duty was inadmissible. In this regard it needs to be pointed out that not only is this a case in which the contract of employment between the parties is in writing but also it is a case where the contract goes further and states in clause 32.3 that **"(t)his contract of employment shall constitute the entire contract between the company and the employee. No other employment contract or promises apply (sic)**".

[66] Assuming that the parol evidence rule did not apply, I proceed to consider what the different witnesses said about the duty under consideration in their evidence in the arbitration.

[67] Mr Porter who had previously worked as a planner at the time that the third respondent worked as a controller, was asked whether, when he was planner, it was his responsibility "**to arrange and monitor both these schedules for both escorts and cash in transit vehicles.**" His answer was: "**No, not the escorts**." He explained that this was not the position during his time as planner but things had changed just before he was promoted to the position of Branch Security Officer or BSO or as he was leaving the position of a planner and it became the job of a planner. Mr Porter was asked how Mr Conway would have known that "**part of his duties was to co-ordinate and produce the schedules for both cash in transit vehicles and escort vehicles**." His answer was that escort vehicles were included on the daily duty sheet whereas in the past they didn't use to be. He also said that it was also in the control room manual. He was asked where in the control room

manual this was. He answered: "**Before the paragraph after the heading controller/planner. It says daily duty. This is above daily activities are described below. Daily duty, starting times and escort duty lists to be maintained etc. The contents of the duty and escort duty lists are only discussed on the morning to which they apply. In other words nobody knows where they are going until the morning**." He confirmed that the third respondent signed the control room manual. The parts of the control room manual that he relied upon do not support the assertion that the duty under consideration was one of the third respondent's duties.

[68] Mr Porter was asked whether he had ever informed the third respondent that this was part of his duty. He answered that the third respondent was made aware either by himself or by the Operations Manager "**because he did it, the duty lists show**". Mr Porter said that from the day that the third respondent took over as planner to the day of the incident no one other than the third respondent ever prepared and set out the escort schedules. On the day of the incident it was the third respondent who had prepared and set out the escort schedules.

[69] Mr Porter was asked to explain the duties of a BSO. He said that as BSO he was "**responsible for both internal and external security of the company. Internal being the security of the actual branch itself, external, overall responsibility for the escorts, the security systems in the vans, attending robberies and any other**

security related matters." He said that he would oversee the control room. He said that, if there was anything that disrupted "**the normal escort duties, preventing them from doing what they are doing I would rely on either the controller or the planner to get hold of me.**" Mr Porter said that it was the responsibility of the planner "**to make sure all those schedules go out on time to ensure that services are correctly maintained which is the bread and butter of our industry, if that falls down, you will have dissatisfied customers, you lose clients.**"

[70] At some stage during the arbitration proceedings the appellant seemed to take the attitude that by giving Strydom a wrong name in the terms of one of the personnel who were supposed to provide back-up at the airport, the third respondent had contributed to the robbery that took place on the 10th August. I shall deal with this shortly. There was a suggestion that this incorrect information that the third respondent gave to Strydom caused confusion to Strydom. However, the fact of the matter is that Strydom was not called as a witness and any evidence to the effect that such information caused him any confusion was hearsay and inadmissible. Indeed, one of the names that the third respondent gave to Strydom was correct. There was no evidence that Strydom had asked Molapo to provide the backup at the airport and Molapo had refused. The third respondent testified that he had made an error in giving Peter's name in stead of Viviers'. The appellant sought to make a mountain out of a molehill in this regard. In my view this was a

genuine error or oversight on the third respondent's part. This error or oversight is understandable because the names that the third respondent gave to Strydom were the names of the personnel whom he had assigned to provide the back-up duty at the airport before the duty list was amended. He should have given the names of the personnel who were assigned to that task after the amendment of the duty list.

[71] Mr Porter's examination-in-chief seems to have been directed at showing that what the third respondent had done wrong was that (a) "**he [had] failed to make sure that the escorts were doing what they were supposed to be doing**" and (b) "**that he [had] failed to inform the controllers of the change in personnel that day**" and thereby caused confusion. Mr Porter's evidence that the third respondent's answer to the question about who the back-up crew for the airport was, caused confusion must be rejected because on his own version he was not in the control room when this occurred. Accordingly, it is hearsay evidence that is inadmissible.

[72] The third respondent was also cross-examined extensively with regard to what his role in the control room was. In particular the appellant's representative in the arbitration sought to show that it was the third respondent's duty to monitor and supervise the controller and other personnel in the control room. The third respondent denied that it was his duty to monitor the controller. Once again, I do not think that this aspect of the matter is of any

significance because the third respondent was not charged with a failure to monitor or supervise the controller and other personnel in the control room. That is not what he was dismissed for.

[73] Mr Porter admitted under cross-examination that, if there was going to be a problem with escorts, the first people who would know would be the controllers. Mr Porter said that the controller would have had to know where the escorts were and what they were meant to do. He further confirmed that, if there was a problem with the escorts, the controller would have had to inform either him or the third respondent. Mr Porter also conceded under cross-examination that it would have been a very easy task for the controller to make sure that there was a vehicle at the airport – simply by maintaining contact. He also conceded that it would have been a very simple thing for the controller to have ascertained, if there was a problem that he did not have back-up at the airport. He conceded that the controller had about 30 to 45 minutes to make sure that there was back-up at the airport. Mr Porter also said that the personnel in the van that was sent to the airport should have been informed not to proceed to the airport until the back-up had been sorted out and that that is the controller's "**initial duty**".

[74] Mr Porter's attention was drawn to the minutes of a certain meeting of the "**CPS**". Item 5 thereof read "**BSO to monitor as the delivery and collection point has been changed. TSO to scout the area fifteen minutes before the vehicle arrives.**" These

minutes related to a meeting that had taken place on the 20th February 2001. This part of the minutes was to the effect that at that meeting it was said that the duty under consideration was the BSO's duty and not the third respondent's duty. He was asked to reconcile this with his evidence that the duty under consideration was the third respondent's duty and he said that this statement related only to lunch-time. It was put to him that the minutes did not anywhere say that this related to lunch-time. It was put to him that this was a responsibility that was applicable at all times and not just during lunch time. He disputed this and maintained that it only related to lunch-time. The third respondent's attorney put it to Mr Prince under cross-examination that what this part of the minutes means is that at that meeting it was stated that the Branch Security Officer was to monitor the collection point at the Virginia Airport. Mr Prince admitted that this is what the minutes of that meeting said. When soon thereafter the third respondent's attorney asked Mr Prince to agree that it was the BSO's responsibility to ensure that "**there is back-up available for the collection**", Mr Prince replied: "**I don't know about back-up but to monitor yes**."

[75] The cross-examination of Mr Porter seems to have led to him accepting that the third respondent did not have to check whether the escorts or back-up vehicles were where they were supposed to be as this was the controller's responsibility but he in effect said, if a planner was a conscientious person, he would remind the controller to make sure that the back-up vehicles were in place.

[76] Mr Porter said that the third respondent was very much the supervisor of controllers. He was asked where that was stated. He then read from page 22 of the control room manual which in the sixth paragraph on that page provides that it is important for the "**planner/controller**" to be available to resolve problems that occur during the day and ensure that services to clients are not disrupted. It was then put to Mr Porter that nobody had ever suggested that the third respondent had not been available to deal with problems if they were brought to his attention because he was in the building. Mr Porter then said that he was "**just pointing out**."

[77] Mr Porter testified that **"(c)ontrollers are based on a radio set where they keep <u>continual contact with vehicles out on the road and the escort vehicles as well</u>. It is their duty to monitor a schedule. A schedule is where a vehicle would serve a particular area. Any problems that might occur and they are not sure of something then they would refer that matter to the planner …".** He clarified that by "**they**" he was referring to the controllers. He explained that escort vehicles are all the bakkies or cars which follow certain schedules. He also said a schedule would be an armoured vehicle that would collect cash or drop it. He said that one would then have a second vehicle that would escort the other one. He said that both vehicles would be controlled in the control room by means of a schedule so one would know where they are at any one time. Mr Porter went on to say "**with escorts**

you are contractually bound to do certain escorts and that was to cover any vehicle that was carrying Cash Paymaster Services money. In between that the controller or the planner could do those escort vehicles as they deemed fit. That is basically the function of a controller".

[78] On Mr Porter's evidence I am of the view that the appellant failed to discharge the onus to prove that it was the third respondent's duty to see to it that the back-up vehicles were where they were supposed to be before the aircraft could land on the 10th August 2001.

[79] Under cross-examination Mr Prince conceded that all personnel had been properly allocated to perform their functions on the day in question. It was put to Mr Prince that "**(t)he planner is in fact responsible for the planning of who is to do what then …. in terms of the list that he produces …"**. He was then asked whether this was correct and he answered: "**That is correct**". Mr Prince was then asked to read portions of some document that set out the relevant procedure that had to be followed or observed before an aircraft could land. Mr Prince read a part of the document that *inter alia* provided that there would be one TSU, two men armed with R5's waiting ten minutes before the plane landed. He was then asked to explain what this meant. His answer was: "**There should be two members as booked on the duty roster standing down ten minutes before the [aircraft lands]"**. He was

then asked whether that refers to the back up and he answered. "**That is correct**". It was then suggested to him that "**the controller was required to communicate with the guard on the plane but only does that when ensuring that the back-up vehicle is in position etc**." He was then asked whether that was correct. His answer was: "**No I can't honestly say if that is correct, no**." He was then asked whether he could not dispute that. He answered: "**No because controller can at any stage check with the aircraft because he has got to monitor the green vehicle, is it at the airport on time or not and then he had to check with the airplane where they are to make arrangements to make sure they come almost simultaneously to the airport**".

[80] At this stage it was put to Mr Prince that the third respondent would say that "**the controller has to make sure that the back up vehicle is placed because he has to communicate with the guard on the plane to tell the guard whether it is in fact safe to land the plane**. Mr Prince's answer to this was: "**That is correct**". It was then suggested to Mr Prince that "**that demands that the controller himself must know that the back-up vehicle is in place**." Mr Prince answered: "**That is correct**"

[81] I do not propose to deal with any further evidence led in the arbitration. However, I have considered it and am satisfied that it does not prove that the duty under consideration was the third respondent's duty. I am of the opinion that the evidence to which I

have referred above is sufficient for the conclusion to be reached not only that the commissioner's finding that this was not part of the third respondent's duty was reasonable, rational or justifiable but that it was also correct.

Dealing with the Commissioner's reasons

[82] The commissioner set out a summary of the evidence that was led before her from page 2 of her arbitration award to the top paragraph of page 23. Thereafter - from just above the middle of page 23 upto just over the middle of page 28 of the award she set out the arguments that were presented to her by the parties' representatives. From the last paragraph at page 28 of the award, she provided her analysis of the evidence and argument presented to her.

[83] In considering whether the commissioner's award falls to be reviewed and set aside, one needs to consider what finding she made with regard to the reasons for the third respondent's dismissal. The reasons for the third respondent's dismissal are the acts of alleged misconduct of which the third respondent was found guilty pursuant to the disciplinary inquiry. With regard to the fourth charge, the commissioner said in her award that it had "**no merit and was not pursued.**" In the review application the appellant has not challenged this finding by the commissioner. Accordingly, the commissioner's finding must stand.

[84] With regard to the third charge – that is the refusal to undergo a polygraph test – the commissioner found that the third respondent was "**entitled to refuse to undergo the polygraph test in terms of clause 18.3 of his contract of employment**." To justify this

finding the commissioner went on to say:

> **"The contract says that [third respondent] shall not unreasonably refuse to undergo such a test. A polygraph test is certainly an invasion of privacy and Prince conceded he did not give [third respondent] a reason to take the test. In addition it was not customary for a planner or staff who were not part of the robbery to take the polygraph test. The [appellant] did not allege that [third respondent] was involved in the robbery and in my assessment his refusal to undergo the test was not unreasonable."**

[85] The commissioner said above that a polygraph test is an invasion of privacy. On the facts of this case I would not be able to uphold that statement to support the conclusion that the refusal was not unreasonable. It seems to me more appropriate to look at the scope of application of the employee's obligation to undergo such test as provided for in his contract of employment. In this case the appellant has throughout approached this issue as if the third respondent's contract of employment obliged him as a general rule to undergo a polygraph test whenever he was asked to undergo one. The latest where this can be seen is in the appellant's heads of argument in this Court. As I say elsewhere herein, that is a misreading of the contract of employment between the parties. What the third respondent's contract of employment does is to place on the third respondent the obligation to undergo a polygraph test only where it would be unreasonable of him to refuse to

undergo the test. In my view, the onus is upon the appellant to show in a particular case that it was unreasonable of the appellant to refuse. Where the appellant fails to discharge that onus, the refusal does not constitute an act of misconduct.

[86] Other reasons which the commissioner gave for concluding that the third respondent's refusal to undergo the polygraph test was not unreasonable were that Mr Prince, who was doing the investigation and who was the one who had asked the third respondent to undergo the test, had stated that he had not given the third respondent any reason why he had to undergo the test and that it was unusual for a planner to be asked to undergo a polygraph test. When one considers that it was unusual for a planner to be asked to undergo a polygraph test and the fact that Mr Prince did not give the third respondent any reason why, on this occasion, he, as a planner, was being asked to undergo the test, it seems to me that the commissioner's conclusion that the refusal was not unreasonable is quite perfectly justifiable and reasonable. No basis exists to interfere with it. There is another reason upon which the commissioner did not rely to justify her conclusion that the third respondent's refusal was not unreasonable. That is that Mr Prince's evidence was that he had told the third respondent at the time that he was not obliged to undergo the test. All in all there is no basis to interfere with the commissioner's finding with regard to the reason for dismissal based on the refusal to undergo the polygraph test.

[87] With regard to the second allegation of misconduct, the

commissioner was alive to the fact that what the third respondent had been charged with in this regard was that he had failed to ensure that there was an escort vehicle at the airport before the aeroplane could land. In support hereof reference can be made to the fact that at page 30 of her award she said: "**It was clear that the Planner was the senior person in the Control Room and had numerous responsibilities relating to the function of the Control Room, but it was equally clear that it was not his function to monitor vehicle crews. This was clearly the responsibility of the Controller who would only turn to the [third respondent] as Planner or Porter as BSO when there were problems. It is common cause that the controller, Strydom, did not ask for assistance or inform either Porter or [third respondent] that he had a problem. Watkins says that the Planner has overall responsibility for the Control Room and attends to problems while the Controller is bound to the radio, monitoring the vehicles**." At the bottom of page 30 of her award, the commissioner stated in effect that whatever the role of the planner was in the Control Room, it "**did not detract from the controller's responsibility to see that the escort vehicle was in position.**" At page 31 of the award she said, among other things, that **"(t)he fault lay directly with the Controller who it appears failed to monitor the movement of the escort vehicles, the armed vehicle or the aeroplane on that day**."

[88] With regard to the third respondent's duties, the commissioner also

stated at page 30 of her award that she was "**unable to accept [appellant's] argument that the [third respondent's] work description can be found in memoranda (one issued sometime before [third respondent] became Planner, disciplinary procedures and the very general Control Room Manual which in any event is directed to both Planner and Controller.**"

[89] The case before the commissioner was one where she was called upon to decide, in relation to the second charge in the disciplinary inquiry, whether it was the third respondent's duty to ensure that the escort vehicle was positioned at the right place at the airport before the aeroplane could land. It was common cause that the third respondent had not done so. It was also common cause that the reason he advanced for not having done so was that it was not his duty to do so. Accordingly, the issue before the commissioner was whether it was the third respondent's duty to do so. In its founding affidavit filed in support of the review application, the appellant criticised the commissioner for taking into account the fact that the appellant had failed to produce the third respondent's job description. The appellant said that the job description was irrelevant and that whether this was one of the third respondent's duties was not one of the issues. The appellant went on to criticise the commissioner for allegedly having paid too much attention to the absence of the job description which - the appellant contended - was irrelevant.

[90] In my view the appellant's criticism of the commissioner for

having taken into account the fact that the appellant had failed to produce the third respondent's job description is wrong, unjustified and misplaced. Indeed, its contention that the duties of the third respondent were not in issue was incorrect. One of the reasons for the third respondent's dismissal was the finding by the chairperson of the disciplinary inquiry that the third respondent had failed to ensure that an escort vehicle was positioned in the right place at the airport on the 10th August 2001 before the aeroplane landed. That called for an inquiry into whether it was the third respondent's duty to do this. To determine what an employee's duties are in a particular case requires one to have regard to the terms and conditions of the contract of employment between such employee and his employer. Any duty that falls outside the terms and conditions of his contract of employment would not be such employee's duty. For that reason the commissioner was right to have wanted to see the authorised job description.

Some observations about the Sidumo judgment of the Constitutional Court

[91] At the time that this appeal was argued in this Court the decision of the Supreme Court of Appeal in **Rustenburg Platinum Mines Ltd v CCMA & others (2006) 27 ILJ 2076 (SCA)** had been handed down but that of this Court in **Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC)** had not been handed down nor had the decision of the Constitutional Court in **Sidumo and Another v Rustenburg Platinum Mines Ltd and others**, as yet unreported, case no CCT 85/06. This Court's decision in Engen was handed down on the 4th May 2007. The Sidumo case was an appeal to the Constitutional Court against the decision of the Supreme Court of Appeal in the Rustenburg Platinum Mines case to which reference has just been made. The Sidumo decision

of the Constitutional Court was handed down on the 5th October 2007.

[92] It is not necessary to refer to the background to the issues dealt with in the Sidumo case because that background can be found in the Sidumo judgment as well as in the Engen and the Rustenburg judgments. It is sufficient for present purposes to make a few observations about the Sidumo judgment of the Constitutional Court. The first is that, in line with the views of this Court as expressed in **Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC)** and **Chemical Workers Industrial Union & others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC)**, the Constitutional Court decided in Sidumo that, when a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in a particular case he or she must not apply the reasonable employer test, must not in any way defer to the employer and must decide that issue on the basis of his or her own sense of fairness. The second is that, when a commissioner of the CCMA conducts an arbitration in terms of the compulsory provisions of the Act, he or she is conducting an administrative action. The third is that the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") does not apply to such administrative action. The fourth is that justifiability of administrative action in relation to the reasons given for it as propounded in **Carephone (Pty)Ltd v Marcus NO and others 1999 (3) SA 304 (LAC)** as a ground of review of CCMA arbitration awards under sec 145 of the Act does not apply any more. The fifth is that the grounds of review set out in sec 145 of the Act are suffused by the criterion of

reasonableness as dealt with in **Bato Spar Fishing (Pty)Ltd v Minster of Environmental Affairs and Tourism & others 2004 (7) BCLR 687 (CC)** and the constitutional requirement that CCMA arbitration awards must meet is that they must be lawful, reasonable and procedurally fair. To this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside. I deal with this issue of unreasonableness of a CCMA arbitration award as a ground of review later in this judgment.

The approach of a CCMA commissioner when deciding whether dismissal as a sanction in a particular case is fair or unfair.

[93] I have already said above that, in line with the decision of this Court in Engen and Algorax, the Constitutional Court decided in Sidumo that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case. Indeed, both in Engen and in Sidumo this Court and the Constitutional Court, respectively, said that the commissioner must decide that issue in accordance with his or her own sense of fairness. (see Engen at par 117 at 1559 A, - par 119 at 1559 H-I; par 126 at 1562 C-D, par 147; Sidumo's case at paras 75 and 76.) In par 75 in the Sidumo case the Constitutional Court, inter alia, said: "**Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view**." At par 76 the Constitutional Court quoted a passage from Engen which *inter alia* contained a statement to the effect that unions "**can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or**

unfair, decide whether the dismissal is fair or unfair."

[94] In terms of the Sidumo judgment, the commissioner must:

(a) "**take into account the totality of circumstances"** (par 78);

(b) "consider the importance of the rule that had been breached" (par 78);

(c) "**consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal"** (par 78);

(d) consider **"the harm caused by the employee's conduct"** (par 78);

(e) consider **"whether additional training and instruction may result in the employee not repeating the misconduct**"

(f) consider **"the effect of dismissal on the employee**" (par 78);

(g) consider the employee's service record.

The Constitutional Court emphasised that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute including the Act. In this regard sec 188 and 192(2) of the Act will usually be of relevance. Sec 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Sec 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Sec 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.

[95] Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a

fair sanction in such a case. In answering that question he or she would have to use this or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable.

Sidumo's test of unreasonableness as a ground of review for CCMA arbitration awards.

[96] The Constitutional Court has decided in Sidumo that the grounds of review set out in sec 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The Court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.

[97] The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner "**is one that a reasonable decision maker could not reach"**. (par 110 of the Sidumo case). If it is an award or decision that a reasonable decision-maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a

reasonable decision maker would not reach but one that a reasonable decision maker could not reach. The Constitutional Court stated that, where a Court must decide the reasonableness or otherwise of a decision, '(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**." (par 109).

[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.

[99] In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to

strike. Indeed, articulating it may be difficult in itself but applying it in a particular case may tend to even be more difficult. In support of the statement that Sidumo seeks to strike the aforesaid balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set said simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review – it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances.

[100] The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration

award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.

[101] Nothing said in Sidumo means that the grounds of review in sec 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in sec 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is *ultra vires* its powers, the reasonableness or otherwise of its decision cannot arise.

[102] What is the difference between the approach enunciated in Carephone and that enunciated in Sidumo with regard to the grounds of review set out in sec 145 of the Act? The difference seems to me to be two-fold. Firstly, Carephone sought to construe sec 145 so as to bring it in line with a constitutional imperative at the time which was to the effect that an administrative action had to be justifiable in relation to the reasons given for it whereas Sidumo seeks to construe sec 145 so as to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. It seems to me that, even

if there may have been a debate under Carephone and prior to Sidumo on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.

[103] In **Pharmaceutical Manufacturers of SA in Re Ex Parte President of the RSA 2000 (2) SA 674 (CC)** at par 86 the Constitutional Court, dealing with rationality as a minimum threshold requirement applicable to the exercise of public power, held that the question whether a decision is rationally related to the

purpose for which the power was given calls for an objective inquiry. It then said: "**Otherwise a decision that, viewed objectively, is in fact irrational might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle**". In my view the same can be said of the determination of the reasonableness or otherwise of a decision or finding or arbitration award made by a CCMA commissioner under the compulsory arbitration provisions of the Act. Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.

[104] In my view the analysis of the evidence and the issues before the commissioner which has been undertaken above reveals without any doubt that the decision that the commissioner reached in this case that the third respondent was not guilty of the acts of misconduct for which he was dismissed and that his dismissal was substantively unfair was a decision that a reasonable decision maker could reach. Accordingly it was a reasonable decision or

finding. In my view it is a decision that could certainly have been reached by a reasonable decision-maker. Accordingly, there is no basis for it to be interfered with on review.

[105] In the circumstances I would dismiss the appeal. With regard to costs I am of the opinion that the requirements of the law and fairness dictate that no order as to costs should be made on appeal.

[106] In the result the appeal is dismissed with no order as to costs.

Zondo JP

I agree.

Jappie JA

I agree.

Khampempe JA

Appearances:

For the Appellant	:	Mr S. Snyman
Instructed by	:	Snyman Attorneys
For the Respondent	:	Mr D Vinnicombe
Instructed by	:	Garlicke & Bousfield
Date of judgment	:	5 December 2007