In the Labour Court of South Africa

Held in Johannesburg

JR 1173/03

In the matter between:	
Swiss South Africa (Pty) Ltd	Applicant
and	
Kobus Louw NO.	First respondent
Commission for Conciliation Mediation and Arbitration	Second respondent
Gengadevi (Angie) Narayen	Third respondent

Judgment

Cele AJ

Introduction

[1] This is an application to review and set aside an arbitration award dated 19 May 2003 made by Commissioner Kobus Louw under the auspices of the second respondent. The first respondent found the dismissal of the third respondent to have been substantively and procedurally unfair and ordered the applicant to reinstate her and he granted a compensatory order in her favour.

Background facts

[2] The applicant is a ground handling company. It has three divisions.

The first division is the Passenger handling division which is responsible for checking in of passengers who are going to board an aeroplane. The third respondent worked in that division. The second division is the Ramp division, also called the aerobridge and the third, is the Cargo division.

[3] The third respondent was employed as a check- in agent at the Passenger handling division. Part of the third respondent's duties was to ensure that passengers' luggage was not in excess of the requisite limit.

[4] On or about 21 May 2002, a complaint was received from a passenger who was part of a group that was checked in by an unnamed staff member of the applicant. When the passenger arrived at his destination in Singapore, he complained that he had been asked by the check- in clerk as to whether his group *"had anything for her"*. He said that the solicitation was made by the staff member pursuant to her having purportedly waived "their official payment". To avoid an unpleasantness, the passenger said that he and his group handed the staff member $120.00

[5] The complaint recorded that the check –in agent told them that they were overweight and that they would either have to pay the excess charge involved or repack their bags. As the party started to repack their bags, the agent suddenly told them that it was not necessary and that she would waive all the relevant charges. During boarding, the same agent was at the aerobridge.

[6] After the complaint was received, an investigation was conducted. The third respondent was interviewed and she acknowledged that she was the staff member who had dealt with the passenger and his party on the 19th May 2002. A disciplinary hearing was convened. The third respondent was charged with: "*extortion or bribery or dishonesty"*.

Disciplinary hearing

[7] The disciplinary hearing took place on 21 June 2002. One Mr David Masina was the chairperson while Ms Mc Naughton represented management of the applicant and the third respondent was not represented. Ms Mc Naughton began by outlining the charges against the third respondent. She then gave a brief account of the complaint. The third respondent was then asked to state her case without being offered an opportunity of questioning Ms Mc Naughton.

[8] The third respondent gave an explanation of events while Mr Masina and Ms Naughton took turns to ask her questions. At the end of these questions, Ms Naughton made the following remark:-
"As much as Angie did not have an opportunity to cross examine the witness, cross examination would not have made much difference".

Evidence:

[10] The disciplinary proceedings formed an essential basis for an understanding of the arbitration proceedings. The evidence of the disciplinary hearing revolved around four incidents which are:-

1. The e- mail message
2. The checking in incident
3. The boarding gate incident
4. Policy of the applicant

The e- mail message

[11] A bundle of documents which was brought by Ms Mc Naughton into the enquiry contained an e-mail message. This message was received by the applicant to investigate this matter. In so far as it can be understood, the message in the e-mail reads:-

"On arrival, a passenger, Ishikawa/ Hiroyoski Mr complained to one of arrival staff that the check in staff of SQ 405/19 May JNB- SIN demanded payment from his group by claiming that she had waived their official excess baggage payment. The passenger was travelling with eight other passengers. Their check – in records show that they checked –in a total of 10 pockets of 139 kg.

According to the passenger, the check –in agent (no specific names mentioned) told them at check-in that they overweight and that they would have to pay up the excess charges involved or repack their bags. They had actually started to re- pack when the agent suddenly told them it was not necessary and that she would waive all charges.

During boarding, the same agent was waiting for them at the aero bridge. She approached the passenger and asked to their disbelief, whether they had anything for her. Eventually, perhaps to avoid an unpleasant scene, the passenger handed over US D 120.00 to her.

While the passenger did not make any specific demand, such as reimbursement of the US D120.00 or such like, we have told the passenger that we will get back to him once we have any news from your side.

I hope that you will be able to shed more light on this matter".

The checking –in incident

[12] Ms Mc Naughton said that the incident in question happened on 19 May 2002. Nine Japanese passengers were travelling from Johannesburg, using Singapore Airline. At the check in points, one check – in agent told them that their luggage was overweight and that they had to pay for the excess luggage or they had to re-pack their bags. They then began to repack but while they were busy the agent suddenly told them not to bother any more because she would waive all charges. They then proceeded to the boarding gate

[13] The evidence of the third respondent in this respect was that she indeed remembered those people (guys). They were all youngsters. She said that she could not recall how many parcels the group had but all were within the weight limit. As such, none of them had any reason to unpack their luggage. Nor did she have any reason to query the weight of their luggage.

The boarding gate incident

[14] Ms Mc Naughton went on to say that during the boarding, the same agent was already waiting for them at the aerobridge. She said that this agent asked one of them if he had anything for her. She said that the passenger eventually gave her $120.00. On investigating the matter she said it was found that the particular passenger was

travelling with eight other passengers under PNR's JWHLMD/KGQUDY/L7QCFQ. She further said that their check-in records showed that they checked in a total of 10 pieces of luggage weighing 139 kg in total. She went on to say that as there was no name of the agent mentioned, all check-in agents on shift on that day were confronted. Of all responses, that of the third respondent was of particular interest because of its unusual coincidences with the complaint.

[15] The encounter given by the third respondent on the other side is that once she had checked the group in, she again saw them at the hand luggage entrance after she was sent to go and work there. She said that she queried some of the parcels the group had. She said some contained fragile items and visually looked bulky but it was not really serious. She then said that one of their group gave her a $100.00 bill which she refused to accept and she gave it back to him. She said that she then asked him what it was for, whereupon he said it was for friendly service. She said she told him that she was only doing her job for which she would be paid. She said that he then pushed something into her hand which turned out to be $20.00. She said she immediately called him back but he refused and rushed away.

[16] The third respondent continued to say that she had not in fact accepted the $100.00 as it was pushed into her hand. When she noticed the $20.00, she said that other passengers were rushing in and the group in question had gone past her. She said that she did not want to create a scene by following them in order to return the

$20.00.

[17] When the third respondent was cross- examined by Ms Mc Naughton, it was put to her that there were numerous occasions on which she had asked to be swooped from the check-in station to the hand luggage section. She said that she could only recall one incident when she made that request but she said further that she did prefer to work at the hand luggage section.

The policy of the applicant

[18] Ms Mc Naughton said, in this regard, that the applicant did not allow staff to accept tips and that the third respondent knew this very well. She continued to say that subsequent to the third respondent leaving the company, the company had fired two more people for incidents which were similar to that of the third respondent.

[19] The version of the third respondent in this regard was that she was well aware of the policy of the applicant on disallowing the receipt of tips due to the difficulty there was in separating tips from bribes. She said that it was her intention to declare the tip to her superior but she said that she forgot to do so.

[20] The third respondent went on to say that she knew that she had done a wrong thing when she accepted the money. She said that when she later received the notification for the enquiry, she knew exactly what it was all about. She described herself as a dedicated

worker who would not stay away from, and was always punctual, at work. That then, concluded all the evidence which the parties presented at the internal hearing.

[21] On 26 June 2002 the applicant issued a letter to notify the third respondent that she was dismissed with effect from 24 June 2002. In that letter the applicant's policy regarding the acceptance of gifts or tips was said to be one of not encouraging staff in the position of the third respondent to accept tips. It was further stated that, while tipping was an internationally accepted practice, the company found the amounts offered as tips unusually disproportionate when compared to the service rendered. The third respondent was aggrieved by the dismissal decision and a dismissal dispute arose between her and the applicant.

[22] On 24 July 2002 the third respondent referred the dismissal dispute to the second respondent for conciliation. She described the dispute as one concerning an unfair dismissal relating to misconduct. The matter was not capable of settlement. On 21 August 2002 a certificate of outcome was issued. The third respondent referred the dispute for arbitration. The arbitration proceedings commenced on 23rd April 2003 with the first respondent as an arbitrator. Mr Masina (recorded in the transcript as Masipa) represented the applicant while the third respondent was not represented.

The arbitration proceedings

1. **The procedure**

[23] The deliberations, during the arbitration proceedings, took the form of a discussion in which no party took an oath or an affirmation. Mr Masina stated what the charge was and proceeded to give an outline of the allegations against the third respondent. The third respondent was not offered an opportunity of putting any questions to him.

[24] The third respondent was also given an opportunity to outline her case. When she finished, Mr Masina was allowed to and did cross-examine her

2**. Evidence**

[25] In respect of the substance of the charge, Mr Masina presented the version which Ms Mc Naughton had given to him during the disciplinary hearing. Like wise, the third respondent repeated what she had said at the disciplinary hearing.

The award and reasons thereof

[26] The first respondent identified the issue to be decided by him as being, whether the dismissal of the applicant by the third respondent was substantively and procedurally fair

[27] In the founding affidavit and in the heads of argument, the applicant did not attack the procedure which the first respondent

adopted during the arbitration proceedings. The attack was rather at the criticisms which the first respondent levelled at the chairperson of the disciplinary hearing.

[28] The notes for the internal disciplinary hearing are clear and concise. They leave no room for any doubt that the third respondent was never offered any opportunity to cross-examine Ms Mc Naughton. It is to be assumed that Ms Mc Naughton was both the applicant's representative and a witness. If she was not a witness, then it follows that the applicant did not call any witness in that enquiry. Criticisms levelled at the first respondent's findings on the procedure at the internal hearing are indeed baseless.

[29] While the procedure followed by the first respondent was not itself a model of perfection, it did not result in the failure of justice.

[30] The first respondent ordered the retrospective reinstatement of the third respondent with compensation which was an equivalent of ten months remuneration and it came to R40 626, 00.

Review proceedings:

[31] Aggrieved by the first respondent's award, the applicant launched an application to review and set aside the award essentially on the

grounds that:

(a) The first respondent's award is neither rational nor justifiable on the basis that: - the third respondent had dealings with the complainant and his travelling party on 19 May 2002;

(b) The first respondent committed a number of fundamental mis-directions which deprived the applicant of a fair hearing. He also misconceived the nature of the enquiry by not applying his mind as to whether the hearsay evidence, should have been admitted under one of the exceptions to the hearsay evidence rule,

Analysis

[32] Section 145(1) and (2) of the Act, on which the application is founded states:-

1. "Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award-

a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17,20 or 21 (in so far as it relates to the aforementioned offence) of the Prevention and Combating of Corrupt Activities Act, 2004; or

b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

iii) exceeded the commissioner's power; or

(b) that an award has been improperly obtained".

[33] In **Carephone (Pty) Ltd v Marcus No & others (1998)11 BLLR 1093 (LAC)** at 1103 paragraph 37, a question was formulated as a specific test to apply in review proceedings such as the one before me, thus:

"Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?"

[34] There is a long line of decisions in which this formulation has been considered. The correctness of the test was confirmed in **Shoprite Checkers (Pty) Ltd v Ramdaw No and others (2001)22 ILJ 1603 (LAC]** where it was held, *inter alia,* that there was much commonality between justifiability and rationality.

[35] Tip AJ in **Standard Bank of SA Ltd v CCMA & others (1998)19 ILJ 903 (LC)** said that a relief by way of review would be available:

> " Where a commissioner sitting as arbitrator has misconstrued oral or documentary evidence, or has ignored or misapplied relevant legal principle, to an extent that is inappropriate or unreasonable, then such commissioner has failed in the task under the Act."

[36] I now turn to the facts of this case, being mindful of the proper approach to be had in review applications.

[37] The main gripe of the applicant lies in the first respondent having rejected the contents of the report in the e-mail report. That he

rejected it, is manifestly clear in his findings that:

> "In my opinion neither Mr Masina nor Ms Marina
> McNaughton was in a position to establish the facts
> Based on the evidence that they had"

The evidence they had was the complaint in the e-mail. The first respondent was constrained to attach any evidential weight to the contents of the e-mail as being hearsay and he consequently found that the applicant had failed to prove that the dismissal of the third respondent was substantively fair.

[38] I have to decide whether first respondent was or was not correct in rejecting hearsay evidence contained in the e- mail report.

[39] Section 3 of the law of Evidence Amendment Act N0 45 of 1998, which I will henceforth refer to as the Evidence Act. Section 3(1) of the Evidence Act states thus:

(1) "Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings; unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to

(i) the nature of the proceedings;
(ii) the nature of the evidence ;
(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(iv) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be

taken into account,

is of the opinion that such evidence should be admitted in the interests of justice".

[40] With the exception of circumstances as are envisaged in section 3 of the Evidence Act therefore, hearsay evidence remains inadmissible in civil and criminal cases. Section 3(4) of the Evidence Act is informative of what hearsay evidence is. It states:

"hearsay evidence means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party means the accused or party against whom hearsay evidence is to be adduced, including the prosecution".

[41] The arbitration proceedings held under the auspices of the CCMA are certainly neither the criminal nor the civil proceedings as is envisaged in section 3(1) of the Evidence Act. In the Carephone-case, supra at paragraph 33, Froneman DJP had this to say:

"There is no constitutional right to have matters capable of being decided by the application of law determined by a court of law. It may be done by another independent and impartial tribunal (section 34 of the Constitution). The Commission is such a tribunal. It is and was, (see Hira and another v Booysen and Another 1992 (4) SA 69 (A) at 91 E-I) quite proper to give an independent and impartial administrative tribunal the exclusive competence to decide not only matters of fact, but also of law, with no right of appeal to a court".

[42] One case in which the Labour Appeal Court had an occasion to pronounce on section 3 of the Evidence Act is **Southern Sun Hotel (Pty) Ltd v SA Commercial Catering & Allied Workers Union & Another 200 21 ILJ 1315 (LAC)** . Zondo AJP, as he then was, said ":……Further it must also be taken into account that, since the

legislature intended hearsay evidence to be admitted in courts of law if to do so would be in the interests of justice, it is highly unlikely that the legislature would demand a higher test before hearsay evidence can be admitted by an administrative tribunal like the Industrial Court than the test to be applied by courts of law in the admission of hearsay evidence".

[43] Depending on circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA. A further aid to the arbitrator in this regard lies in section 138 of the Act. It provides:

"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".

[44] With this in mind, I now return to the facts before me, to determine if the admission of hearsay evidence in this case would have been in the interest of justice.

The nature of the evidence

[45] A passenger of Singapore Airline lodged a complaint with a staff member in Singapore. This complaint was given to one Mr Richard Lee who in turn reduced the complaint into writing in the form of an e- mail message. Mr Lee sent this e-mail message to one Mr Yekohong Chung, in Singapore. Mr Chung in turn, forwarded the same e-mail message to one Mr John Murray by e-mail transmission. Mr Murray appeared to be a staff member of the

applicant and was based in South Africa. The applicant investigated the matter and that led to the third respondent being charged with misconduct. The first respondent took a cautious approach, in my view, in this regard and he said:

"I could see no documentation or affidavits from the Singapore passenger wherein he directly complained against the actions of the applicant. Singapore Air or Yokehong Chung did not confirm the authenticity of the complaint and that it had in fact been received as a formal complaint".

[46] The admission of this evidence, on this basis would be prejudicial to the third respondent as it goes to the merits of her defence. There is no indication that there was no other way of proving the guilt of the third respondent, if such evidence is excluded. No basis has been laid to support a claim that it would be difficult to get the passenger or to present to him the initial version of the third respondent and invite him to comment thereon, before deciding to charge the third respondent.

The purpose for which the evidence is tendered

[47] It was presented as being the truth of what it contained, that is to prove the guilt of the third respondent. To admit the same would therefore be highly prejudicial to the third respondent who would have been denied, as it happened in the internal hearing, her right to test the veracity of the report by means of cross examination. The third respondent consistently denied the version as it was reflected in the report. No clear reason has been canvassed on why

the passenger would not be available to testify in a matter in which the third respondent stood to lose her employment.

The probative value of the evidence

[48] It is difficult to say that the evidence is of good evidential value. The staff member, to whom the complaint was lodged, did not reduce that report he or she received from the passenger down into writing. If he or she did, there is no evidence of it.

The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

[49] In his founding affidavit in support of the application, Mr Masina said that the first respondent failed to consider that the complainant and his party were not (sic) readily available to testify and it would not be reasonably practicable to obtain their presence at the hearing. The expense involved would be exorbitant. Yet no basis for this was ever laid. There is no indication to suggest that this passenger lives and resides in Singapore. The purpose for which the group had come to South Africa is not indicated anywhere to suggest that this was a once of visit. One remark by Mr Lee in the e-mail message is:

> "While the pax (passenger) did not make any specific demand, such as reimbursement of the USD 120.00 or such like, we have told pax that we will get back to him once we have any news from your side".

[50] This gives the only slightest indication that the passenger might be

in Singapore. There is no evidence at all to suggest that this passenger would not return to South Africa in the near future. This could have been easily ascertained from him as Mr Lee undertook to get back to him. What Mr Masina proffers as a reason for not calling this passenger is only conjecture.

[51] At the time of the writing of the e-mail message, Mr Lee was in a position to communicate with the passenger. The e-mail system provides an effect convenient and cheap communication tool which, if resorted to before the third respondent was charged, could have produced better results. This would make it possible for the passenger to be presented with the explanation which the third respondent gave when she was confronted with the allegations. Parties could then arrange a safe mode for the transmission of a formal complaint, even under oath or affirmation, from the passenger. Mr Lee, in his well considered opinion, had opened a door for further investigations and further communication which would lead back to the complainant. Instead, the applicant acted precipitately by charging the third respondent at a time when the applicant was well aware that a dispute of facts was inevitable.

Any prejudice to a party which the admission of such evidence might entail.

[52] It is in the interest of the business of the applicant that its staff members have to be honest and have interest of their passenger at heart. The applicant did not prohibit the receipt of tips but adopted

a policy that the same be declared to superiors. The interest of the third respondent, in her job are however more paramount than those of the applicant who stands to loose her job on the basis of an untested report. There are no other factors which, in my view, should be taken into account.

[53] A proper conspectus of all these factors indicates to me that the admission of hearsay evidence in this case would not have been in the interest of justice. Accordingly, third respondent did not commit any defect as is envisaged by section 145 of the Act in rejecting the hearsay evidence. Added to this is, in my view, the fact that the version of the third respondent standing alone, while it may have its own shortfalls, is not so ludicrous as to be only worthy of rejection. The applicant disclosed in the letter of dismissal that tipping was an internationally accepted practice. The policy of the applicant in this regard was said to be one of not encouraging staff in the position of the third respondent to accept tips but allowed such staff to have to declare the same, if given. The act of receiving a tip was accordingly not made an actionable misconduct.

Order

The application is dismissed with costs.

CELE AJ

Date of hearing	:	13 September 2005
Counsel for the applicant	:	Mr W Hutchinson
Attorneys for the applicant	:	Fluxmans Incorporated Attorneys
Attorneys for the respondent	:	Unopposed
Date of Judgement	:	28 November 2005