THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1743/17

In the matter between:

BIDAIR SERVICES (PTY) LTD **Applicant**

and

THABO SEKHABISA N.O. (AS COMMISSIONER) **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

NUMSA obo SIBANYONI, PAULUS **Third Respondent**

Heard: 19 November 2019

Delivered: 26 November 2019

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of commissioners – test for review – s 145 of LRA 1995 – determination of gross irregularities and unreasonable outcome

Evidence – evaluation and determination thereof – arbitrator ignoring crucial evidence – approach of arbitrator in deciding matter irregular – outcome arrived at by arbitrator unsustainable on the evidence, a misdirection and unreasonable

Dismissal – dereliction of duties – principles considered – conduct of employee actually constituting gross negligence – arbitrator failing to have proper regard to serious nature of misconduct – arbitrator having no regard to

the essential requirement of safety in the aviation industry – finding of substantive unfairness reviewable

Dismissal – sanction of dismissal – arbitrator failing to properly consider the facts and legal principles relating to the issue of dismissal as an appropriate sanction – finding that dismissal not being appropriate unreasonable and reviewable

Review of award – conclusion of arbitrator irregular and unreasonable – arbitration award reviewed and set aside – powers of the Court under section 145(4) considered – application of discretion – appropriate in this instance to substitute award with award that dismissal substantively fair and not remit matter back to CCMA

JUDGMENT

SNYMAN. AJ

Introduction

[1] The judgment in this instance concerns an application by the applicant to review and set aside an arbitration award of the first respondent in his capacity as a commissioner of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). This application has been brought in terms of section 145 of the Labour Relations Act[1] (the LRA).

[2] The origins of the current application is found in the dismissal of the individual third respondent by the applicant, following disciplinary proceedings, for misconduct relating to gross insubordination and dereliction of duties. The dismissal of the individual third respondent was then pursued by the National Union of Metalworkers of South Africa (NUMSA) as an unfair dismissal

[1] Act 66 of 1995 (as amended).

dispute, to the CCMA, and this dispute ultimately came before the first respondent for arbitration on 30 June 2017.

[3] The first respondent was called upon to decide whether the dismissal of the individual third respondent was substantively fair, as procedural fairness was not in issue in the arbitration. Under the heading of substantive fairness, the individual third respondent disputed that he committed the misconduct with which he had been charged, and also placed dismissal as an appropriate and fair sanction in issue.

[4] In an arbitration award dated 10 July 2017, the first respondent decided that the individual third respondent's dismissal by the applicant was substantively unfair, and afforded the individual third respondent the consequential relief of reinstatement with retrospective effect to date of his dismissal, coupled with back pay in an amount of R132 000.00, being an amount equivalent to ten months' salary. It is this award of the first respondent that forms the subject matter of the review application brought by the applicant.

[5] The applicant's review application was brought on 28 August 2017, and was thus two days outside the six weeks' time limit in terms of section 145(1) of the LRA. The applicant brought a substantive application for condonation for this failure. In addition, the review application itself was opposed by NUMSA, and their answering affidavit was also filed out of time. NUMSA consequently also applied for condonation for this failure. When this matter was argued before me, neither party opposed the condonation application of the other. Having considered both condonation applications, I was satisfied that good cause had been shown by both parties for condonation to be granted, and I accordingly grant condonation for both the late filing of the applicant's review application, and the answering affidavit of NUMSA.

[6] I now turn to considering the merits of the review application, by first setting out the relevant background facts in this matter.

<u>The relevant background</u>

[7] The applicant conducts business as an airfreight service provider, and facilitates the transporting of the freight of a variety of customers, by air. As

such, it works closely with the various airlines, and is subject to the strict safety requirements and stipulations as applicable to the airline industry. Also, and because the applicant in this instance operates from the OR Tambo Airport, which is a key point site, it is also subject the key point security regulations applicable to such sites.

[8] For ease of reference in this judgment, I will refer to the individual third respondent, Paulus Sibanyoni, as ‘Sibanyoni’. Sibanyoni was employed by the applicant as the night shift supervisor at its OR Tambo Airport warehouses. He commenced employment with the applicant on 6 January 1999. The night shift commenced at 22h00. Sibanyoni reported to the operations manager, Joe Fyfer (‘Fyfer’).

[9] As a result of security considerations, and after discussions with staff members, including Sibanyoni, Fyfer issued an e-mail instruction to the various managers / supervisors, with regard to the consolidating and integration of all NS operations. In terms of this instruction as contained in an e-mail dated 25 February 2016, and with effect from 29 February 2016, all operations were integrated as one night shift operation, with all security, save for one, moving to warehouses 4 – 6. As a result, warehouse 7 had to be closed from 22h00 to 05h30, with vehicles parked inside the warehouse, and the doors to the warehouse closed by security from the inside. Sibanyoni was directly responsible for the security of all warehouses, including warehouse 7, and had to ensure that this instruction was heeded to.

[10] It appeared that this instruction was however not adhered to as required. There were a number of instances referred to in the arbitration proceedings which happened in July 2016 which showed that the doors of warehouse 7 were wide open with trucks coming in and out, long after 22h00. It must have been patently apparent to Sibanyoni that this was happening. What makes this more unfortunate is that Sibanyoni in fact gave the assurance to the regional manager – Gauteng, Morne Bellingan (Bellingan) that the instruction was being adhered to. The failure was only discovered when a parcel went missing from warehouse 7 in July 2016 and an investigation ensued, showing the aforesaid state of affairs.

[11] The answer given by Sibanyoni for this was that it was not his responsibility to ensure that warehouse 7 was closed, and that was the responsibility of the security guard left there. He also added that during the course of the shift, he was seeing various clients at various locations, and could thus not be held accountable for ensuring that the warehouse is closed. He also said that it was the duty of the supervisor with the shift ending at 22h00 to ensure the door was closed. There are however a number of difficulties with this explanation, which will be discussed later.

[12] There was however a far more serious failure on the part of Sibanyoni, which gave rise to the charge of dereliction of duty against him. It is perhaps appropriate in this regard to pertinently refer to an extract from the job description of Sibanyoni, which reads that he must '*Ensure that Manifests / Control sheets are accurate and completed 100%*'. There is a good reason for this duty, as the facts of this case properly illustrate.

[13] In this instance, the applicant had cargo that was to be transported on Mango Flight JE701 on 26 July 2016, departing from Lanseria Airport. The manifest for the cargo showed a total weight of 1 259.61 kilograms. It is critical that the manifest must show the absolute correct weight. As Bellingan explained, it is a critical component of aviation safety that aircraft must not be overloaded, as this may well cause a crash. It is the duty of the pilots on the aircraft to satisfy themselves as to the weight of the aircraft before departure, and in this respect the cargo manifests form part of the weight calculation. It does not take a genius to appreciate that if all cargo service providers provide manifests to pilots that understate the weight of cargo, such pilots would be misled as to the true weight of the aircraft with possible fatal consequences.

[14] As stated, it is the specific duty of Sibanyoni to ensure that the manifest is '100%' correct. On 26 July 2016, this did not happen. The driver, Michael Mashigo ('Mashigo') arrived at Lanseria with the cargo concerned to be laoded on the aircraft, and then telephoned Sibanyoni, indicating that 48 parcels were missing from the load, totalling 237 kilograms. But it turned out that this report by Mashigo was not correct, and that the parcels were indeed part of the load and that original manifest of 1 259 kilograms was correct. However, and without in any way satisfying himself that the manifest was correct and that the

parcels were or were not part of the load, Sibanyoni accepted that the manifest simply be amended by hand to reflect the weight of the cargo as being 1 022 kilograms. Therefore, what was conveyed to the pilots was understated by 237 kilograms, which is entirely unacceptable.

[15] This was discovered when the flight arrived in Cape Town, and the 48 parcels were found to be amongst the cargo. That was a reportable safety incident in terms of Civil Aviation regulations, resulting in an incident report being filed by Mango, reflecting the safety incident as being a ‘cargo discrepancy’. This failure was explained by Sibanyoni as being a ‘miscommunication’ between the driver, Mashigo, and the manifest officer, Lehlohonolo. Considering the implications, and the clear duties of Sibanyoni in this regard, this was an untenable state of affairs and simply not a proper explanation for such a failure.

[16] The final issue that gave rise to the misconduct charges brought against Sibanyoni related to his failure to prepare a daily regional flight schedule of flights on which the applicant could facilitate cargo transport, and then provide this to the applicant’s clients so the clients could know when they could transport cargo. As Bellingan explained, if the clients are not kept fully up to date on available flights, they would simply seek out another service provider in this highly competitive industry. It is thus essential that such a daily schedule be prepared and circulated.

[17] The evidence was that Sibanyoni should prepare this schedule and then upload it onto the applicant’s system, and the applicant’s system would then automatically send this information to all clients. It was thus not expected that Sibanyoni had to actually send the schedule to clients, and all that was expected of him was to prepare the schedule and load it on the system. However, if the schedule was not prepared, it could not be sent. It was undisputed that in the period of 19 to 25 July 2016, Sibanyoni failed to prepare this flight schedule.

[18] Once again, and when confronted with this, Sibanyoni sought to blame everyone else. He blamed other managers and even the IT department. He said that preparing the schedule was not his responsibility, in the face of clear

e-mail communication that indicated the contrary. These explanations also be dealt with later in this judgment.

[19] The upshot of the aforesaid is that on 27 July 2016, Sibanyoni was suspended, followed by a written notice to attend a disciplinary hearing to be held on 4 August 2016. He was charged with gross insubordination relating to the failure to ensure the closure of warehouse 7, and dereliction of duties were it came to the Mango JE701 manifest incident and the failure to prepare the daily regional flight schedule. It may be added that there were other charges contained in the charge sheet as well, but Sibanyoni was not found guilty of those charges, which therefore played no role in the decision to dismiss him, and need not burden this judgment.

[20] The disciplinary hearing then took place on 4 August 2016, where Sibanyoni pleaded not guilty to the charges. He was however found guilty of the charges relating to the three issues set out above, and ultimately dismissed on 21 September 2016 as a result of the sanction of dismissal having been found to be appropriate for the misconduct concerned.

[21] Dissatisfied with Sibanyoni being dismissed, NUMSA, of which Sibanyoni was a member, pursued an unfair dismissal dispute to the CCMA, filed on 17 October 2016. The dispute was unsuccessfully conciliated on 16 November 2016, and then referred to arbitration on 15 March 2016. The dispute came before the first respondent for arbitration on 30 June 2017. Bellingan and Choene Vinea Sekoadi (Sekoadi) testified for the applicant, and Sibanyoni was the only witness that testified in support of his case.

[22] In deciding this matter, the first respondent first found that the applicant had failed to lead evidence on the bulk of the first charge. As to the issue of the closure of warehouse 7, which was a part of the first charge, the first respondent held that Sibanyoni was not guilty of this charge, because of the move to warehouse 4 – 6 and that only one security and cargo handler was left behind in warehouse 7. The first respondent also accepted that it was the duty of the supervisor whose shift ended at 22h00 to ensure the warehouse was closed. Lastly, the first respondent held that because Sibanyoni moved to different places during the course of his shift, he may not be aware that the

door of warehouse 7 is open. For all these reasons, the first respondent concluded that Sibanyoni was not guilty of the first charge.

[23] The first respondent next dealt with what he called the third charge, being the charge relating to the duty of the applicant to prepare a daily regional flight schedule, so this information could be sent to clients. The first respondent himself was highly critical, in his award, of the defences raised by Sibanyoni to this charge. He called the defences a '*bare denial of his responsibilities*'. He further rejected the attempts of Sibanyoni to shift blame for the failure to prepare these schedules to other employees. The first respondent then accepted that it was part of the duties of Sibanyoni to prepare this daily regional flight schedule, and that he had failed to discharge this duty.

[24] The first respondent then finally dealt with the issue relating to the manifest of Mango flight JE701. The first respondent accepted that this manifest was incorrect. The first respondent also accepted that the duty was squarely on Sibanyoni to have ensured that this manifest was correct. He added that Sibanyoni failed to communicate with the airline about the cargo that according to Sibanyoni was not manifested and not loaded. The first respondent accordingly accepted that Sibanyoni was guilty of this charge.

[25] The first respondent then turned to the issue of an appropriate sanction. He considered that Sibanyoni had a clean disciplinary record, because past warnings had expired. He considered that there was no evidence that the dereliction of duties of Sibanyoni was persistent, and what happened was a single act. He also held that the misconduct in question was not serious, there was no complaint from the client or the airline, and the neglect was not shown to have '*disastrous consequences*'. For these reasons, the first respondent concluded that the sanction of dismissal was not appropriate in this instance.

[26] The first respondent there decided that the dismissal of Sibanyoni was substantively unfair. The first respondent directed that Sibanyoni be reinstated with retrospective effect to date of his dismissal on 21 September 2016, with full back pay until then, as set out above. This prompted the current review application, which I will now turn to deciding by first setting out the applicable test for review.

<u>The test for review</u>

[27] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[3]*.* In *Duncanmec (Pty) Ltd v Gaylard NO and Others*[4] the Court succinctly summarized the test as follows:

> 'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[28] It is always necessary and important for the Court to enquire into and consider the merits of the matter in deciding what is reasonable.[5] In *Herholdt v Nedbank Ltd and Another*[6] the Court said:

> '… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set

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[2] (2007) 28 ILJ 2405 (CC).
[3] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[4] (2018) 39 ILJ 2633 (CC) at paras 42 – 43
[5] Id at para 41.
[6] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

> aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[29] What this means is a two stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[30] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[7] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[8]

[31] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the first respondent.

<u>Grounds of review</u>

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[7] *Fidelity Cash Management Service (supra)* at para 102.

[8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

[32] In this case, there is no cross review. As such, the findings of the first respondent that Sibanyoni committed the misconduct as contemplated by the charges in respect of the Mango JE701 manifest and the preparation of the regional daily flight schedule, stand. In this regard, the ground of review raised by the applicant is directly aimed at the decision of the first respondent that dismissal was an inappropriate sanction for this misconduct. In short, and according to the applicant, the first respondent's decision on sanction ignored and negated pertinent evidence, constituted a failure to apply requisite legal principles, and was a misdirection, to the extent of rendering such determination unreasonable.

[33] The applicant also takes issue with the first respondent's finding where it comes to the charge in respect of the closure of warehouse 7. According to the applicant, the first respondent also failed to have proper regard to, and in essence ignored pertinent evidence, especially considering that there was a direct duty imposed on Sibanyoni to ensure the security of the warehouse.

[34] This judgment will focus on these two review grounds, which I will now deal with below.

<u>Analysis</u>

[35] From the outset, I must say that I have sympathy for Mr Mabaso, the attorney representing NUMSA in Court, who came into the matter right at the very end. He inherited a case that was in my view already broken. Mr Mabaso, who clearly properly read and considered the record and arbitration award in this case, appreciated the difficulties with the award of the first respondent, and in effect conceded that the award should be reviewed and set aside. In this respect, this was the responsible course of action to take, and for this he cannot be faulted. However, and what Mr Mabaso suggested is that the consequential relief to be granted once the award is reviewed and set aside is not that of substitution, but rather that the matter be remitted back to the CCMA for arbitration *de novo*. This contention I will deal with later in this judgment.

[36] Despite the concession of Mr Mabaso as to the merits of the review application, this Court must still satisfy itself that the applicant has met the necessary thresholds to justify the reviewing and setting aside of the award of the first respondent. Having considered the record in this matter, and for the reasons to follow, I am satisfied that this threshold has been met, and that the applicant has made out a proper case that the award of the first respondent falls to be reviewed and set aside.

[37] I will commence with the first charge relating to the closure of warehouse 7. From the outset, the first respondent misdirected himself where it came to the evidence relating to this charge. According to the first respondent, the move to warehouse 4 – 6 negated this charge. But the opposite is true. It is precisely the move to warehouse 4 – 6 that gave rise to the instruction which then formed the basis of the charge. Because of the move to warehouse 4 – 6, all that remained behind in warehouse 7 for the night shift was one security and one controller. That is precisely why the warehouse needed to be secured by locking it from the inside, with the vehicles parked inside, and not conducting operations out of it. If this was not done, and with the limited personnel therein, it would be a security risk. The first respondent thus unfortunately got his evaluation of the evidence in this regard all wrong.

[38] Next, and in terms of the undisputed duties of Sibanyoni as night shift supervisor, he was responsible for the security of all the warehouses in the course of his shift, which included warehouse 7. It simply cannot be correct to say that the responsibility to close warehouse 7 rested with the supervisor going off duty at 22h00. The reason why this cannot be correct is one of common sense and logic. The supervisor preceding Sibanyoni coming on duty still operates out of warehouse 7 until 22h00. When Sibanyoni comes on duty, operations are limited to warehouses 4 – 6 and warehouse 7 is closed until 05h30. It must surely follow that it is Sibanyoni that must ensure warehouse 7 is shut for the rest of the night.

[39] One also cannot escape a material contradiction in the defences raised by Sibanyoni where it came to this charge. On the one hand, he stated that the duty to close and lock the warehouse rested with the security and controller in the warehouse and the instruction was directed at them. But when confronted

with his duty to ensure the security of the warehouse, he says that he did comply with the instruction, but he was not always able to monitor that the warehouse was closed because he was required to move around to see clients. In any event, a proper consideration of the instruction of 25 February 2016 shows that it is clearly directed at Sibanyoni. The first respondent had no regard to any of this evidence, or contradictions in the explanation.

[40] But even of the explanation of Sibanyoni that he had to move around to see clients is considered, there is the undisputed testimony of Bellingan that moving around to see clients was not part of his job, and if he chose to do so, that was of his own accord and could excuse him from ensuring the security of warehouse 7. The further testimony of Bellingan was that warehouse 7 was wide open with trucks moving in and out, and as far he was concerned it was simply not possible that Sibanyoni would not have noticed this. None of this evidence was dealt with or referred to by the first respondent in his award, and instead the first respondent simply plumbed for the explanation of Sibanyoni.

[41] Overall considered, it is my view that the first respondent's finding that Sibanyoni did not committed misconduct where it came to the charge in respect of warehouse 7 is unsustainable, if proper regard is had to the evidence, and probabilities, as a whole. There was clearly an instruction given to Sibanyoni to ensure that warehouse 7 was closed and locked between the hours of 22h00 and 05h30. Sibanyoni failed to carry out this instruction. The finding of the first respondent that Sibanyoni committed no misconduct in this regard accordingly falls to be reviewed and set aside.

[42] This then only leaves the issue of dismissal as an appropriate sanction. From the outset, I must express my grave concerns about the findings of the first respondent where it comes to the severity of the misconduct and the possible consequences thereof, where it comes to the Mango JE701 manifest charge. In the airline industry, safety is of paramount importance. Everything functions on the basis of checking and double checking. The reason why this the case is because if this does not happen, people die. Bellingan said so in so many words. For the first respondent to simply negate this, as he did, without any proper cause or reason, is an untenable proposition. In *Harmony Gold Mining*

Co Ltd v Commission for Conciliation, Mediation and Arbitrtation and Others[9] the Court said:

> 'In my view the commissioner in the present instance failed to attach sufficient weight to the evidence led by the applicant's witnesses concerning all charges that were brought against the fourth respondent and in particular that contravention of a safety rule and procedure amounts to very serious misconduct which could lead to loss of life and thus warrant dismissal.'

[43] The weight of an aircraft is a critical safety consideration. An imbalanced or overweight aircraft is an accident waiting to happen.[10] It is the duty and responsibility of the pilots on the aircraft to decide if it is safe to fly. One of the considerations that must be taken into account when making this decision is a calculation of the take-off weight of, and distribution of weight in, the aircraft. Part of what is used in that calculation is the cargo manifests. If those manifests are wrong, the calculation is wrong, and that directly compromises the safety of the aircraft. That is surely why the job description of Sibanyoni specifically says that his duty is to ensure that the manifest is '*100%*' correct.

[44] In this case, what was ultimately loaded onto the aircraft was 1 259 kilograms in cargo. But what the manifest showed that was presented to the flight crew was 1 022 kilograms. It is understated by 237 kilograms. Assuming this may happen with all other cargo service providers, the take-off weight may be thousands of kilograms more than what the flight crew think it is. It does not take a genius to appreciate how serious a safety violation this is. That is why it is a reportable incident. As a general proposition, the failure of an employee to follow critical safety requirements is the kind of misconduct that is deserving of dismissal.[11] One can hardly do better than refer to the following *dictum* in

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[9] (2013) 34 ILJ 912 (LC) at para 26.

[10] As for example happened in the case of Fine Air Flight 101 on 7 August 1997 in Miami, Florida, where major contributing factors to a fatal accident was the failure of Fine Air to exercise operational control over the cargo loading process; and the failure of Aeromar (a cargo service provider such as the applicant) to load the airplane as specified by Fine Air, resulting in an overloaded and imbalanced aircraft – see the United States National Transportation Safety Board report issued under reference NTSB/AAR-98/02 dated 16 June 1998.

[11] See *National Union of Mineworkers and Others v Sibanye Gold Ltd (Kloof Division) and Others* (2018) 39 ILJ 2476 (LAC) at para 17; *Impala Platinum Ltd v Jansen and Others* [2017] 4 BLLR 325 (LAC) at para 17; of *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 35; *Eskom Holdings Soc Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2019] JOL 42300 (LC) at paras 55 and 74.

Sasol Mining (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[12]:

> '… Safety of employees at the workplace is paramount. It cannot be compromised. An employer cannot be expected to wait until an employee is maimed or has lost his or her life, before taking decisive action against an employee who has exposed fellow employees to danger. … '

The first respondent completely misunderstood what the misconduct actually was, and that, in my view, is a material failure that renders the outcome unreasonable.

[45] This brings me neatly the finding of the first respondent that the airline did not complain. Not true at all. Mango filed a formal safety report with regard to the incident in terms of the civil aviation regulations. If that is not a complaint, it is difficult to comprehend what would be. This is therefore another piece of critical evidence the first respondent simply negated.

[46] In my view, and where it comes to the Mango JE701 manifest charge, it is extremely serious misconduct with potentially drastic consequences that justifies the sanction of dismissal. Added to this, the complete failure by Sibanyoni to appreciate how he failed and what the consequences of this failure could be, and then to own up to it with a commitment that he will ensure it does not happen again, is also telling where it comes to the destruction of the employment relationship and the justification of dismissal as a sanction.

[47] The consequences of the failure to secure warehouse 7 is also serious. As Bellingan explained, safety and security is one of the specific requirements of being allowed to operate a warehouse at the airport, and the applicant could possibly lose its ACSA licence to do so if it is found wanting. Bellingan also explained the serious consequences to the applicant if its clients do not receive the daily regional flight schedule, which forms the very basis of them approaching the applicant for cargo transport. In short, this explanation by Bellingan, which was not contradicted, was that the clients would simply immediately go to a competitor to find a possible available flight in what is an extremely competitive industry.

[12] (2015) 36 ILJ 2359 (LC) at para 6.

[48] In summary, and where it comes to the issue of an appropriate sanction, the first respondent failed to consider critical and essential evidence, as well as all the required principles where it comes to deciding whether dismissal was an appropriate sanction, rendering the outcome he arrived at that dismissal was inappropriate in this instance to be entirely unreasonable. As said in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[13]:

> 'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. …'

[49] As to the general principles applicable to deciding whether dismissal is an appropriate sanction, it must first be said that it is not the function of the first respondent as arbitrator to decide whether he would have dismissed Sibanyoni or not. In deciding whether dismissal as a sanction is fair, an arbitrator does not decide the issue on the basis of a clean slate, so to speak, as if the arbitrator was the employer. The premise upon which the issue of dismissal as a fair sanction must be decided is that of deciding whether what the employer did in dismissing the employee was fair. In short, whilst the arbitrator must not defer to the employer, the arbitrator must not act as if he or she was the employer. As was said by Ngcobo J in *Sidumo supra*:[14]

> '… the commissioner… does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair'

[50] In deciding whether the employer acted fairly in deciding to dismiss an employee, a variety of factors must be considered, as a whole.[15] These are, in sum: (1) the importance of the rule that had been breached (seriousness of the misconduct); (2) the reason the employer imposed the sanction of

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[13] (2014) 35 ILJ 943 (LAC) at para 21. See also: *Pam Golding Properties (Pty) Ltd v Erasmus and Others* (2010) 31 ILJ 1460 (LC) at para 6.
[14] Id at para 178. See also the judgment if Navsa J in *Sidumo* (Id fn 2) at para 79 where the learned Judge said: *'… In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. …*'
[15] See *Sidumo* (*supra*) at para 78

dismissal; (3) The explanation presented by the employee for the misconduct; (3) the harm caused by the employee's conduct; (4) whether additional training and instruction may result in the employee not repeating the misconduct; (5) the service record of the employee; (6) the breakdown of the trust / employment relationship between the employer and employee; (7) the existence or not of dishonesty; (8) the possibility of progressive discipline; (9) the existence or not of remorse; (10) the job function of the employee; and (11) the employer's disciplinary code and procedure.[16] Not all the factors are always relevant to a particular case, so only those that are relevant must be identified, and considered.[17] In general terms, what requires consideration by an arbitrator was articulated in *Vodacom (Pty) Ltd v Byrne NO and Others*[18] as follows:

> '… the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …'

[51] The above being the applicable principles, what must be done next is to apply the facts to the principles that are relevant to this case, and then to consider whether the outcome arrived at by the first respondent that dismissal was not appropriate is reasonable. As a point of departure, and as discussed above, there can be no doubt that the misconduct in this case is serious. What is called 'dereliction of duties' in this case, is in essence nothing else but gross negligence on the part of Sibanyoni. It is trite that gross negligence constitutes the kind of misconduct where dismissal would normally be justified.[19] Also in this case, this is exacerbated by the fact that it is directly linked to safety issues.

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[16] *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2277 (LAC) at paras 17 – 18; *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at para 14; *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38; *Fidelity Cash Management (*Id fn 3*)* at para 94.
[17] See for example *Duncanmec* (Id fn 4) at para 46.
[18] (2012) 33 ILJ 2705 (LC) at para 9. See also *Wasteman Group v SA Municipal Workers Union and Others* (2012) 33 ILJ 2054 (LAC) at 2057G-I.
[19] See *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) at para 35.

[52] The explanation offered by Sibanyoni for his misconduct is not acceptable. He in essence has no explanation for the failure in respect of the Mango JE701 manifest issue, other than that two of his subordinates 'misunderstood' each other. He does not even acknowledge his responsibility to ensure that the manifest was correct and his own rule in causing an incorrect manifest to be provided. Next, his explanation about the failure to prepare the daily regional flight schedule and blaming a number of other employees for the failure was found by the first respondent himself to be false. In the end, there are at least two gross failures in this case that stand unexplained.

[53] It follows that the first respondent's misconduct in this instance is serious and there exists no acceptable explanation to try and justify or mitigate this misconduct. There is accordingly nothing that can detract from the consequences of such serious misconduct. Added to that, the misconduct exposes the applicant to severe potential harm, being the loss of its licence to operate in addition to possibly being responsible for an aircraft crash. The approach of the first respondent is in fact tantamount to derogating the misconduct to something far less than what it actually was, thereby unreasonably negated a critical factor that indicated that dismissal would be a fair sanction in this case.

[54] Next, Sibanyoni showed no true remorse, and never actually acknowledged wrongdoing. He did not plead guilty in the disciplinary hearing, which is of course the first indicator of genuine remorse.[20] He sought to blame everyone else for his own failures. He, throughout the arbitration, either tried to justify what he did, or contended he did nothing wrong. This approach persisted at arbitration. As dealt with above, several explanations he gave to justify his failures were false. True remorse was explained in *Absa Bank Ltd v Naidu and Others*[21] as follows:

> '… Therefore, the crucial question is whether it could be said that Ms Naidu's utterances empirically and objectively translated into real and genuine

[20] See: *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2273 (LAC) at para 23.
[21] (2015) 36 ILJ 602 (LAC) at para 46.

remorse. In *S v Matyityi*, the Supreme Court of Appeal remarked as follows on this issue:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.''

[55] Without the requisite remorse, it is not possible to restore the relationship of trust that forms the foundation of the employment relationship. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[22] the Court said:

'… Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken.'

Sibanyoni fell far short where it came to this. The first respondent acted unreasonably in failing to appreciate this.

[56] The first respondent placed emphasis on Sibanyoni's long service and clean disciplinary record. I accept that there is nothing wrong in doing so, and it is of course an important factor any arbitrator should consider. But certain misconduct is so serious that long service and a clean record cannot save an

[22] (2000) 21 ILJ 1051 (LAC) at para 25.

employee from dismissal. This was specifically recognized in *Toyota SA Motors (Pty) Ltd v Radebe and Others*[23], where the Court said:

> ‘Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. …'

The matter *in casu* is in my view such a case.

[57] The first respondent had no regard to the undisputed testimony by Bellingan that the trust relationship had been destroyed. As Bellingan explained, and considering the failures in this case, how could Sibanyoni be trusted to diligently execute his core responsibilities, especially considering the nature of his position and that he was the one where, in effect, the buck stopped on the night shift. The absence of such a trust relationship in this case worked in favour of dismissal as being considered a fair sanction, and is a factor which, as said above, the first respondent had no regard to at all. The following *dictum* in *Miyambo v CCMA and Others*[24] is apposite, where it was held:

> ‘It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust...’

[58] Another factor to consider is that the disciplinary code of the applicant provides for dismissal as a competent sanction for the disregard of safety rules or common safety practices. The first respondent did not refer to this at all.

[59] The first respondent held that the misconduct in his case was a single occurrence and not persistent. Presumably, the first respondent had in mind

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[23] (2000) 21 ILJ 340 (LAC) at para 15. See also *Schwartz v Sasol Polymers and Others* (2017) 38 ILJ 915 (LAC) at para 26; *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at para 42.
[24] (2010) 31 ILJ 2031 (LAC) at para 13.

the consideration that it was unlikely that Sibanyoni would repeat the mistake again, and as such, progressive discipline was justified. In my view, it however simply cannot be expected of the applicant to run this risk, especially considering the serious nature of the misconduct and the persistent refusal by Sibanyoni to acknowledge any wrongdoing on his part. In the end, and considering what happened in this case, the applicant was in my view entitled to consider it too much of a risk to continue with an employment relationship with Sibanyoni. As said in *De Beers supra*[25]:

> 'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[60] In sum, and where it comes to the first respondent's determination on the issue of dismissal as an unfair sanction, there exist a number of fundamental failures. He failed to have proper regard to the seriousness of the misconduct. He failed to consider the issues of the complete absence remorse and the destruction of the trust relationship, as important factors justifying dismissal. He failed to consider the potential prejudice suffered by the applicant, the provisions of the disciplinary code, and the particular position of trust and duties of Sibanyoni. He has no regard to the critical safety considerations, and the absence of any acceptable explanation by Sibanyoni for his failures. All these factors far outweigh the long service and clean disciplinary record of Sibanyoni, and eliminate the prospect of possible progressive discipline.

[61] Overall considered, and if the first respondent had proper, reasonable and rational regard to all of these factors, the only reasonable conclusion he could have arrived at is that the dismissal of Sibanyoni was justified, and fair. It can hardly be better described than the following *dictum* in *Solari v Nedbank Ltd and Others*[26] where the Court said the following, specifically referring to

[25] Id at para 22. See also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v National Union of Mineworkers and Others* (2001) 22 ILJ 658 (LAC) at paras 21 – 22.
[26] (2014) 35 ILJ 3349 (LAC) at para 29.

conduct of a commissioner where it came to deciding if dismissal was an appropriate sanction:

> '… it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach'

[62] For all the reasons as set out above, it is my view that any determination by the first respondent in his award to the effect that that the dismissal of Sibanyoni was not an appropriate or fair sanction is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.[27] As such, the award of the first respondent falls to be reviewed and set aside.

Conclusion

[63] Therefore, I conclude that the first respondent's finding that the dismissal of Sibanyoni was substantively unfair cannot be sustained, and falls to be reviewed and set aside. It is clear that the only reasonable outcome the third respondent could have arrived at, considering the evidence as a whole and the applicable principles of law, had to be that the first respondent earned his dismissal, which was a justified and fair sanction in the circumstances.

[64] I now turn to the passionate plea by Mr Mabaso that this matter, with the award of the first respondent having been reviewed and set aside, be remitted back to the CCMA for arbitration *de novo*. In terms of section 145(4) of the LRA,[28] I have a wide discretion where it comes to the issue of consequential relief to be afforded to a review applicant, once it is decided that the arbitration award be reviewed and set aside.

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[27] See *Msunduzi Municipality* (*supra*) at para 30.
[28] Section 145(4)(a) reads: '*If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate …*'

[65] Mr Mabaso argued that it was the most fair solution for this matter to be remitted back to the CCMA for arbitration *de novo*. He referred me to the fact that several of the versions offered by Sibanyoni in giving his evidence were never put to the applicant's witnesses when they were cross examined, and it would thus be appropriate if this could be ventilated with such witnesses in an arbitration *de novo*. However, the immediate problem with this argument is that the failure to put a version to an opponent's witness has a trite consequence prescribed by law, and this failure cannot serve as some basis of justification to then get a second bite at the cherry. The legal principle deteriming the consequence of such a failure was described in *ABSA Brokers (Pty) Ltd v Moshoana NO and Others*[29] as follows:

> '… A failure to cross-examine may, in general, imply an acceptance of the witness' testimony…

And in *Trio Glass t/a The Glass Group v Molapo NO and Others*[30] the Court said the following:

> '… The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….'

[66] I am thus compelled to decline Mr Mabaso's invitation to remit this matter to the CCMA for arbitration *de novo* before another arbitrator for the reason mentioned above. All considered, the core factual matrix in this matter was mostly undisputed, and all the evidence was properly before me in a record that was in all respects complete. There is simply no need to go through the whole exercise of arbitration again. This matter dates back to 2017, and it would be contrary to the fundamental principle of the expeditious resolution of employment disputes to have this matter start all over again at arbitration.[31]

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[29] (2005) 26 *ILJ* 1652 (LAC) at para 39.
[30] (2013) 34 *ILJ* 2662 (LC) at para 41. See also Glencore (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2018) 39 ILJ 2536 (LC) at para 19.
[31] See Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman 's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC) at para 187. See also Matsha & others v Public Health & Social Development Sectoral Bargaining Council & others (2019) 40 ILJ 2565 (LC) at para 17 and the authorities cited there.

This is especially so where I am actually in the proper position to bring it to an end.[32] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[33] it was held:

> ‘Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court 'is in as good a position' as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration or substitute its own decision for that of the commissioner. Thus, where the issues are largely common cause, the pleadings comprehensive, the full record of both the disciplinary and arbitration proceedings are before the court, and there has been a elapse of almost 20 months from the date of dismissal to the date of finalisation of the review application, such as in this case, the consideration of bringing the dispute to a speedy finality would certainly have a bearing on the decision of the reviewing court to decide the dispute, and not remit it to the CCMA, because it is 'in as good a position' as the CCMA to do so.’’

[67] I therefore consider it appropriate and justified to finally determine this matter. I shall accordingly substitute the arbitration award of the first respondent with an award that the dismissal of Sibanyoni by the applicant was substantively fair.

<u>Costs</u>

[68] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the third respondent with a costs order, especially considering the opportunity

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[32] See Long v SA Breweries (Pty) Ltd & others (2019) 40 ILJ 965 (CC) at paar 26; Civil & Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2019) 40 ILJ 2055 (LC) 63; Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others (2018) 39 ILJ 903 (LC) 100; General Motors SA (Pty) Ltd v National Union of Metalworkers of SA & others (2018) 39 ILJ 1316 (LC) 26 –27

[33] (2015) 36 ILJ 1511 (LAC) 58

afforded to me to bring this matter finally to an end. Mr Hutchinson, for the applicant, in any event did not press the issue of costs. There is also an ongoing relationship between NUMSA and the applicant. I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[34] where it comes to costs awards in employment disputes before this Court, and I do not consider there to be sufficient reason to depart from this. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

[69] In the premises, I make the following order:

<u>Order</u>

1. The applicant's review application is granted.

2. The arbitration award of the first respondent, arbitrator T Sekhabisa, dated 10 July 2017 and issued under case number GAEK 10117 – 16, is reviewed and set aside.

3. The arbitration award is substituted with an award that the dismissal of the individual third respondent, Paulus Sibanyoni, by the applicant, was substantively fair.

4. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

[34] (2018) 39 ILJ 523 (CC) at para 25.

For the Applicant:	Advocate W Hutchinson
Instructed by:	Moodie & Robertson Attorneys
For the Third Respondent:	Mr S Mabaso of S Mabaso Inc Attorneys