IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1889/14

In the matter between:

SOUTH AFRICAN AIRWAYS TECHNICAL SOC LTD **Applicant**

And

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

LAZARUS MATLALA *N.O* **Second Respondent**

MARTIN C COETZER **Third Respondent**

AVIATION UNION OF SOUTH AFRICA **Fourth Respondent**

Heard: **7 November 2019**

Delivered: **3 March 2020**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The third respondent (Coetzer), was employed by the applicant (SAA Technical) as Senior Licenced Technician from July 1994 until his dismissal on 6 August 2013. The applicant performs maintenance services on various aircraft at OR Tambo International Airport (ORTIA). It provides technical and maintenance services to its parent company, SAA and also to other airlines such as Air France, British Airways Comair, Air Mauritius and TAAG. It has been accredited by aviation regulatory bodies such as the South African Civil Aviation Authority, European Aviation Safety Agency and Federal Aviation Authority in the USA. Coetzer in his capacity was involved in aspects of the work performed on those aircrafts.

[2] It is common cause that on 8 March 2013, a long haul SAA aircraft ZS-SNI A340/600 ('The Aircraft') arrived at the Base Maintenance Department for a scheduled CKC Check, and that Coetzer, together with the Acting Team Leader (Minords) and the Unlicensed Technician (Martin Moyo), were tasked with working on the right wing Engine 4 of the Aircraft. The three were responsible for the removal of a triangular or blanking cover and borescope plug from Engine 4 of the Aircraft, for the purposes of inspection, and were required to reinstall the same upon completion of the inspection. Once the borescope plug was reinstalled, the triangular or blanking cover was to be placed over the borescope plug by using 3 bolts for installation and securing the blanking cover.

[3] According to the applicant, Moyo and Minords had confirmed that this job was completed by completing the paperwork, when in fact they had not done the job by installing the triangle/blanking cover. Minords in terms of the applicant's Quality Manual of Procedures (QMP) was responsible for performing an inspection of the work done by Moyo. Since the tasks to be completed were critical on an engine control system that affected the propulsive force of the Aircraft, Minords had raised a certificate for duplicate inspection in terms of

the QMP. He had requested Coetzer to perform the first leg of the duplicate inspection whilst the second leg was performed by him (Minords).

[4] The job log was generated by Moyo and signed off by Minords on 25 March 2013. The certificate of duplicate inspection was generated and signed by Minords and Coetzer on 28 March 2013, and according to the applicant, in violation of standing procedures that such certificates should be issued simultaneously.

[5] On 30 March 2013, the Aircraft was released from the CKC Check and re-entered service upon being declared serviceable. On 31 March 2013, the Aircraft departed from ORTIA to Cape Town International Airport and back. On the same day, it was scheduled to depart to JFK International Airport in New York (JFK). Before departing the First Officer of the Aircraft performed an exterior pre-flight inspection and discovered that fragments of a heat shield were protruding from the tail pipe area of Engine 4 of the Aircraft. This was brought to the attention of the engineer on the ground, who had had inspected the engine and trimmed the protruding heat shield. He had declared the aircraft serviceable.

[6] On arrival at JFK on 1 April 2013, the flight crew noticed that Engine 4 consumed more fuel (1.5 tons) than the other three engines. The Aircraft returned to ORTIA on the same day. On 2 April 2013 the Aircraft departed from ORTIA to JFK.

[7] Prior to the scheduled flight back to ORTIA, an external pre-inspection was conducted by its First Officer, who had discovered fragments of head shield protruding from Engine 4. The engineers at JFK where then asked to assist. An engineer from Virgin Atlantic Airways assisted and upon opening the cowl of Engine 4, it was discovered that the Right Hand C-duct insulation of Engine 4 had been severely damaged, and that the borescope blanking cover of the engine was missing. The cover was subsequently found in the right hand C-duct.

[8] As a result of the defects to the Aircraft, it was then grounded by JFK aviation authorities until repairs could be done. Alternative flight and accommodation

arrangements had to be made for the stranded passengers and crew at great expense to SAA and the applicant. In order to address the problems with the Aircraft grounded at JFK, the applicant had other than ordering replacement parts from France, also had to dispatch a team of engineers from ORTIA to JFK. Further expenses were incurred as a result of the Aircraft having been grounded by the JFK authorities, who had imposed penalties on the applicant.

[9] The Quality Control department of the applicant subsequently conducted investigations into the incident. The findings of the audit report were essentially that;

a) The borescope access blanking plug 1HP NGV was removed and reinstalled on completion of inspection. This was signed off by Moyo and certified by Minords.

b) Coetzer and Minords had signed off the duplicate inspection certificate on 28 March 2013

c) Coetzer, Moyo and Minords did not install the triangular/blanking cover of the borescope plug, nor did they perform the duplicate inspection as required by QMP despite having issued a certificate for duplicate inspection.

d) As a result of omissions, the hot air from the engine escaped the engine case because the triangular/blanking cover which serves as an insulator had not been reinstalled, resulting in the R/H C-duct being severely damaged.

[10] Coetzer, Moyo and Minords were charged and dismissed following a disciplinary enquiry into the following allegations;

i. "Gross Negligence in that on 28 March 2013 GT/26; 11/009 was signed off for work not performed on engine number 4 ZS-SN1 by MC Coetzer.

ii. Neglect of duty or carelessness in that on 28 March 2013 on GT/26: 11/009 you indicated that the blanking cover was fitted yet it was not thereby resulting in damage to SAA aircraft; disruption of scheduled service which further resulted in financial loss at a minimum of $66 879.41"

The arbitration proceedings and Commissioner's award:

[11] Subsequent to his dismissal, Coetzer as assisted by the fourth respondent (AUSA) referred an unfair dismissal dispute to the first respondent (CCMA). When attempts at conciliation failed, the dispute was referred for arbitration and came before the second respondent (Commissioner) for determination.

[12] The Commissioner had found that the dismissal of Coetzer was substantively unfair, and had ordered Coetzer's retrospective reinstatement together with back-pay in the amount of R225 295.00. The applicant approached this Court to have the arbitration award reviewed and set aside. Coetzer as assisted by AUSA opposed the application.

[13] Coetzer's case before the Commissioner was that the allegations against him were not proven; that the applicant was not consistent in the application of discipline; and that the chairperson of the disciplinary enquiry was biased.

[14] Four witnesses, *viz*, Messrs Khan (Senior Manager: Base Maintenance); Du Plessis (Team Leader); Booysen (Quality Controller); and Niranjan (Chairperson of the internal disciplinary enquiry) testified on behalf of the applicant. To the extent that the Commissioner had found that Coetzer's dismissal was procedurally fair, it would not be necessary to deal with Niranjan's testimony in this judgment.

[15] Khan's testimony was essentially that Coetzer in his position was responsible and accountable for his own tasks and for overseeing and signing off work performed on behalf other employees who did not hold any licenses. Coetzer was also a health, safety and environmental representative. Khan further relied on the audit report which essentially confirmed that Coetzer, Minords and Moyo did not perform the duties allocated to them on the Aircraft, and that they had signed the paperwork without actually having performed the tasks. This was further confirmed when the cowl of engine 4 of the Aircraft was opened whilst it was still at JFK. According to Khan, Coetzer had maintained

throughout that the certificate for duplicate inspection was never a requirement when that was not the case.

[16] Du Plessis' testimony was merely to confirm that indeed he was part of the team that was dispatched to New York to repair and recover the Aircraft. Upon an inspection of the Aircraft, it was discovered that there was extensive damage on the Right Hand C- duct, which had to be replaced. The engineer from Virgin Atlantic Airways who had assisted with the inspection of the Aircraft had handed him an intact triangular/blanking cover recovered from inside the cowl of Engine 4, which he had brought back to South Africa. That triangular/blanking cover was not installed in the first place. He had then installed a new C-duct which came from France, and a new triangular/blanking cover. Thereafter Engine 4 had functioned normally.

[17] Booysen's testimony was to confirm that following his own investigations from the maintenance records of the Aircraft, he had compiled the Quality Control Audit, which was also based on reports from other individuals who had assessed the damage to the Aircraft. He had conceded that the applicant had not conducted its investigations to determine as to what had happened with the blanking cover, and the reason it was found in the C-duct upon the latter being opened at JFK.

[18] Coetzer had testified and also called upon Messrs Cronje, Kloppers (Quality Controller) and De Abrieu (Team Leader) as his witnesses. Central to their evidence was that there was no requirement to conduct a duplicate certificate. Coetzer had nonetheless conceded that he had performed a duplicate certificate, but upon instructions from his superior, Minords. Minords' instructions according to Coetzer was to specifically inspect the plug and not the blanking cover, as its inspection was not specified on the GT26. The cover was in any event fitted even though he did not personally inspect it.

[19] Coetzer further denied any responsibility in respect of the damage to the Aircraft and the associated costs of its repairs. He blamed the engineer on duty in that as at 31 March 2013, an intermittent engine number 4 fire loop was reported as well as the protruding heat shield. According to Coetzer, the

engineer on duty ought to have opened the engine cowl and had he done so, he would have discovered the damage. The engineer had however only trimmed off the excess and declared the aircraft serviceable. Thus, according to Coetzer, had the engineer done what he was supposed to do, a cowl which was available before the Aircraft was declared serviceable could have been fitted at the time, and thus avoided any damages to the Aircraft.

[20] Cronje, had testified that the damage to the composite material as seen on photographs presented by the applicant, was as a result of impact damage and not heat damage, even though he had not personally inspected the C-duct as according to de Abreu and Kloppers, it was never brought back to South Africa for inspection, as it was sent to France.

[21] It was also Coetzer's case as advanced through the evidence of de Abreu on his behalf that the applicant was inconsistent in the application of discipline. In this regard, he testified that there were three other employees who were accused of negligence and causing damage to other aircraft in the past, which damage had necessitated the grounding of the aircraft in question in excess of three days. These employees were however not dismissed.

[22] The Commissioner having had regard to the question of onus under the provisions of section 192 of the Labour Relations Act (LRA),[1] and also the provisions of Item 7 of Schedule 8 of the Code of Good Practice: Dismissal concluded that;

22.1 In regards to the issue of duplicate inspection, Coetzer, de Abreua and Klopper had testified that there was no requirement in the QMP to do a duplicate inspection, and the testimony of Minords at the internal disciplinary enquiry to the contrary could not be relied upon. To that end, it should be accepted that the QMP did not require a duplicate inspection of the GT26.

22.2 The applicant (SAA Technical) had relied on the Quality Control Audit Report compiled by Booysen in contending that Coetzer was

[1] Act 66 of 1995 (as amended)

responsible for the damage to the Aircraft. Booysen had conceded in the arbitration proceedings that he had compiled the report based on other documents he had seen, had not himself investigated the causes of the damage to the Aircraft, did not go to JFK, nor observed the incident leading to the damage.

22.3 The evidence of Minords in regards to the existence of the rule or standard, as well as the evidence of Booysen in regards to incidents leading to the damage to the Aircraft constituted hearsay evidence within the meaning of section 3 of the Law of Evidence Amendment Act (LEAA)[2]. Since Coetzer had objected to the admission of such evidence, Booysen's and Minords' evidence ought to be rejected.

22.4 SAA Technical had therefore failed to discharge the onus placed on it to prove that Coetzer had committed the misconduct in question.

22.5 In regards to inconsistent application of discipline, since there was evidence that other employees were in the past charged with gross negligence and were not dismissed, and further since no evidence in that regard was presented by SAA Technical, it should be found that there was inconsistent application of discipline in respect of Coetzer, making the dismissal unfair.

<u>The grounds of review and evaluation:</u>

[23] The principles applicable to reviews of arbitration awards are trite. It can only be reiterated that an arbitration award will be set aside, if it is established that the decision arrived at by the Commissioner is one which a reasonable decision maker could not have arrived at in the light of the material placed before him/her. An arbitration award or decision will be reviewable if it is not supported by the evidence placed before the Commissioner, or where the conclusions reached by the Commissioner were without any deductive

[2] Act 45 of 1998

reasoning. Reasonableness is therefore the yardstick against which an award is assessed[3].

[24] In further clarifying the test on review, it was held in *Head of the Department of Education v Mofokeng and Others*[4];

> 'The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.'

[25] The applicant relied on three main grounds in support of its case that the arbitration should be reviewed and set aside, *viz*, that the Commissioner failed to understand the dispute before him; misapplied the law of evidence by excluding hearsay evidence when deciding the matter, and failed to apply his mind to certain evidence led during the arbitration proceedings.

[26] It is further trite flowing from *Goldfields*[5] that in determining whether an award is reviewable, the essential enquiry is to ask whether in terms of his or her

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[3] See *De Beers Consolidated Mines Ltd (Venetia Mine) v National Union of Mineworkers & others* (Case no: JA83/18; Delivered on 11 December 2019)

[4] [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at para 31

duty to deal with the matter with the minimum of legal formalities, the process that the arbitrator employed gave the parties a full opportunity to have their say in respect of the dispute; whether the arbitrator identified the dispute he was required to arbitrate; whether the arbitrator understood the nature of the dispute he or she was required to arbitrate; whether he or she dealt with the substantial merits of the dispute; and whether decision arrived at is one that another decision-maker could reasonably have arrived at based on the evidence placed before him or her.

[27] In this case, the Commissioner was alive to the provisions of section 192 of the LRA in respect of the issue of onus, and the need to take into account the provisions of Item 7 of Schedule 8 in determining the substantive fairness of the dismissal. I further did not understand the applicant's case to be that the parties were not afforded a full opportunity to have their say in respect of the dispute.

[28] A proper identification and understanding of the nature of the dispute required to be resolved entails an examination of the allegations that led to Coetzer's dismissal, and a proper assessment of the evidence led in that regard. It follows that where there was a misconception of the true enquiry this would result in an unreasonable outcome.

[29] The nature of the enquiry in this case was to determine the fairness of a dismissal for misconduct. The allegations of misconduct were that Coetzer was grossly negligent as he had signed off for work not performed on Engine 4. The second part of the allegations constituted an elaboration of the first part and the consequences thereof. In this regard, it was alleged that Coetzer indicated in the requisite GT/26 that the blanking cover was fitted when it was not, and that this conduct had caused damage to the Aircraft, disruption of scheduled service and financial loss to the applicant.

[30] The enquiry therefore was whether Coetzer had signed off for work that was supposed to be done when he had not done the work. Coetzer's case as I

[5] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para [20]

understood it was that his involvement in the work done on the Aircraft was limited to doing the inspection on the plug and did not relate to work done on the cover for which he was charged, found guilty and dismissed. To this end, his argument was that the applicant failed to prove that he was guilty of the charges against him in relation to the cover.

[31] The Commissioner having accepted on the common cause facts that Coetzer and Minords had signed off the duplicate inspection and having accepted that there was indeed damage to the Aircraft, nonetheless got swayed and distracted by disputes of fact as to whether there was a rule in respect of the application of the QMP to the job to be done. He had accepted the evidence of Coetzer, de Abreau and Kloppers that there was no requirement in the QMP for a duplicate inspection. In a nutshell, the Commissioner found that the fairness of Coetzer's dismissal was substantively unfair on account of there being no workplace rule in respect of the application of the QMP to the tasks to be performed.

[32] Clearly the Commissioner misconstrued and misunderstood the nature of the enquiry and the dispute he was called upon to determine. The disputed facts as to the existence of the rule was neither here nor there. The Commissioner's approach in regards to the existence of the rule or standard and contravention thereof as contemplated in Item 7 (a) of Schedule 8 is a classic case of a mechanical application of those provisions. The enquiry into the existence of a workplace rule and breach thereof cannot be a mechanical one. This is so in that depending on the nature of the work to be done, some tasks do not necessarily only require workplace rules in order to be performed, but may require common sense and due diligence in order to be carried out satisfactorily.

[33] The nature of the work that Coetzer and the others were instructed to perform on the Aircraft not only required written rules but also a high standard of care and common sense expected of reasonable employees performing inspections and maintenance on aircraft. Collectively, they were tasked with removing a triangular or blanking cover and a borescope plug from engine 4 of the aircraft for inspection, and to reinstall same upon completion. This is so

in view of the importance of safety in the aviation industry, and the services that the applicant rendered in the industry.

[34] Furthermore, I did not understand the evidence of Khan in regards to Coetzer's responsibilities (i.e., being responsible and accountable for his own tasks and for overseeing and signing off work performed on behalf other employees who did not hold any license) to have been challenged. Coetzer's contention therefore that he was only responsible for the one part of the inspection and maintenance and not the whole task in respect of Engine 4 was unsustainable.

[35] The allegations against Coetzer were not your typical textbook allegations, where a simple enquiry is whether there was a rule or not. The allegations were that he had signed off for work that was not done. Thus, once the Commissioner had accepted that Coetzer and Minords had signed the GT26 indicating that a duplicate inspection was done, when the evidence on the other hand pointed to the fact that it was not done, and that flowing from such conduct there was damage to the Aircraft, that ought to have been the end of the matter.

[36] It was therefore irrelevant whether Coetzer had signed the documentation upon Minords' instructions or not, or whether a written rule existed in that regard or not. The fact remained that the document was signed (some three days after the alleged completion of the task and contrary to the requirements of the QMP). That document indicated that a duplicate inspection was done, inclusive on the very Borescope Plug which Coetzer had removed for inspection and reinstalled, and which he had alleged was his sole responsibility[6]. It followed that even on Coetzer's version that he had signed the documents indicating that the tasks were completed when this was not the case, the allegations against him were proven.

[37] The debates surrounding whether the Quality Control Audit Report as presented by Booysen was admissible or not is equally neither here nor there. Evidence presented at the arbitration by Booysen was that the report was a

[6] Annexure 'MC 6' to the Answering Affidavit

collation of reports compiled as a result of his own investigations from the records of the Aircraft and reports from the Pilot.

[38] Even if the report was regarded as hearsay, the Commissioner had simply rejected the evidence of Booysen, Khan and Du Plessis, and in so doing, completely misconstrued and misapplied the provisions of section 3(1) of the Law of Evidence Amendment Act[7]. The mere fact that Coetzer had not agreed to the admission of the report as presented by Booysens was not the end of the enquiry. It is further not clear from the Commissioner's reasoning as to the reason the interests of justice would have militated against the admission of that evidence.

[39] A blanket statement that '*it is not in the interests of justice to admit hearsay evidence*' is meaningless and does not add any value to any reasoning. As to how the interests of justice are determined was stated by the Constitutional Court in *S v Molimi* as follows;

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[7] **3 Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
  (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
  (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
  (c) the court, having regard to-
    (i) the nature of the proceedings;
    (ii) the nature of the evidence;
    (iii) the purpose for which the evidence is tendered;
    (iv) the probative value of the evidence;
    (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
    (vi) any prejudice to a party which the admission of such evidence might entail; and
    (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) *(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.

(4) For the purposes of this section;
'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

"In comparison to the common law the Act allows a more nuanced approach to the admission of hearsay evidence. As the Supreme Court of Appeal stated in *Makhathini v Road Accident Fund*, in the application of the Act in the context of a civil case, the Act requires the court to take a contextual approach. The court said that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interests of justice justify its reception. A court making a determination whether it is in the interests of justice to admit hearsay evidence must—

"have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.""[8] (Citations omitted)

[40] In this case, the Commissioner made no effort to take into account that arbitration proceedings are not akin to court proceedings, and there is a certain measure of flexibility enjoyed by commissioners when dealing with hearsay evidence, and in the general conduct of proceedings. The Commissioner equally paid scant regard to the nature of the evidence regarded as hearsay, the purpose for which the evidence was tendered; its probative value, and the reason why Booysen, other than conducting his own investigations from the material available to him, had relied on various reports in compiling the Audit report.

[41] Equally crucial was the need to assess the so-called hearsay evidence against other evidence proffered by the applicant's witnesses as against Coetzer, and to the extent that such evidence was uncontroverted. In this regard, it was common cause that the engine 4 of the Aircraft was attended to by Coetzer, Moyo and Minords, and that the Aircraft was grounded in JFK at considerable expense to the applicant and inconvenience to SAA passengers who were left stranded. Du Plessis and his team were despatched to JFK to assess and repair the Aircraft, and had received a report from the Engineer from Virgin Atlantic Airlines who was the first to inspect the damage, and also

[8] 2008 (3) SA 608 (CC) ; 2008 (2) SACR 76 (CC) 2008 (5) BCLR 451 (CC) at para 35

handed over an intact blanking cover recovered from inside the cowl of Engine 4, which he brought back to South Africa.

[42] The Commissioner's conclusions that Booysen's evidence ought to be rejected simply on the basis that *'he did not observe any of the incident described by the respondent (SAA Technical) leading to the damage of the Aircraft with his own senses but relied on documents written by other people'*, borders on the ludicrous. They are not conclusions that could have been reached by a Commissioner properly applying his mind to the totality of the evidence, and the provisions of section 3(1) of the Law of Evidence Amendment Act. Evidence cannot be regarded as inadmissible hearsay simply on the basis that the witness did not observe an incident with his or her own senses. That is not the test when applying the LEAA.

[43] The charges/allegations against Coetzer pertained to gross negligence. The requirements for a dismissal based on negligence are that the employee failed to exercise the standard of care that can reasonably be expected of him through conduct that caused loss or potential loss to the employer[9]. In *Ford Motor Company (Pty) Ltd v CCMA,*[10] Van Niekerk J held that there can be no misconduct in the form of gross negligence without negligence also being present. Gross negligence inevitably has the same core content as the concept of 'ordinary' negligence; in other words, the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person*.*

[44] In this case, insofar as the totality of the evidence was concerned, once it was accepted that all associated problems experienced by the Aircraft emanated from Engine 4, which was supposed to have been attended to by Coetzer and others, I find difficulties in appreciating how Coetzer can in good conscience, allege that he was only responsible for one part of the installation and inspection and not the other. Coetzer in my view, cannot be absolved from his own negligence and that of the other individuals, when they were collectively

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[9] *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) at para 19

[10] *Ford Motor Company (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (PR232/2014) [2015] ZALCPE 44 (16 October 2015) at para 16

responsible for the maintenance and inspection of Engine 4, and further in circumstances where he had signed off for work, when it was not in fact done.

[45] To the extent that conduct in question had led to the consequences in question, it is clear that the allegations of misconduct were proven. Clearly Coetzer did not live up to the standard of a reasonable employee when attending to Engine 4 of the Aircraft, and the uncontroverted evidence was that the applicant had suffered a loss.

[46] My earlier conclusions in regards to the Commissioner's mechanical application of the provisions of Item 7 of Schedule 8 are equally apposite to the extent that he had dealt with the issues surrounding allegations of inconsistent application of discipline. Item 7 (b) of Schedule 8 is specific. As it was correctly submitted on behalf of the applicant, it is only if there is a finding that a standard or rule was contravened, that there is a need to look at other considerations such as inconsistent application of the rule or standard, or appropriateness of sanction for contravention of the rule or standard.

[47] In this case, the Commissioner, for reasons not supported by the evidence, had found that Coetzer had not contravened any workplace rule. Ordinarily, the question of inconsistent application of discipline would not arise, thus bringing the matter to an end. I agree with the submissions made on behalf of Coetzer that the fact that the Commissioner dealt with the issue of inconsistency does not necessarily on its own make the award reviewable. The point to be made however is that for the Commissioner to have ventured into whether there was inconsistent application of the rule or discipline when he had found that no rules were breached, is a misconception and misapplication of the provisions of Item 7 of Schedule 8.

[48] Even if the Commissioner felt compelled to deal with the issue of inconsistency, again, there was no basis for any conclusions to be reached that the argument was sustainable. Coetzer, Moyo and Minords were dismissed for the same offence as the circumstances leading to the incident in question were common to all of them. The mere fact that other people in the past that were mentioned by Coetzer and de Abreau were issued with lesser

sanctions for the same or similar offence is not the overriding criteria in determining whether discipline was consistently applied.

[49] An inconsistency claim cannot simply be thrown at commissioners to attain absolution from misconduct, especially in cases of gross negligence as in this case. This point was stressed in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11] where the Labour Appeal Court held that;

> 'This Court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly.'

[50] It is my view that even if an employee is able to identify the persons who were treated differently and the basis upon which they ought not to have been treated differently, the enquiry does not end at that point, in that there are other factors to be considered, including but not limited to personal circumstances of individual employees, their positions and responsibilities at the workplace, the overall effect of the misconduct in question, the employees' posture after the misconduct in question, including at internal disciplinary hearings and arbitration proceedings.

[51] In this case, I did not for any moment, understand Coetzer to have been contrite given the costs and prejudice suffered as a result of his and others' negligence. Mercifully nothing more disastrous had happened to the Aircraft whilst it was airborne between ORTIA, Cape Town and JFK. The conduct in question clearly had implications for the applicant's operations. In all of these, Coetzer showed no willingness to take responsibility for his actions, and instead, sought to blame an engineer for not doing what he (Coetzer) ought to

[11] (2017) 38 ILJ 860 (LAC) at para 31

have done in the first place in ensuring that Engine 4 of the Aircraft was free of defects. Throughout the disciplinary enquiry and arbitration hearings, his posture, and as again reflected in his pleadings and submissions made on his behalf, was to blame everyone but himself. In these circumstances, I am in agreement with the applicant's view that Coetzer has in the light of his misconduct, his lack of appreciation of the consequences of his conduct, and lack of contrition, irretrievably broken any trust or working relationship with the applicant. He cannot be entrusted with the proper maintenance and safety of aircrafts, which function is core to the applicant's operations.

[52] In summary, Coetzer failed in his duties and responsibilities to exercise the standard of care that was reasonably be expected of him in regards to the service and maintenance of Engine 4 of the Aircraft. It was common cause that the applicant suffered extreme prejudice (financially) as a consequence of his conduct. The Commissioner's award therefore constituted a gross irregularity, in that he failed to appreciate, identify and understand the essence of the dispute before him and what he was required to determine. The Commissioner made conclusions without deductive reasoning, which conduct in the end, made his decision one that a reasonable decision make could not have made in the light of the material before him.

[53] In the light of the conclusions reached in this judgment, it is my view that no purpose would be served by remitting this matter back to the CCMA, particularly since all the material evidence presented at the arbitration proceedings over a period of six days is before the Court. To this end, the Court is in a position to substitute the Commissioner's award. I have further had regard to the requirements of law and fairness, and it is my view that a costs order is not warranted in this case.

[54] Accordingly, the following order is made;

<u>Order:</u>

1. The arbitration award issued by the Second Respondent under case number GAEK 7989-13 is reviewed, set aside and substituted with an order that;

‘The dismissal of Martin C Coetzer on 6 August 2013 by South African Airways Technical Soc Limited was procedurally and substantively fair.’

2. There is no order as to costs

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. M Mkhatshwa, instructed by Cliffe Dekker Hofmeyr INC
For the Third and Fourth Respondents:	Mr. H Pretorius of Johannette Rheeder Incorporated Attorneys