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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR581/20

In the matter between:

SA AIRLINK (PTY) LTD

Applicant

and

VUSUMUZI EUGENE MOYO N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

HANLI VAN RENSBURG

Third Respondent

Heard: 19 August 2025

Delivered: 29 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 29 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application for re-enrollment of its review application, as an application for condonation of the late delivery of the review application, and as an application to review the arbitration award issued by the first respondent. The court will first address the application for re-enrollment, then the application for condonation and thereafter the review application.

Re-enrollment

[2] The review application was struck from the roll on 1 March 2022 by Moshwana J due to the non-appearance by the applicant. Mr. Posthuma, the applicant's attorney of record, deposed to an affidavit in support of the re-enrollment application. He states that he was unaware that the matter had been set down for 1 March 2022. He only came to realise that the matter had been set down when counsel for the third respondent contacted him on the morning of the 1st of March asking about his whereabouts. Mr. Posthuma explained to counsel that his offices were unaware that the matter had been set down and he requested an indulgence that the matter stand down to another day in the week as he was in Vanderbijlpark at the time. Counsel declined to grant the indulgence, and the matter was subsequently struck from the roll.

[3] Mr. Postuma launched an investigation why his office was not made aware of the set down. Upon retrieval of the court file, it became apparent that the notice of set down was emailed on 9 December 2021 to the email address [s.\[...\]](#) and not faxed as is normally the case. His offices use a fax to email system, and all faxes are received in this email address. This email address was manned by a candidate attorney at that time, Khutso Makgoko. He asked her whether she received the email, and she could not recall that she did. She went back to the emails and faxes received on the 9th of December 2021 and could not find a trace of the set down.

[4] An IT support agent was requested to assist to determine whether the set down was received. After doing a scan of the email address it was determined that the email containing the notice of set down was blocked by Mimecast, which is software designed to protect Labournet's IT systems from suspicious emails. Confirmatory affidavits of Makgoko and the IT agent, Magaele, were attached to the founding affidavit. Proof of the email having been directly routed to the Junk email folder was also attached. Makgoko advised that she rarely if ever opens the Junk email folder.

[5] This court is of the view that the failure by Mr. Postuma to appear on 1 March 2022 was not willful and that a reasonable explanation was provided for his non-attendance. However, the court notes that this administrative issue led to a substantial delay in the speedy resolution of the review proceedings and that this substantial delay of over three years could have been avoided. Similarly, a substantial delay could have been avoided by the third respondent's counsel agreeing to stand the matter down and seeking an agreement of wasted costs. Be that as it may, the court must accept the explanation as a reasonable one and, as such, grants the application for the review application to be re-enrolled.

Condonation application

[6] The applicant became aware of the arbitration award on 10 March 2020. The review application had to be delivered on or before 21 April 2020. It was only delivered

on 21 May 2020, rendering it some 30 days late. The deponent to the founding affidavit in support of the application for condonation states that she instructed the applicant's attorney of record to apply for a review application soon after receiving it. However, on 27 March 2020 a national lockdown was implemented under the state of disaster declared due to the Covid-19 epidemic. The initial period of the lockdown would have been for three weeks, but this was subsequently extended to five weeks ending the 1st of May 2020.

[7] The lockdown, however, continued under level 4 and as the deponent was not an essential service employee, she was confined to her residence. She states that there was confusion whether she was permitted to leave her residence to have the affidavit commissioned. She was however advised on or about 13 May 2020 that it may be permissible, and she had the affidavit deposed on the same day. The attorneys were only able to collect the affidavit from her on 18 May 2020 whereafter the review application was delivered on 21 May 2020.

[8] In respect of prospects of success, the deponent states that the applicant has excellent prospects of success, as appears from the applicant's review application that was delivered. The affidavits in support of the review application were attached to the deponent's founding affidavit. In respect of prejudice, the deponent states that the delay is a relatively short delay and that there is a very good explanation for the delay, coupled with the excellent prospects of success. She submits that it would be manifestly unfair to the applicant to not allow them to proceed with the review application. The prejudice to the third respondent is substantially less, if anything. The delay is also not of the nature or so material that it would cause inconvenience to the court or prejudice to the conduct of the application. The prejudice resulting from the delay to the third respondent can be fully cured by interest running on the compensation award and a possible cost order.

[9] The court must again note that the applicant, by delivering the review application outside of the six-week period, did indeed cause the third respondent and this court the

inconvenience of having to address the application for condonation. But for the late delivery of the review application, the court would only have been required to address the merits of the review application. The court must stress the importance of time frames provided in the Labour Relations Act¹ (LRA) and the rules of this court, which are to ensure the speedy and effective resolution of labour disputes. This court, having considered the applicant's explanation for the delay, is satisfied that the requirement that good cause must be shown has been met. The degree of lateness is not severe, a reasonable explanation was given for the lateness, and the prejudice to the third respondent is minimal. In respect of prospects of success, this court is satisfied that the applicant has good prospects of success. The application for condonation is therefore granted.

Background to review application

[10] The third respondent was employed as a maintenance planner. She stood accused of misconduct and more specifically allegations of dishonesty, unauthorised removal of company property and theft of an aircraft part. The applicant operates a fleet of commercial aircraft and was in the process of phasing out three of its aircraft in a project called a "parting out" project, which essentially means that an aircraft is dismantled for parts. According to the applicant, the purpose of this project was to retrieve parts from the aircraft for further operational or commercial work and, in the case of one of the aircraft, to be converted into a cabin crew trainer. According to the third respondent, the point of the exercise was not only to retrieve parts but also to scrap parts that are no longer to be used. Further, according to the third respondent, the scrapped parts were retained by Nevergreen Aviation (Nevergreen) and became its property in terms of an agreement between it and the applicant. The court will address this contradiction hereunder when the respective parties' evidence is analysed.

[11] The parties agree that the type of aircraft was RJ85's and their registration numbers were ZS-SSK, ZS-SSH and ZS-ASW respectively. Although the third

¹ Act 66 of 1995

respondent was a maintenance planner, she requested to be the project overseer of the parting out project on an ad hoc basis. The parting out project was outsourced to Nevergreen and was regulated by a service level agreement. According to the third respondent, although she agrees that there was a service level agreement, she has no knowledge of the contents thereof and it was never tendered as evidence. According to the applicant, the service level agreement was to take apart the aircraft and to return the parts to the applicant.

[12] The parts that are returned to the applicant will be inventoried to determine whether it is usable for spare parts. This would be done by the stores manager and technical experts from the applicant. The service level agreement contains a so-called 'wish list' of parts which the applicant sought to retrieve from the aircraft. The third respondent confirms that she is aware of the term 'wish list' and that it will contain a list of all parts that the applicant wished to retrieve from an aircraft after a parting out process. The third respondent, however, denies that one of the parts that the applicant wished to retrieve was a part called flap track, which is the part of an aircraft that controls a flap's upward and downward motion. According to the third respondent, she testified that she cancelled the return of the flap tracks from Nevergreen following a joint decision made by management at the applicant.

[13] The nexus of the charges against the third respondent stems from an email that the third respondent's mother sent to the human resources manager regarding what she perceived to be possible wrongdoing by the third respondent. The email was in turn sent to Heinrich Maritz (Maritz), the security manager of the applicant. Maritz visited the home of the third respondent's mother in Tiegerpoort in Pretoria. After a discussion with the third respondent's mother, he decided that what she was claiming was unsubstantiated and he took no further action. The mother later sent Maritz a message with a photograph of a carpet appearing to belong to applicant's aircraft. He drove to her house again and collected the carpet. This caused Maritz to launch an investigation into the third respondent.

[14] The third respondent's emails were accessed, and Maritz came across a document the third respondent signed wherein she confirmed herself to be the legal owner of an aircraft flap-track that she appeared to be selling to a scrap dealer, and wherein she advised that they could retrieve it from her residence. Also found was proof of payment of an amount for the flap track into the bank account of the third respondent's husband. Based on this evidence, the third respondent was charged with misconduct. She was additionally charged with dishonesty. The charge of dishonesty related to a meeting she had with her superior, Neil Wilson (Wilson), and another contractor of the applicant, Mark Shelly (Shelly). Wilson and Shelly questioned the third respondent whether she sent an aircraft brake unit to a third party service provider. She told them that she did not, although this is disputed by the third respondent. The third respondent's version was that she cannot remember whether she sent it. An email from the third respondent contradicted that denial. The email clearly shows that she did instruct that the brake unit be sent.

[15] The third respondent was charged and consequently summoned to a disciplinary hearing which was chaired by an independent chairperson. She was found guilty of all the charges, and her dismissal was recommended. Dissatisfied with the dismissal, the third respondent referred an unfair dismissal dispute to the second respondent which culminated in the impugned award.

Arbitration award

[16] The first respondent, after surveying the evidence and argument, finds in respect of the first charge, i.e., the charge dealing with dishonesty related to the brake unit, that it is possible that the third respondent could have been confused initially about whether she gave the instruction or not, as this was a few months after she had been taken off the project. As a result, once she was confronted with the incriminating evidence in an email she compiled, she accepted that it was hers. She also suffered some psychological problems causing panic attacks. The first respondent finds the third respondent's testimony credible, reliable and probable. In respect to the seriousness of

the matter, the first respondent finds that the applicant's witnesses conceded that the applicant suffered no losses for the brakes sent to Mistral and that the third respondent had nothing to gain by sending the brakes to Mistral. The first respondent further finds that the third respondent's role and tasks were not clearly defined by a job description thus miscommunication such as this was bound to prevail. The applicant could have dealt with the matter by taking the third respondent for training, which was never done, and issuing additional instructions to avoid repetition. The principles of progressive discipline could also have been applied.

[17] In respect of charge 2, i.e., the charge related to the unauthorised removal of the carpet, the first respondent finds that the stolen carpet was not found in the third respondent's property nor in her possession. Statements accredited to the third respondent's mother were hearsay evidence, as she was not called to testify. He also finds that the mother is not credible, as there was clear animosity between her and the third respondent and that he could not attach any weight to the mother's evidence. The first respondent finds that he does not admit the hearsay evidence. He also finds that Maritz, the investigator, conceded that he had no evidence that the third respondent stole the carpet from the applicant.

[18] In respect of the third charge, the first respondent finds that Krsmanovic, the owner of Nevergreen, confirmed that he gave permission to the third respondent's husband to sell the flap tracks. The first respondent accepts the evidence that the scrap metal, referring to the flap track, belonged to Nevergreen as scrap removed from the wing of the aircraft. The first respondent refers to the applicant's challenge regarding this evidence on contractual terms, but finds the argument misguided. The first respondent finds that it essentially becomes a contractual dispute that would have its own platform and recourse for the applicant. What remained vital for the labour dispute is that it was not disputed that Krsmanovic took responsibility for the flap tracks and subsequently gave permission to the third respondent's husband to sell them.

Review Test

[19] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,² the Court held that “the reasonableness standard should now suffuse section 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 *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Court applied this reasonableness consideration as follows:

‘... 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 aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[20] This test has thus been applied as 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, for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[21] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁵ 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

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

³ *Id* at para 110.

⁴ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

⁵ *Fidelity* at para 102.

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 by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

[22] The court will now proceed to consider the review application by the applicant against the above principles and the test applicable to review applications.

Grounds of review

[23] The applicant challenges the first respondent's findings on the theft of the flap track as inexplicable in that he completely ignored the applicant's evidence and made his finding solely on the evidence of Krsmanovic, the owner of Nevergreen. The applicant submits that Krsmanovic's evidence was so improbable that it could not be believed. The evidence given by Krsmanovic that, after the wings of an aircraft are removed it becomes the property of Nevergreen, was never put to the applicant's witnesses to respond to. It was an untested version that the first respondent just blindly accepted even though the untested nature of the evidence was pointed out to the first respondent. The first respondent did not evaluate the applicant's evidence at all. Wilson, an executive of the applicant, testified that a part will only be scrapped after being assessed by the applicant's technical experts and that Wilson was the final signatory of all scrapped parts. This version was never disputed, and the contradictory version was never put to him. Wilson's version, therefore, by law, should have been accepted.

[24] The first respondent furthermore ignored the service level agreement between the applicant and Nevergreen which included a 'wish list'. The wish list is what the applicant wanted to retrieve from the aircraft. The flap tracks were specifically mentioned in the wish list. Krsmanovic's evidence was at best improbable and at worst

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

an outright lie. The evidence was further that it would make no economic sense for two entire wings with its value to just be handed over to Nevergreen, which evidence the first respondent ignored. Such an arrangement was contradictory to the documentary evidence and common sense.

[25] The first respondent also ignored the evidence that the third respondent identified herself as the legal owner of the flap track. The third respondent could not furnish any reasonable explanation why she made this statement other than stating that she assisted her husband who was the rightful owner. It furthermore contradicts her untested defense that Nevergreen became the owners of the wings and whatever parts were on the wings. The first respondent ignored the evidence that the third respondent cancelled the removal of the flap tracks from the aircraft ZS-ASW. This, in the context of all the other evidence, was a smoking gun. The third respondent cancelled the movement of the flap tracks to the applicant, identified herself as the owner of it, and had the part sold for a fraction of its value. The only reasonable conclusion that could have been reached on the objective evidence was that the third respondent was directly involved in the theft of the flap track.

[26] The first respondent further failed to consider the evidence regarding the commercial value of the flap track. The evidence led was that the monetary value of the part was some 10 000 pound sterling used, and almost 50 000 pound sterling new. He also ignored that it is highly improbable that such a part would be in the possession of a private person or that the part would be sold for the amount that it was. This evidence was not disputed. The finding of the first respondent that the third respondent was not responsible for the theft of the flap track is therefore so unreasonable that no other decision-maker could have reached it.

[27] The applicant submits that the first respondent's findings regarding the removal of the carpet were similarly unreasonable. The first respondent dismissed the applicant's evidence out of hand that it was hearsay evidence when it was not. Reference is made to Maritz's evidence as to the circumstances under which he

obtained the carpet from the third respondent's mother. This was not hearsay evidence but direct evidence from Maritz that he obtained the carpet from the third respondent's mother. Maritz's evidence was not disputed in this regard. Under these circumstances there was a shifting onus onto the third respondent to present some version in rebuttal. She just offered a bare denial.

[28] The first respondent ignored the fact that the only link the mother had with the applicant is through the third respondent. The fact that the mother lived with the third respondent during the parting out period completely went over the first respondent's head. The only way in which the mother could have obtained the carpet is by the third respondent removing it from the premises. Therefore, the finding of the first respondent on the issue of the unauthorised removal charge is completely unreasonable and could not have been made by another reasonable decision maker.

[29] Regarding the charge of dishonesty that the third respondent lied in a meeting about sending brake parts to a third party to be serviced, there could also not reasonably have been made a finding in favour of the third respondent. Wilson's evidence was that the parting out project was done by Nevergreen and that this project will consist of taking apart the aircraft and handing the parts back to the applicant. This evidence was not disputed and was in fact confirmed by the third respondent in her evidence. There would therefore be no conceivable reason for the third respondent to send the brake units to an unrelated third party in the first place.

[30] The third respondent's evidence was that she was only overseeing the parting out and return of aircraft parts to the applicant. It is therefore highly unlikely that she would *bona fide* send aircraft parts to a third party service provider which would incur costs to the applicant. Furthermore, if her version is true that she stated to Wilson and Shelly that she could not remember, a reasonable person would have tried to recall and investigate whether she did that and report back to Wilson at a later stage. The fact that she did not follow up supports the applicant's version that she denied sending the brake units there during the meeting. Finally, on this point, the third respondent had a final

written warning for making unauthorised budget expenditures. A few months after this she was confronted by Wilson and Shelly on a subject which could be argued to be related to the warning. This, and her general participation in theft of the aircraft parts would have caused her to be dishonest for her own preservation. This evidence was before the first respondent and was argued, but he completely ignored it.

Evaluation of the grounds of review

[31] This court is required to determine whether the first respondent's findings in respect of the three charges are findings that a reasonable decision-maker, faced with the same evidence, could not reach. To do so, this court must consider the reasons advanced by the first respondent in respect of his findings relating to each charge and compare his findings to the evidence presented during the arbitration proceedings. If the reasons advanced by the first respondent are based on the evidence, and the first respondent asked himself the right questions in relation to each charge, this court is likely to conclude that the applicant has failed to make out a case for this court to interfere with the first respondent's findings.

[32] However, if the first respondent *inter alia* failed to ignore crucial evidence in arriving at his findings, or if he rejected evidence as hearsay evidence when same was not hearsay evidence, this court will be required to consider all the evidence and decide whether the outcome that the first respondent arrived at was a reasonable outcome despite the failures by the first respondent and even if it is based on reasons not addressed by the first respondent.

[33] It is clear to the court that this is a matter where the first respondent ought to have been guided by the case law regarding the assessment of evidence and, when there are two contradictory versions, to determine which party's version is more probable. In other words, the first respondent was required to determine the third respondent's guilt in respect of each charge by applying the onus of proof applicable in labour litigation, i.e., to prove an allegation on a balance of probabilities. It is trite how

this onus of proof is to be applied, but because of the first respondent's failure to properly apply the onus in arriving at his conclusions, it is necessary for this court to very briefly address the onus to prove, on a balance of probabilities, before delving into the first respondent's findings.

[34] It is trite that the employer bears the onus to prove its allegations against an employee on a balance of probabilities. In some cases, it is not difficult to prove allegations against an employee, as there is direct evidence of the employee having committed misconduct. A simple example is where an employee is seen on video footage stealing from an employer. Another example is where an employee arrives late for work, as supported by the employer's biometric systems.

[35] However, in other cases such as the matter before this court, the evidence around alleged misconduct of an employee comes down to the word of one person against that of another; or where there are several possible explanations or versions around the alleged misconduct. In the absence of direct evidence linking an employee to the alleged misconduct, a decision-maker must determine whether the employer discharged the onus of proving its allegations on a balance of probabilities. Defendants often think that, to rebut an allegation, all that needs to be done is to poke holes in the version of an employer's witnesses to create doubt or offer other possibilities but then fails to present an alternative probable version of their own.

[36] The Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd v Martell ET CIE*⁷ referred to the technique employed by courts to resolve factual disputes as follows:

"... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its

⁷ 2003 (1) SA 11 (SCA) at para 5.

impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".

[37] This court will assess the probabilities as to the two conflicting versions between the parties before the first respondent in accordance with the same technique. Furthermore, the decision-maker must evaluate all of the evidence presented to determine a matter and then, based on the evidence, determine whose version is more probable or more likely. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*⁸, the Labour Appeal Court held that a "reviewing court must ascertain whether the commissioner considered the principle issue before him/her, evaluated the facts

⁸ (2014) 35 ILJ 943 (LAC) at para 16.

presented at the hearing and came to a reasonable conclusion.” In *Herholdt v Nedbank Ltd*⁹ the following as stated:

“For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequences if their effect is to render the outcome unreasonable.”

[38] Lord Hoffman, in *Re B (Children)*¹⁰, employing arithmetic analogy, characterised the burden of proof in the following terms:

“If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened, or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

[39] The first issue to be determined by this court is whether the first respondent committed any irregularities regarding the finding he arrived at in respect of the first charge, i.e., dishonesty related to the brake units sent to Mistral, and whether the first respondent’s decision in this regard is one that a reasonable decision-maker could not reach.

⁹ 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA).

¹⁰ [2008] UKHL 35 at para 2.

[40] The first respondent, according to his reasoning in the award, makes no reference to various critical parts of the evidence placed before him by the applicant. Wilson testified that the parting out project was to be done by Nevergreen and that this project will solely consist of taking apart the aircraft and handing the parts back to the applicant. If this evidence was considered, and accepted, then it will make no sense why the third respondent would have sent the brake unit to a third-party service provider. The third respondent's duty was to oversee the parting out and return of aircraft parts to the applicant. If this evidence is accepted, and there is no reason why it should not have been accepted as agreed by the third respondent during her evidence, it makes absolutely no sense why the third respondent would *bona fide* sent a brake unit to a third-party service provider. This is more so given that, by sending the brake unit to Mistral, an expense would have been incurred for the applicant for which no authorisation was sought.

[41] What is strikingly missing from the third respondent's evidence is why she sent the brake unit to the third-party service provider. Since it was established, although initially denied that she did send the brake unit, the question that the first respondent had to ask himself is why she sent the brake unit without seeing permission to do so and without informing Wilson, at the time, that she did so. What were her intentions of sending the brake unit and why was this not reported to the applicant? From the third respondent's version, the reason could not be ascertained. The third respondent's response, when cross-examined on why she sent the brakes given that her duty was to oversee the parting out and return of spares to the applicant, is that there is nothing that prohibited her from doing so. This response is not sufficient to explain her actions, as if she was in doubt whether she could do so, she could and should have asked Wilson. On the third respondent's own version, she regularly approached Wilson for advice and guidance yet, when it came to the brake unit, she failed to do so and simply assumed that sending the brake unit to Mistral was within her responsibilities.

[42] The aforesaid is a prelude to the first charge relating to dishonesty. The applicant called two witnesses, and they confirmed that the third respondent denied that she sent

the brake unit to Mistral. The first respondent does not state why he rejected their evidence in favour of the third respondent's version. He does not make a credibility finding, and he fails to properly consider the evidence presented in support of the charge. The first respondent fails to consider that the third respondent, after being asked about the brake unit and on her version that she cannot remember, never went to check her records to confirm whether she did so or not. The third respondent waited until she was confronted with the proof that she sent the brake unit to Mistral.

[43] The third respondent's failure to follow up on whether she sent the brake unit makes the version presented by the applicant's witnesses more probable than the third respondent's version. If her response was that she cannot remember, she would have followed up and she would have reverted to Wilson and Shelly to confirm that she did in fact send the brake unit to Mistral. There is nothing in the transcribed record showing that Wilson and Shelly had any reason to lie about the third respondent's response when asked about the brake unit. To reject their evidence, a finding ought to have been made that their version was not credible for some reason. No such finding was made, and their evidence was simply brushed aside. The probabilities, especially given the third respondent's failure to follow up on the brake unit sent and doing nothing until confronted with confirmation that she did send it to Mistral, are overwhelmingly in favour of the versions presented by Wilson and Shelly and this court accepts their version for purposes of the review application.

[44] The first respondent's conclusion regarding the first charge of dishonesty is one that a reasonable decision-maker could not reach. If he considered all the evidence, and if he properly weighed the evidence, he would have arrived at the conclusion that the applicant discharged the onus to prove, on a balance of probabilities, that the third respondent was dishonest when she initially denied that she sent the brake unit to Mistral.

[45] The second issue for this court to determine is whether the first respondent's finding and conclusion in relation to the second charge, i.e., the charge related to the

unauthorised removal of the carpet, is one that a reasonable decision-maker could not reach. This court took into consideration the first respondent's reasoning in support of his finding regarding this charge and finds that the reasons advanced to support the first respondent's conclusion contains a misunderstanding of the test that he ought to apply, as well as a misunderstanding on the law of evidence.

[46] The first respondent's finding that the evidence led by the applicant in support of the second charge amounts to hearsay evidence is factually incorrect. The applicant did not rely on the evidence of the mother in support of the charge at all. They relied on Maritz's evidence, who testified that he was contacted by the mother, and that he went to fetch the carpet from the mother's house. This evidence was not hearsay evidence, and it was never disputed by the third respondent.

[47] Instead of rejecting the evidence as hearsay evidence, the first respondent was required to determine how the carpet ended up in possession of the mother. He failed to do so and, instead, simply rejected the evidence as hearsay evidence. Had he asked the question, he would have established the common cause facts, and he would then have weighed the applicant's conclusions drawn from the common cause or undisputed facts against the bare denial offered by the third respondent. There is no dispute that the carpet is an asset of the applicant and that it is in fact a carpet from one of the three planes that were parted out, which process was overseen by the third respondent. It is common cause that the mother lived with the third respondent during the time that the aircraft was parted out. It was further the third respondent's version that the mother was asked to leave her premises and that the mother did so taking her belongings with her.

[48] How then did the carpet end up in the mother's possession? This question was never asked by the first respondent. Is it possible or probable that the mother had access to the premises where the parting out process took place and then to remove the carpet? This is extremely improbable based on the evidence that was presented. Is it possible that Nevergreen gave the carpet to the mother? This is improbable, as if this was the case the applicant would have presented such testimony. Krsmanovic, from

Nevergreen, was called as a witness and he was not asked any questions regarding the carpet. The third respondent's husband was available to testify, but the third respondent did not see the need to call him as a witness. It is therefore highly improbable that the mother obtained the carpet from Nevergreen.

[49] The third respondent's bare denial to this charge is not sufficient to reject the applicant's conclusion that the only link between the applicant and the mother was the third respondent, who was tasked to oversee the parting out process conducted by Nevergreen. The only probable explanation as to how the carpet ended up in the mother's house is that the carpet must have been taken or removed by the third respondent and taken to her house.

[50] This link between the mother and the third respondent is sufficient to conclude that the applicant has discharged the onus to prove, on a balance of probabilities, that the third respondent was responsible for removing the carpet. The evidence about carpets being placed in a bin is irrelevant to the enquiry. In the absence of the third respondent having provided another probable or likely explanation as to how her mother came to be in possession of the carpet, the applicant's version ought to have been accepted.

[51] The third issue is whether the first respondent's findings on the third charge relating to the selling of the flap track for scrap metal is a conclusion that a reasonable decision-maker could not reach. Once again, the first respondent completely misunderstood the nature of the enquiry regarding this charge. The first respondent failed to consider the applicant's evidence and disposed of this charge by finding that the issue of the flap track being sold for scrap is a contractual dispute between the applicant and Nevergreen. In this regard, the first respondent's finding is completely irregular. This was not the issue that he was required to determine. The first respondent's acceptance of Krsmanovic's evidence as sufficient to conclude that it was a contractual dispute between Nevergreen and the applicant was irregular, as Krsmanovic's evidence was not satisfactory at all.

[52] The third respondent was dismissed for selling the flap track, and the first respondent was required to determine the role she played in the selling thereof. Whether it is a contractual dispute between the applicant and Nevergreen simply because Krsmanovic claimed that the flap track was owned by Nevergreen is irrelevant. The potential false evidence by someone cannot now change the playing field from allegations of dishonesty against an employee to a contractual dispute between the applicant and Nevergreen.

[53] Krsmanovic's evidence ought to have been approached with extreme caution, especially since the third respondent's husband works for Nevergreen. Krsmanovic was firstly unable to show during his evidence where in the agreement for the parting out of the aircraft provision was made that Nevergreen becomes the owner of scrap metal. His response was that the contract does not state that Nevergreen does not become the owner. This is not a satisfactory response. The relationship between the applicant and Nevergreen was guided by the agreement and the mere fact that the agreement does not state that Nevergreen does not become the owner does not mean that they became the owner. There must be a proper basis for such a conclusion, which was clearly absent. And in any event, Krsmanovic's version was never put to Wilson when he testified, and Wilson's evidence should have been accepted. Krsmanovic's evidence that, once the wings are cut off, everything on the wings, including the flap track, becomes scrap metal and belongs to Nevergreen cannot be accepted. This evidence was clearly false, as demonstrated by the fact that the flap tracks are specifically mentioned on the wish list. How then can flap tracks, contained on the wish list, become property of Nevergreen simply because of the wings having been cut off? This is incomprehensible and not supported by the evidence presented, such as the wish list. The mere cutting off the wings therefore cannot lead to the conclusion that everything on the wing is scrap metal. It is, in any event, entirely improbable that flap tracks, which could potentially be reused, as indicated on the wish list, will be regarded as scrap metal simply because Nevergreen cut off the wings.

[54] Krsmanovic's evidence that the engine burned and therefore that the flap track cannot be used is hard to believe, especially since this was never put to Wilson. In any event, it is not for Nevergreen to determine what can and what cannot be used as parts. This was for people with the necessary expertise, working for the applicant, to decide. Insofar as Krsmanovic referred to a spreadsheet where the return of the flap track was cancelled, he failed to refer specifically to the spreadsheet during his evidence. What he could not, however, dispute is that the flap tracks were specifically included on the wish list as items to be returned to the applicant.

[55] It further boggles the mind that, if the flap track was regarded as scrap metal, on Nevergreen's assessment and not on the applicant's assessment, why the third respondent sent an email wherein she claimed to be the lawful owner of the flap track when she communicated with Mr. T, the scrap metal company. If Nevergreen became the owner, as Krsmanovic wanted the first respondent to believe, then Nevergreen would have been required to correspond with Mr. T to confirm that they are the lawful owner of the flap track. The only probable reason why this was not done, and why the third respondent claimed ownership, is very clear. Nevergreen never obtained ownership of the flap track in question, hence the need for the third respondent, as an employee of the applicant, having to claim ownership.

[56] A further very concerning aspect of Krsmanovic's evidence is that, when asked whether the so-called scrap metal, referring to the flap track, given to the third respondent's husband came off ZS-ASW he was unable to confirm or deny it. This is surprising given that his evidence presented was based on the wings of ZS-ASW having been cut off and upon doing so, Nevergreen obtained ownership. When one considers Krsmanovic's evidence, and compare his evidence to that of Wilson, the only reasonable conclusion to be drawn is that Krsmanovic was in fact not an honest witness and Wilson's evidence should have been preferred to that of Krsmanovic. Krsmanovic's evidence is inherently unlikely especially given that his version was never put to Wilson. There is nothing on the record suggesting any reason why Wilson's evidence should not have been accepted. On the other hand, Krsmanovic's evidence should have been

rejected insofar as he claimed ownership of the flap track, as such a version is simply incomprehensible and not supported by the undisputed facts.

[57] The court already referred to the email sent by the third respondent to Mr. T. She failed to provide any acceptable explanation for claiming ownership of the flap track, which her and her husband were busy stripping at their house. As stated already, the most probable reason why she did so is because Nevergreen was never the owner of the flap track and Mr. T required someone to confirm that the flap track is no longer the property of the applicant. This email is sufficient proof that the third respondent dishonestly claimed ownership of property belonging to the applicant, and dishonestly sold the flap track, after dismantling it at her house, for her and her husband's own financial gains.

[58] Insofar as the third respondent cancelled the return of the flap track to the applicant is concerned, her evidence was that this was done in consultation. No corroborating evidence was presented in this regard. The flap track was on the wish list of assets to be returned. It was not disputed when Wilson testified that he was the person with ultimate authority to write parts off as scrap after the part was assessed by technical person with the necessary skills and expertise. Wilson never signed off on the flap track being regarded as scrap metal.

[59] The third respondent's version that the flap track was damaged was never corroborated. Her version of the flap track that became the property of Nevergreen must be rejected given that she cancelled the return of the flap track to the applicant and then sent the email to Mr. T claiming ownership of the flap track.

[60] When one considers all the evidence, the only reasonable conclusion that one can arrive at in relation to the third charge is that the third respondent is guilty of the charge and that the applicant discharged the onus of proving, on a balance of probabilities, that the third respondent unlawfully sold the flap track as scrap metal and

that she and her husband received monies for their own account at the expense of the applicant.

[61] In conclusion, the first respondent failed to properly consider the evidence in respect of all three charges and his decision, in respect of all three charges, is one that a reasonable decision-maker could not reach. The award must therefore be reviewed and set aside in its entirety. This court further finds that the third respondent's conduct was dishonest and that her actions destroyed the trust relationship between her and the applicant. It is simply inconceivable that an employer can be expected to continue in an employment relationship with an employee who has engaged in such acts. There are no mitigating factors that this court could find that would require a sanction any less than that of summary dismissal.

Costs

[62] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹¹ when it comes to the issue of costs in employment disputes. This court is of the view that, since the third respondent defended an award that was issued in her favour, it is not in the interest of law and fairness that the third respondent be ordered to pay the applicant's costs.

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

Order

1. The application for the arbitration award to be reviewed and set aside is granted.
2. The third respondent's dismissal was substantively fair.
3. No order is made as to costs.

¹¹ (2018) 39 ILJ 523 (CC).

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

A Posthuma from Snyman Attorneys

For the Third Respondent:

N J Raubenheimer

Instructed by:

Mostert Attorneys

LABOUR COURT