IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. JR1595/04

In the matter between:

AUTOPAX PASSENGER SERVICES (PTY) LIMITED	FIRST APPLICANT
and	
TRANSNET BARGAINING COUNCIL	FIRST RESPONDENT
ADVOCATE M I E ISHMAIL NO	SECOND RESPONDENT
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS' UNION	THIRD RESPONDENT
PHILEMON THABA	FOURTH RESPONDENT

JUDGMENT

D VAN ZYL AJ:

1] The fourth respondent was employed by the applicant as a bus driver. He was dismissed after having been found guilty of gross misconduct at a disciplinary hearing by reason of the fact that in breach of the applicant's rules he failed to issue tickets to passengers when they

boarded the applicant's bus. The fourth respondent referred a dispute to the Transnet bargaining council (the first respondent) alleging that his dismissal was substantively unfair. When conciliation was unsuccessful the dispute was referred to the second respondent (the arbitrator) for arbitration. He found that the sanction of dismissal was unfair and ordered the applicant to reinstate the fourth respondent from the date of the award with a final warning valid for six months.

2] The applicant seeks to have the award set aside and substituted with an order that the fourth respondent's dismissal was substantively fair. The application is opposed by the third and fourth respondents (the respondents). The fourth respondent has also applied in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (the Act) to have the arbitrator's award made an order of this Court. This application is opposed by the applicant simply on the basis of the pending review application. According, should the review application fail then the applicant does not oppose the award being made an order of court. By agreement between the parties and with the leave of the Court the two applications were heard together. I intend to first deal with the review application (the application) because the outcome thereof will also determine the future of the section 158(1)(c)

application.

3] In their opposing affidavit under the heading "**Point in limine**" the respondents raised the following objection to the application:

> "**4.1 I have read the founding affidavit of Moshe Moses Modiba in this matter and I will respond to it hereunder. However, I am advised that the applicant has not prosecuted this review application with the degree of diligence required and that it should be dismissed on this basis alone.**
>
> 4.2 **The award in this matter was handed down on 26 September 2001. The review application was launched on 7 November 2001 but the rule 7A(8) notice was only delivered on 3 November 2004. I am advised that this delay is so excessive that the applicant is required to apply for condonation. It has failed to do so.**"

4] The applicant dealt with these allegations in its replying affidavit and also subsequently filed an application seeking condonation for "**the late filing of applicant's notice in terms of Rule 7A(8)(b) …**" of the rules of this Court. Counsel for the applicant, Mr Wesley, submitted that the applicant has understood the respondent's complaint to be that the applicant did not comply with the time period laid down in the

aforesaid rule. This rule specifies that once the registrar has made the record of the arbitration proceedings available to an applicant in review proceedings, the said applicant must within ten days either deliver a notice standing by its founding affidavit or an affidavit supplementing the founding affidavit. The reason for the applicant having understood this to be the position is, according to Mr Wesley, the fact that the respondents alleged in their answering affidavit that the applicant was required to apply for condonation and the applicant can only be required to apply for condonation in respect of a failure to comply with a rule of this Court or a provision of the Act.

5] On behalf of the respondents Mr Orr submitted that it is clear from the papers that the real issue before the court is whether the applicant has acted diligently and with due expedition in prosecuting its review application. He submitted that the delay in the present matter is so excessive that the applicant was required to apply for condonation for that delay. Mr Wesley's answer thereto was that whilst it is correct that the court has an inherent power to order that an application be dismissed for want of prosecution, this is not the order the respondents sought from this Court in their papers. Instead they have averred that the applicant is required to apply for condonation and this

is not a correct statement in law.

6] What is in my view clear from the respondents' affidavits filed in both the review and the condonation applications, is that what was intended to be placed in issue was the failure of the applicant to proceed with the application within a reasonable time and not its failure to comply with the rules of court. I fail to see how there could have been any misunderstanding. I do not find any merit in the submission that the respondents are not entitled to rely on this ground for the dismissal of the application simply because it may have been incorrectly stated, as a matter of law, that the applicant was required to apply for condonation. Assuming it to be a misstatement of the legal position, the real question is rather whether the applicant was in any way prejudiced in dealing with this issue. This question must in my view be answered in the negative. As will become more clear hereunder when I address the question whether the delay in the prosecution of the application is excusable, the applicant fully and adequately dealt with this issue in its application for condonation.

7] There is nothing in the Act or in rules of this Court that provides that legal proceedings once instituted becomes superannuated by the

effluxion of time for want of prosecution or that a litigant must apply for condonation on account of a delay in the prosecution thereof. That is also the position in the High Court. There is also no general time limit under the common law within which legal proceedings must be concluded once instituted (*Kuhn v Kerbel and Another* 1957 (3) SA 525 (A) at 534F.) It has however been held that the High Court has an inherent discretion to dismiss proceedings by way of action where there has been an undue delay in the prosecution of the case. (Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed at page 547). This discretion quite clearly arises from that court's inherent power to prevent an abuse of its process.

8] I agree with Mr Wesley that no reason exists why the Labour Court does not have a similar power. In terms of section 151(2) of the Act this Court is a Superior Court that "**…has authority, inherent powers and standing, in relation to matters under its jurisdiction equal to that which a court of a provincial division of the [High Court] has in relation to matters under its jurisdiction.**" This Court, like the High Court, therefore has the power to protect and control its own proceedings and to grant

orders which would further the administration of justice, including an order dismissing proceedings already instituted on account of a delay or want of prosecution amounting to an abuse of the court's process.

9] Accepting this to be the position, the question then is under what circumstances the court will exercise such power. Mr Wesley suggested that this Court should adopt an approach similar to that in the High Court and referred to a number of reported decisions. In *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) the court discussed various earlier decisions and held that the fact that a plaintiff in an action had permitted an unreasonable time to elapse before taking the next procedural step, was not in itself conclusive. Nor was it conclusive that such delay had caused prejudice to the defendant. The question was rather whether there was behaviour which overstepped the threshold of legitimacy. Consideration of the prejudice caused by the delay both to the defendant and to the administration of justice persuaded the court to dismiss the action.

10] In *Gopaul v Subbamah* 2002 (6) SA 551 (D) the approach adopted was one where the court would weigh up the period of the delay and

the reasons therefor, on the one hand, and the prejudice, if any, caused to the defendant, on the other. In *Sanford v Haley NO* 2004 (3) SA 296 (C) a similar approach was adopted. The court held that the "**...prerequisites for the exercise of such discretion are, first, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the [defendant] is seriously prejudiced by such delay.**" It was further held that the court will exercise its power to dismiss an action or account of a delay or want of prosecution only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. (See also *Kuiper and Others v Benson* 1984 (1) SA 474 (W) at 477A and *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271 and 273.)

11] What the aforementioned decisions have in common is that they all deal with proceedings commenced by way of action. I am of the view that it will not be desirable to without more transplant to review proceedings the same test or prerequisites that are used for the exercise of the court's discretion to dismiss an action for want of prosecution. The reason therefor lies in the fundamental difference

between action and review proceedings. Of necessity different considerations will apply in assessing issues such as whether there as has been an unreasonable delay and whether it has caused any prejudice. For instance, otherwise than in action proceedings, where the focus is predominantly on the likelihood of prejudice at the trial, prejudice in review proceedings is not limited to actual prejudice to the respondent but also includes the inherent potential for prejudice to the efficient functioning of the public body concerned and to those who rely upon its decisions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van* Kaapstad 1978 (1) SA 13 (A) at 4E-F:

> "**Ek sou byvoeg dat besef van die moontlikheid dat onredelike vertraging tot benadeling van die ander party tot die verrigtinge kan lei, nie die enigste grondoorsaak van die bestaan van die reël (waarna ek gerieflikheidshalwe sal verwys as die versuimreël) is nie. Dit is wenslik en van belang dat finaliteit in verband met geregtelike en administratiewe beslissings of handelinge binne redelike tyd bereik word. Dit kan teen die regspleging en die openbare belang strek om toe te laat dat sodanige beslissings of handelinge na tydsverloop van onredelike lang duur tersyde gestel word - interest reipublicae ut sit finis litium, (Sien *Sampson v SA Railways & Harbours*, 1933 K.P.A. 335 op bl. 338.) Oorwegings van hierdie aard vorm ongetwyfeld 'n deel van die onderliggende redes vir die bestaan van die reël**"

Proceedings for judicial review therefore also have a public interest element in the finality of administrative decisions and the exercise of administrative functions. (See further *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at 612E-I.)

12] I agree with Mr Orr that it may be of more assistance to consider the approach of the High Court to the question of delay in instituting proceedings for review at common law. This was dealt with as follows by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321B:

> "**It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see eg *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'être of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg**

Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad **1978 (1) SA 13 (A) at 41).**

[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiers* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiers* at 39C - D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E - F).”

13] It must be recognised that the present matter differs from the aforementioned case in that the delay here occurred after the

application for review was launched and not before. Further, as correctly pointed out by Mr Wesley, the rule that the court has the power to refuse an application for review because of an undue delay in initiating the proceedings, has been held to be procedural and part of the court's inherent power to regulate its own proceedings where the rules of court do not govern the particular situation. (See *Wolgroeiers* (supra) at 41H and *Kruger & another v MacGregor NO & another* [1999] 9 BLLR 935 (LC) at G-J.)

14] By contrast, the rule that the court has the power to dismiss proceedings due to a delay in the prosecution thereof lies in the court's inherent power to prevent an abuse of its own process. Despite these differences, the reasoning underlying the principle that a delay may be fatal to a review application must in my view equally apply to both an applicant who delays in initiating review proceedings and one who thereafter delays in the finalisation of the matter. Except for the fact that the court should possibly also have regard to the respondent's own conduct in the exercise of its discretion, the same considerations are relevant and should find application in the exercise of the court's discretion. (See *Mkhwanazi v Minister of Agriculture and Forestry, Kwazulu* 1990 (4) SA 763 (D) at 766F-H.) In any

event, the approach adopted in the *Gopaul* and *Sanford* cases (*supra*) is not radically different from the suggested approach in the present matter. For example, the enquiry is similarly whether there has been an undue delay, and if so, whether the delay is excusable. The differences that do exist rather pertain to the factors to be taken into account in deciding the second enquiry.

15] Turning then firstly to the question whether there has been undue delay, it is not desirable, and even impossible, to attempt to lay down what an unreasonable delay is. As stated in the *Associated Institutions Pension Fund* case (*supra*), what is or what is not an unreasonable delay needs to be determined by the facts and circumstances of each particular case. Although these would vary from case to case, it should not be difficult to recognise an unreasonable delay when it occurs. As stated, the applicant dealt with the issue of the delay in its prosecution of the review proceedings in the application for condonation for the late delivery of its notice in terms of rule 7A(8)(b). A perusal of that application reveals the following:

(a) The arbitration award was handed down by the second

respondent on 26 September 2001;

(b) The review application was filed and served on 7 November 2001. At that stage the applicant was represented by a Mr Molatudi, a former employee of the applicant's attorneys of record.

(c) When the second respondent failed to file the record of the arbitration proceedings within the prescribed time period the applicant applied on 29 November 2001 for an order compelling the production of the record;

(d) Nearly nine months later and on 13 August 2001 this application was heard and the second respondent was ordered to provide the registrar of this Court with the record of proceedings within ten days of the receipt of the said order;

(e) On 16 September 2002 the applicant's attorneys addressed a letter to the second respondent. At that stage the matter had been assigned to a Mr Malan. In the said letter the said attorney inquired about the failure of the second respondent to file the record of proceedings within the time limit set in a said court

order;

(f) There was no response to this letter and nearly ten months passed without the applicant or its attorneys taking any further steps. On 2 July 2003 a new attorney, a Mr van Rensburg took the matter over. On 4 July 2003 he wrote a letter to the second respondent apparently also inquiring about the record of proceedings. On 9 July 2003 the second respondent responded by saying that it was not in possession of any of the recordings;

(g) The applicant's attorneys did not attempt to reconstruct the record of proceedings or to take any further step until the applicant itself wrote a letter to its attorneys on 26 December 2003 inquiring about the status of the review application;

(h) The file was then handed to a Ms Ramjettan. During January 2004 a supplementary affidavit was prepared by the applicant's attorneys and forwarded to the applicant for signature. In this affidavit it was stated that it was not possible to reconstruct the record of proceedings and that the award should be set aside because the arbitrator failed to mechanically record the

arbitration proceedings;

(i) This application was not deposed to apparently because the employee who had to depose to the affidavit left the applicant's employment on a disclosed date. As a result the affidavit was never filed of record;

(j) Nothing happened until April 2004 when an attorney acting on behalf of the fourth respondent addressed a letter to the applicant's attorneys inquiring whether the applicant was still interested in pursuing the matter and requesting that the papers be indexed and paginated with a view of obtaining a date for the hearing thereof. In spite there being a reference number on the said letter corresponding with previous correspondence emanating from the office of the applicant's attorneys, this letter was not responded to;

(k) On 24 September 2004 the third and fourth respondents instituted an application to have the award made an order of court;

(l) Instructions were then taken from the applicant and an answering affidavit was filed to the aforementioned application;

(m) Mr Coster, an attorney in the office of the applicant's attorneys of record then took steps to obtain the court file in the office of the registrar. On 2 November 2004 the file was found and on examining the said file it was then discovered that the first respondent had in fact filed the record of proceedings and that this was done on 2 October 2002, two years earlier;

(n) On 4 November 2004 the applicant then served a notice in terms of rule 7A(8)(b) on the respondent's attorneys.

16] The actions, or rather inaction of the applicant and its appointed attorneys can be summarised as follows:

(a) It took the applicant nine months to set down an unopposed application to compel the second respondent to file the record of proceedings;

(b) During the period 27 August 2002 to July 2003, a period of

more than ten months, one letter was written to the second respondent inquiring about the record of proceedings;

(c) For the period 2 July 2003 to 15 January 2004, a period of more than six months, one further letter was written to the second respondent and an unsigned affidavit was drafted and forwarded to the applicant;

(d) For the period 15 January 2004 to September 2004, a period of almost eight months nothing further was done.

(e) The first attempt that was made to peruse the contents of the court file was sometime in October 2004, more than two years after an order was granted compelling the second respondent to file the record of proceedings;

(f) From the time that the application for review was instituted until its attorneys wrote a letter 28 August 2003, the applicant inquired once about the status of the case.

17] In addition to the conduct of the litigants, a material fact to be taken

into account in making a value judgment as envisaged by the inquiry as to whether or not there has been an unreasonable delay, is the nature of the challenged decision. The reason for this is that not all decisions have the same potential for prejudice to result from their being set aside. (See *Gqwetha* (supra) at 613B-C.) As stated earlier, the challenged decision in the present matter was a decision to dismiss the fourth respondent for failing to comply with the applicant's rules relating to the issuing of tickets to passengers when they boarded a bus. The nature of this decision is such that it has potential for prejudice if it were to be set aside on review after the lapse of any considerable time. As stated by Nugent JA in *Gqwetha* (supra) at 613D-E;

> "**A decision of that kind will necessarily have immediate consequences for the ordinary administration of the organisation, and for other employees who will be called upon to perform the functions of the dismissed employee or even to replace her. Moreover, personnel decisions that are susceptible to review are no doubt made by any large organisation on a regular and ongoing basis, and some measure of prompt certainty as to their validity is required.**"

18] The importance of the nature of the challenged decision was recognised by the Labour Appeal Court in *Queenstown Fuel*

Distributors CC v Labuschagne NO and Others (2000) 21 ILJ 166 (LAC) where the said court, in dealing with condonation of the late filing of a review application, stated at 174E-F that:

> "…**condonation in a case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, a case for attacking a defect in the proceedings would have to be cogent and a defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.**"

19] The delay of over twenty six months from the date on which the second respondent was ordered to file the record of proceedings to the date of service on the respondent's attorneys of the notice in terms of rule 7A(8)(b) is clearly unreasonable. The delay is of a kind which runs contrary to the purpose of the Act, namely to effect expeditious dispute resolution.

20] The remaining question is then whether this Court, in exercise of its discretion, should condone the delay. Relevant factors to be considered in this regard are the following:

(a) The applicant's explanation for the delay;

(b) The incidence of prejudice to the parties;

(c) Whether there are prospects of the applicant succeeding in the review application;

(d) The prospect (or lack) of a meaningful consequence of the setting aside of the award.

(See *Gqwetha* (supra) at 614J - 615F.) The list is not intended to be exhaustive. Because it involves the exercise of a judicial discretion, which is undesirable to circumscribe, these factors are inter-related and not individually decisive. Much will depend on a balancing of all the relevant considerations and the weight that is to be given to any of them will depend on the facts and circumstances of each case. (See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).) However, if there are no prospects of success, the granting of condonation would for obvious reasons be without purpose.

21] In the present matter the delay that has occurred since the proceedings

were instituted is inordinately long and of such a nature that in the absence of an acceptable explanation, or for other convincing reasons, it should not be condoned. The applicant has in my view failed to advance adequate reasons for overlooking its default. The fact that the applicant's case was from time to time entrusted to a different attorney within the same firm and that there had as a result not been any continuity, cannot assist the applicant. It is clear from the explanation advanced that there were long periods of inaction for which there is no excuse. There does not appear to be any reason why:

(a) The court file was not perused at a much earlier stage or the registrar was not asked whether the record of proceedings was filed;

(b) No steps were taken before July 2003 to enforce the court order obtained in August 2002;

(c) The applicant made no attempt, save to draft an unsigned affidavit, to have the matter finalised without the record of proceedings.

22] As correctly submitted by Mr Orr, there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. (See *Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 140H-141D; *Buthelezi & Others v Eclipse Foundries Ltd* 1997 18 ILJ 633 (A) at 638I-639A; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA); *Mkhize v First National Bank & Another* [1998] 11 BLLR 1141 (LC) at 1144D; *Waverley Blankets Ltd v Ndima & Others; Waverley Blankets Ltd v Sithukuza & Others* (1999) 20 ILJ 2564 (LAC); *Rustenburg Transitional Local Council v Siele NO & Others* (1999) 20 ILJ 2935 (LC) at 2938E to F and 2939E to F and *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC).) The applicant's own actions similarly speak of a lack of interest. Save for writing one letter to its attorneys during the relevant period, it passively sat by. The evidence strongly suggests that the applicant and its attorneys were pushed into action by the respondent's application to have the award made an order of court.

23] Mr Wesley urged the court to have regard to the respondents' own supine approach to the litigation over the period in question. Whilst a

respondent's own inactivity is a factor that the court should have regard to, the weight to be given thereto will depend on the circumstances of each case and there is surely a limit to which it would assist a dilatory applicant. The applicant remains *dominus litis*. In the present matter it is not a case of the respondents having done nothing. A letter was addressed to the applicant's attorney enquiring about the delay in the prosecution of the matter. When no response was received application was made to have the award made an order of court. Although the respondents could have acted earlier, I am not convinced that in the circumstances of the matter their conduct assist the applicant in making up for its own remissness and the inadequate explanation therefor.

24] Besides the duration of the delay and the failure to adequately explain it, there are two further considerations that militate against this Court exercising its discretion in favour of the applicant. I am not convinced that the applicant's case carries any significant prospects of success or, if the decision of the arbitrator is set aside, that there is any significant prospect of anything meaningful being achieved thereby. I shall first deal with the prospects of success. In argument Mr Wesley submitted that the decision of the arbitrator to impose a sanction of a

warning instead of confirming the applicant's dismissal of the fourth respondent was flawed to the extent that it prevented a fair trial of the issues and amounted to a gross irregularity. This submission was based on three further submissions: Firstly, that the arbitrator incorrectly made a finding that the charge of misconduct levelled against the fourth respondent implicitly included an element of intentional misconduct. Secondly, that the arbitrator erred in finding that the fourth respondent suffered prejudice in preparing his case insofar as he was not aware that the charge against him included an element of dishonesty. Lastly, that the arbitrator incorrectly set about determining an appropriate sanction.

25] The first and second submissions can be disposed of simultaneously. Besides the fact that the first submission appears to be in conflict with the applicant's own case as set out in its founding affidavit (wherein it was alleged that the arbitrator should have found that "**…the element of dishonesty is clearly implied in the nature of the charge …**"), there is in my view no merit in these arguments. In the notice of the disciplinary enquiry the fourth respondent was charged with gross misconduct in that "**You as the driver of Company vehicle BGW670GP on 16 January 2001 failed to issue tickets to three passengers where they boarded the vehicle.**"

Having regard to the award and the arbitrator's reasoning, what he found was that in the absence of an allegation in the charge of intentional or fraudulent conduct on the part of the fourth respondent, the charge "…**proved against Grievant can merely relate to negligent misconduct.**" It is therefore not correct to state that the arbitrator found that the charge implicitly included an element of dishonesty. Upon a proper reading of the award his finding was rather that it would be unfair to find an employee guilty of misconduct on the basis that his or her conduct was dishonest if the said employee was not forewarned in the charge that reliance would be placed thereon. That finding would obviously also have a bearing on the imposition of an appropriate sanction. Reference in the award that this would have caused prejudice to the fourth respondent, must be seen in this context. Save to extent that the arbitrator should have enquired whether the fourth respondent's conduct amounted to gross misconduct rather than negligent misconduct, his reasoning in this regard, although not the epitome of clarity, cannot be faulted.

26] In support of the third submission it was argued that the arbitrator should have had regard to the fourth respondent's dishonesty during the disciplinary hearing and the arbitration itself. It was also

submitted that the arbitrator ought to have solicited evidence from the applicant before determining an appropriate sanction for the misconduct. The obvious difficulty facing the applicant is that this ground of review was not raised in the applicant's founding affidavit with the result that the arbitrator was not given an opportunity to deal therewith. (See *Rustenburg Platinum Mines Ltd v CCMA & Others* [2004] 1 BLLR 34 (LAC) at 38H-I.) The dishonesty relied upon in this regard relates to the unacceptable explanation tendered by the fourth respondent for his failure to issue tickets to the passengers concerned. Whether this factor would be enough to conclude that the sanction is inappropriate, is an open question. It would simply be one of the factors to be considered in the assessment of an appropriate sanction which is a value judgment. The second part of this submission appears not to be factually correct. There is nothing in the award that indicates that the arbitrator denied any of the parties an opportunity to place evidence before him regarding the imposition of a sanction. On the contrary, it is recorded that the applicant's assistant depot manager during his testimony stated that the applicant "**…views such cases very seriously and does not tolerate such misconduct.**" As will be pointed out when I deal with the issue of rationality, the arbitrator in his reasons for imposing the sanction considered the

implications which the fourth respondent's conduct may have had for the applicant. In the absence of anything to the contrary, this is an indication that the arbitrator recognised and considered the applicant's views on the seriousness of the transgression.

27] A further ground of review relied upon was that the award is not justifiable in relation to the reasons given therefor. The arbitrator's reasoning in imposing the sanction was as follows:

> "**There is sufficient authority to suggest that negligent misconduct is not deserving of the ultimate sanction of dismissal, especially in view of Grievant's clean record. However, Grievant's conduct (negligent misconduct) certainly has serious implications for the Company, which requires a corrective mechanism designed to influence his errant behaviour, furthermore that he forfeits a portion of his income, so that it serves as a deterrent.**"

28] Read with the remainder of the award, what the arbitrator considered was the following:

(a) The absence of dishonesty in the fourth respondent's conduct;

(b) The fourth respondent has a clean disciplinary record;

(c) The serious implications that the fourth respondent's conduct held for the applicant's business;

(d) The fourth respondent should be given an opportunity to mend his ways; and

(e) The sanction he intended to impose would result in the fourth respondent forfeiting a portion of his salary.

29] The legal position with regard to the constitutional requirement of rationality can be summarised as follows:

(a) Whether the rationality threshold has been met is determined with reference to whether there is a rational objective basis on which, on the basis of the evidence properly before the administrative decision-maker, the conclusion eventually arrived at could be justified. (See *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC) at para [36] to [37]. See further *Country Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (1999) 20 ILJ 1701 (LAC); *Pharmaceutical Manufactures Association of*

SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at paras [85] and [90] and *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* [2002] 6 BLLR 493 (LAC) at 508H-I.)

(b) Although it requires a value judgment that will entail a consideration of the merits of the matter in some or other way, the merits are not entered in order to substitute the court's opinion on the correctness of the decision. Despite the fact that the scope of judicial review of administrative action has been broadened, the fundamental difference between appeal and review must be maintained. (See *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2000 (4) SA 621 (C) at 640G; *Derby-Lewis & another v Chairman, Amnesty Committee of the Truth & Reconciliation Commission, and others* 2001 (3) 1033 (C) at 1066E; *Pepcor Retirement Fund v Financial Services Board* [2003] 3 All SA 21 (SCA) at 37 paragraph 48; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & others* 2004 (7) BCLR 687 (CC) at 711 paragraph 45.)

(c) In applying the rational connection test, the reasons should be

considered cumulatively rather that separately. (*Ellerine Holdings Ltd v CCMA & others* [1999] 7 BLLR 676 (LC) at 681F-682A). As was pointed out by the court in *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & another* (2000) 21 ILJ 940 (LC), the odd misconceived finding of fact or occasional error of law does not necessarily render a decision unjustifiable (see *Purefresh Foods (Pty) Ltd v Dayal & another* (1999) 20 ILJ 1590 (LC). What is to be determined is the impact bad reasons have on the rationality of the decision arrived at by the decision-maker rather than whether it was right or wrong. If the same decision could be arrived at upon the basis of the remaining permissible reasons the decision must stand. The court must accordingly adopt a flexible approach to the question. (See *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) at paragraph 101; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2003] 7 BLLR 676 (LAC) at paragraph 19.)

30] Although the arbitrator may incorrectly have placed emphasis on the fourth respondent's conduct having constituted negligent misconduct rather than determining whether it could be said to have been gross

misconduct, I am of the view that this error cannot be said to justify a finding that the decision does not meet the rationality threshold. The arbitrator was quite clearly of the view that the sanction imposed by the applicant was unfair because it was premised on dishonesty. He then assessed what he considered to be an appropriate sanction. His reasoning reflects on application of his mind to this issue and the reasons advanced are able to sustain the decision arrived at.

31] Further, considering the sanction imposed by the arbitrator, namely that of a final warning with a loss of four months' salary, the question is whether it can be said, in all the circumstances to be "**so out of kilter with what this Court would have imposed, that it constitutes a gross irregularity.**" (Per Nicholson AJ in *Toyota South Africa Motors (Pty) Ltd v Radebe & others* [2000] 3 BLLR 243 (LAC) at 258J.) If not, then there is no guarantee that anything meaningful could be achieved by a setting aside of the award. I am not convinced there will necessarily be a different result in the sense that either the arbitrator, if the matter is referred back to him, or that this Court, would impose a different sanction.

32] For the aforegoing reasons I consider that the delay was unreasonable

in the circumstances and that there are no adequate grounds for overlooking it.

33] Turning to the issue of costs, there is no reason to depart from the general principle that costs ought to follow the result.

In the result the following order is made:

(a) The application for review is dismissed.

(b) The award made by the second respondent and dated 26 September 2001 is hereby made an order of this Court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995.

(c) The applicant is ordered to pay the costs of both the application for review and the application in terms of section 158(1)(c) of the aforesaid Act.

D VAN ZYL

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Date of Judgment: 21 August 2006