IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO. C174/2007

In the matter between:

RAM HAND-TO-HAND COURIERS	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY ("NBCRFI")	**First Respondent**
DAVID MIAS (Cited in his capacity as Arbitrator of the National Bargaining Council for the Road Freight Industry ("NBCRFI")	**Second Respondent**
ANTHONY PEKEUR	**Third Respondent**

LEAVE TO APPEAL

AC BASSON, J

1] This is an application by the applicant for leave to appeal against my judgment and order dated 27 May 2009.

2] In that judgment I concluded that there is no reason why this Court should interfere with the conclusion reached by the Commissioner as it is not one that a reasonable decision maker could not reach in the circumstances.

3] The Application for leave to appeal takes issue with two issues. (i) The first is the finding that since the Applicant made no attempt to reconstruct the record of the arbitration proceedings, the award did not fall to be set aside purely on the basis of the absence of the record. (ii) Secondly the finding that the conclusion arrived at by the arbitrator to the effect that the sanction of dismissal was too harsh in light of all the circumstances did not warrant interference on review.

4] The application is one day late. I have considered the reasons furnished for the late referral and in light of the fact that the delay is negligible, condonation is granted.

Absence of a record

5] The Applicant for leave to appeal contends that this court erred in finding that the Applicant should carry the risk as a result of failing to produce a satisfactory record. In the event it was thus submitted that there exists prima facie grounds to review and set aside the decision on this ground alone. The Applicant argued that it was materially prejudiced by the absence of a proper record to such an extent that fairness and equity dictate that the award be set aside on this basis

alone.

6] This court was of the view that the review could proceed in the absence of the record in light of the fact that there did not exist a material dispute of fact. The court proceeded without having regard to the record of the arbitration.

7] The Respondent argued that the Applicant is required to place evidence before the Court regarding the steps it had taken to reconstruct the record and to explain why it was not possible to place an adequate record before the Court if it was the case. Moreover, an applicant for review faced with a defective record is not entitled to merely do nothing and seek to have the proceedings set aside on the basis that the arbitrator has failed to deliver the record of the proceedings (see *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO & Others* (2005) 26 *ILJ* 876 (LC) at 879E – F). The Court will also not as a matter of course accept that due to a fault with the audio recording of the proceedings a complete transcript was not possible. (See *Papane v Van Aarde NO & Others* (2007) 28 *ILJ* 2561 (LC) where the LAC did not accept such an explanation at 2574G – I).

8] In the application for leave to appeal the Applicant relies on the fact that the arbitrator did not file any written notes of the arbitration proceedings together with the record. The Applicant alleges that it is "*unclear"* whether such notes were kept. I am in agreement with the submission that this does not take the matter any further. It is not for a Court to speculate whether or not the Arbitrator kept written notes. It is the Applicant in a review that ought to have taken steps to secure the arbitrator's notes if any. If there were no such notes, the Applicant ought to have given evidence to this effect in its supplementary affidavit.

9] I have already indicated that the Applicant must place evidence before the Court describing what steps had been taken to complete the record. Yet in the Applicant's supplementary affidavit it fails to allege that it took any steps whatsoever to reconstruct the record upon learning of the loss of the tapes. The Applicant's conduct therefore falls short of what is required of a litigant. I am of the view that this in itself constitutes sufficient basis to dismiss the review. The Court, however, did not dismiss the review on this basis alone but proceeded with the considering of the view in light of the fact that the record was, in any event, not material to the review. I am of the view that there is no reasonable prospect that another Court would reach a different conclusion in respect of this point.

The sanction

10] The Applicant contend that this Court erred in failing to find that it had made out a proper case on review notwithstanding the defective record and that the Court erred in finding that there did not exists a material dispute of fact which goes to the heart of the review. There are two points to be made here. Firstly, the Applicant must stand and fall by the fact that it failed to take any steps to reconstruct the record. Secondly, a plain reading of the award clearly shows that the Commissioner passed the test of reasonableness. The arbitrator was steeped in the atmosphere of the arbitration hearing and had the benefit of listening to the evidence and observing the witnesses hence its conclusion that the event which gave rise to the dismissal was blown out of proportion. This is not reasonable and coupled with the fact that the offence was not serious and in light of the employee's clean disciplinary record and in light of his long length of service, the conclusion that dismissal was not an appropriate sanction is clearly a reasonable conclusion. It certainly is not a conclusion that a reasonable decision maker could not reach. It should lastly be borne in mind that the question is not whether or not the arbitrator was right or wrong, but whether or not the arbitrator arrived at a reasonable decision. This was not an unreasonable decision. I am therefore of the view that there is no reasonable prospect that another Court could conclude otherwise.

11] In the premises the application for leave to appeal is dismissed with costs.

AC BASSON, J 26 January 2009