IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR922/05

In the matter between:

SOPH MAIFO	**Applicant**
And	
E L E MYHILL N O	**1ST Respondent**
Commission for Conciliation Mediation and Arbitration	**2nd Respondent**
South African EXPRESS AIRWAYS (PTY) LTD	**3RD Respondent**

JUDGMENT

MOLAHLEHI J
Introduction

1] This is an application to review and set aside the award issued under case number GA 5116/03 dated 31st January 2005. In terms of the ward the first respondent (the commissioner) found that the dismissal of the applicant was both procedurally and substantively

fair.

The background facts

2] The applicant was prior to his dismissal on the 2nd of October 2002 employed as an executive human resource manager for a period of about 7 years.

3] The applicant was charged with insubordination and gross negligence of which he was found guilty and dismissed. The charges were formulated and set out in a letter dated 12 April 2002, wherein the applicant was notified to attend the disciplinary hearing.

The case of the third respondent

4] The first witness of the third respondent Mr Modise an independent Attorney who checked the disciplinary hearing denied that he was biased in the manner he conducted the disciplinary hearing and that he was a close friend of the legal adviser of the third respondent Ms Tshiqi.

5] According to Mr Modise the applicant had initially no problem

with him chairing the disciplinary hearing until when findings of guilt against him was made. The applicant's attitude detoriated further during presentation of mitigation.

6] Modise testified further that the applicant was properly charged with misconduct and not incapacity and that at the end of the hearing he was satisfied that the third respondent had proved its case and after considering the charges cumulatively he came to the conclusion that an appropriate sanction was a dismissal.

7] The other accusation against Modise was that he denied the applicant the opportunity to present his case without interruption and that the comment he made about settlement was a threat intended to the applicant. Modise denied this and indicated that his style whenever he conducts disciplinary hearings is to enquire at the beginning of the proceedings if there were any prospects of settlement negotiations.

8] As concerning the issue of Mr Vermeeleun testifying through the telephone conference, Modise testified that the arrangement was made only after both parties had agreed to it.

9] The first charge against the applicant related to the allegation that he failed and neglected to submit a staff optimization plan as it was required by Ms Dibate the Chief Executive Officer (the CEO).

10] In order to develop an optimization plan the applicant needed information on bench making of the aircraft. He informed the CEO that he did not have information on bench making of the aircraft. The applicant submitted to the CEO the optimization plan only when he was asked about it by the CEO. The plan was seen by the CEO as below standard and as nothing but the regurgitation of the provisions of S189 of the LRA 65 of 1995.

11]The CEO expressed satisfaction of the plan in an email dated the 3rd of March 2002. The CEO demanded an amended or improved plan from the applicant on the 4th March 2002. The plan was not ready and the applicant requested for an extension.

12]The version of the third respondent was that because the plan, as a matter of urgency due to the financial difficulty the third

respondent found itself, the applicant was put on special leave and the task was given to someone else.

13]As concerning the second charge of refusing or neglecting to initiate and manage the score card process the CEO testified that the score card was suppose, to be implemented as a matter of urgency. She had advised the applicant in a meeting where this issue was discussed that he was speaking to a wrong person, Mr Nozipho Ndaba at the Esselen Park about the information relating to the score card. She informed the applicant that the person should be speaking to at Esselen Park was Mr Johan Vermeulen. In this regard the applicant was told by the CEO to meet with Vermeulen who had given 3 (three) days where he could be available to meet and discuss the matter.

14]At the management meeting on the 29th February 2002, when asked why he did not meet with Vermeulen the applicant became aggressive according to the CEO. The CEO then instructed him to make sure that he meet with Vermeulen as soon as possible otherwise he could be disciplined.

15]Vermeulen in the testimony he gave over the telephone, after it was so agreed between the parties, blamed the applicant for failure of progress on the issue of score card. He accused the applicant of failing to co-ordinate meetings properly.

16]The CEO testified that despite having told to prioritise the score card the applicant had done nothing on this issue by the end of February 2002. the CEO addressed a letter to the applicant on the 1st of March 2002, informing him that she noted that he had not at that stage confirmed meeting with people who are supposed to be part of the process and that as it was already Friday, some of them could have already filled in their diaries.

17]The applicant was not found guilty on charge against him regarding failure or neglect to attend to the employee's grievances.

The case of the applicant

18]The applicant testified that the issue of the optimization plan was first discussed at the meeting of the board on the 11th December

2001. He discussed the matter first with Mr Sam Pretorius before consulting with other people in other operations. He in this regard sent an email requiring information from various people regarding the score card. He contended that the first time he received a formal instruction regarding a bench make on the staff optimization was on the 27th February 2002, in an email from the CEO.

19]The applicant further testified that, he informed the CEO on the difficulty he was encountering on obtaining information regarding the score card, because the CEO insisted the plan was to be given to her on the same day.

20]The applicant received an email on the 4th March 2002 from the CEO and as a result thereof the applicant sought a meeting with her but was told that she was only available the following day. The applicant managed to meet with the CEO at 17H00 and during that meeting the CEO demanded the optimization plan. It was after this meeting that he received a letter that he was placed on a special leave.

21]The applicant denied the accusation by Vermeulen that he failed to honour scheduled meetings.

Grounds of review

22]The applicant challenged the decision of the commissioner on the basis that he did not base his decision or conclusion on the evidentiary material that was placed before him and also on the general legal principles of the law. In this regard the applicant contended that the conclusion reached by the commissioner was so fundamentally floored that it amounted to both gross irregularity on the part of the commissioner.

23]The award was also challenged on the basis that the commissioner failed to properly construe and make a proper analysis of the evidence, facts and arguments before him.

The arbitration award

24]The commissioner agreed with the findings of the chairperson of the disciplinary hearing that the applicant should as HR Executive Manager, have acted speedily and with the sense of urgency given the precarious financial situation that the third respondent was

faced with. It was for this reason that the commissioner found the applicant of gross negligent. The commissioner also agreed with Modise regarding the applicant's conduct concerning the implementation of the balance of the score card system.

25]As concerning the appropriateness of the sanction the commissioner, reasoned that the good record that the applicant had with the third respondent did not mitigate the seriousness of the offence and that the appropriate sanction was that of dismissal.

Evaluation of the award

26]The assessment whether or not to review an arbitration award is not based on the correctness of the outcome of the award but on its reasonableness. The fundamental requirement in this regard is that the relevant evidence must be taken into account and be objectively assessed in the determination of whether or not the commissioner's decision is reasonable.

27]It is now firmly established since **Z Sidumo v Rustenburg**

Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC) that the test to apply in evaluating and considering whether or not to review the decision of the CCMA commissioners is that of a reasonable decision-maker. The test entails conducting an enquiry into whether the decision of the commissioner is one which a reasonable decision-maker could not have reached. In other words the decision of the commissioner would be reasonable and immune from interference by the Court if it is one which a reasonable decision-maker could have reached. The function of the Court in this regard is not to determine the correctness of the decision but its reasonableness.

28] In enunciating further on the reasonable decision-maker test set out in Sidumo, Labour Appeal Court went further to caution in **Fidelity Cash Management Service v Commissioner for Conciliation Mediation and Arbitration 2008 (29) ILJ 964 (LAC)** at paragraph 98 to 100 as follows:

> "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have

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

In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the other hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions.

That is not a balance that is easy to strike the aforesaid said balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set aside said simply because the Court would have arrived at a different decision to that of the commissioner, it

also does not require that a CCMA's commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review- it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is not that a reasonable decision-maker could not reach in all of the circumstances. The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable, is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particular the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a

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

29]An award would be unreasonable when there is a glaring discrepancy between the evidence presented and the conclusion reached by the commissioner. In other words an award would be unreasonable if the commissioner completely misconstrued the evidence before him or her.

30]In my view, in the present instance, the award of the commissioner is reasonable because he considered and applied his mind to the evidence and other material which were placed before him. However I did agonise about whether indeed the employee was guilty of insubordination or poor performance. I had to caution myself that my function was that of determining the reasonableness of the award and not its correctness. It may well be that court may have found the decision of the commissioner to be incorrect had it been enjoined to do so.

31]The award would however, still stands even if it was found that the commissioner's decision in as far as insubordination is concerned is unsustainable. The award would stand on the finding of gross negligence.

32]It is on the basis of the above reasons that I concluded that the review application stands to dismissed. The dictates of law and fairness do not call for costs to be issued in this case.

33]The Order

1. The review application is dismissed.
2. There is no ordered as to costs.

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Molahlehi J

Date of Hearing: 30 May 2008

Date of Judgement: 22 July 2008

APPEARANCES

For the Applicant: ADV W HUTCHINSON

Instructed by: LEBEA & ASSOCIATES

For the Respondent: ADV T MOTAU

Instructed by: THSIGI ZEBEDIELA INC