

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: JA1/2007

2008-05-14

In the matter between

10 CHECKPORT SA (PTY) LIMITED

Appellant

And

CCMA & OTHERS

Respondent

J U D G M E N T

DAVIS JA: The appellant carries on business from Johannesburg International Airport. It is a service provider concerned with passenger profiling and documentation verification which, needless to say, is an important service, to prevent human trafficking and to promote security
20 and safety on aircraft.

Third to fifth respondents were employed as checking agents at Johannesburg International Airport in respect of flights carried out by South African Airways (Pty) Ltd (SAA). Third respondent was the supervisor of fourth and fifth respondents.

On 6 October 2005, email correspondence were received by appellant from the government of the United Kingdom pertaining to one passenger who had travelled from Johannesburg International Airport on a SAA flight on 6 October 2005, carrying a fraudulent passport. He was detected by the authorities at Heathrow Airport in London. Pursuant to an investigation which was carried out by the appellant, it was discovered that a total of 177 passengers had boarded the SAA flight and that only five had been scanned. Third to fifth respondents were the scanning personnel who were on duty when the aircraft was boarded. Another
10 employee on duty, namely Bridget, performed the function of physically checking the travel documentation of passenger.

Third to fifth respondents were charged with five counts, being:

1. Failure to carry out instructions and report an incident flight SAA234 of 6 October 2005 was not scanned as instructed;
2. Breaching the code of conduct in employment contract and rules and regulations;
3. Dishonesty. Due to 1 and 2, a passenger went through undetected with fraudulent passport; and
4. Bringing the company into disrepute;
- 20 5. Gross negligence.

Pursuant to a disciplinary enquiry which followed these charges, third to fifth respondents were found guilty of all charges, save for the third charge.

On 19 October 2005, a written outcome of the disciplinary hearing of third respondent was handed down. Fourth respondent's

services were terminated on 19 October 2005. Third respondent's services were terminated on 21 October 2005. Fifth respondent's services were terminated on 26 October 2005. Third to fifth respondents were dissatisfied with these decisions and their consequent dismissals. The dispute was then referred to first respondent.

On 6 December 2005, the matter was set down for arbitration. Second respondent was appointed to arbitrate the matter. On 19 December 2005, second respondent handed down her award. She concluded that the dismissals of third to fifth respondents were
10 substantively unfair and ordered that they be reinstated.

On March 2006, appellant launched an application in terms of Section 145 of the Labour Relations Act, 66 of 1995 ('the Act'), to review and set aside the award of second respondent. The matter was set down for hearing on 22 September 2006. On 13 October 2006, Ndlovu AJ, handed down judgment in which he dismissed the appellant's application. There was no order as to costs.

With leave of the court *a quo*, this dispute has now come on appeal before this court. The essence of the case concerned the reasons why only five of 177 passengers who boarded the flight on the day in
20 question had their passports scanned.

In her award the second respondent summarised the dispute thus:

"The respondent (being the appellant in this case) blamed this on the applicants (third to fifth respondents) who in turn blamed the scanners".

She found for the respondents on the following bases:

1. The evidence indicated that it was “common cause” that the manager responsible on the day, Mr Mostert “checked on them and if they were acting contrary to known or expected procedures, he would have picked that up”.
2. The five passengers whose passports were scanned, appeared at different parts of the list of passengers. This was “an indication that there was indeed something wrong with the scanners because even the ones that were assisted by the SAA passengers, their
10 images were not found”.
3. If the scanners could not retain the images, then “it is possible that they could fail to detect the fraudulent passport. If that was the case therefore, it would be unfair for the respondent to blame the Applicant for the malfunction of their machinery”.

For these reasons, the second respondent found, on the probabilities, that there was insufficient justification for the dismissal of the respondents.

The test in a review application of this nature has been settled in our law. Briefly stated: What concerns the reviewing court is whether this
20 is a decision to which a reasonable decision maker could not have come; in other words, is there a justification, based on the evidence, for the conclusions reached by second respondent?

Mr Hutchinson, who appeared on behalf of the appellant, (there was no appearance on behalf of the respondents), submitted that the award manifestly had not taken account of significant portions of the

evidence. A series of misdirections were evident throughout the award. This lead to only one plausible conclusion; this was not an award which a reasonable decision maker could have made.

I turn briefly to deal with the difficulties as indicated by Mr Hutchinson. In the first place, appellant in the form of evidence of Mr Morné Olivier, gave a clear description as to the manner in which the scanners operated. Two portions of his evidence are worth repeating for the purposes of this judgment. In examination in chief he said the following: *"The scanner that we use is basically a laptop and then it has*
10 *got the scanner underneath the laptop here. So every time we put in a passport it will tell you "scanning document" and then it goes 10%, 20%, up until 100% and then the document appears on the screen of the laptop and it does a, if it is a machine readable passport where you have got like a barcode at the bottom, there it will tell you, yes this is good or it is not good. And then you have also got the option to see the UB and the 3M and the stuff like that. But as soon as you scan, the image will appear on the screen in front of you".*

Asked under cross examination whether the scanner could simply not operate at all in the fashion urged by respondents. Mr Olivier
20 said: *"Firstly, if the scanner does not want to initialise it will tell you, "failure to initialise scanner" and it will not allow you to scan any passports. Secondly, if the battery is flat, the scanner will not come on at all and it will give you the same message. Thirdly, if it says "ready to handle next passenger", and you put in the passport but no image appears in front of you, there is a problem. If you put the passport there*

and an image appears in front of you, it means the scanner is working, there is nothing wrong with it”.

Mr Olivier then indicated that, in the event of any problem being encountered, the operation of the scanner would indicate to the operator that there was a problem. To suggest that this evidence uncontested as it was, needed to be supplemented by further expert evidence, is surely to be grossly unfair to the employer.

The contrary argument put up by the respondents and accepted by the second respondent; *“if such scanners could not retain the image, it is possible that they could fail to detect the fraudulent passport”* is based on pure speculation. There is no basis for drawing this kind of inference on the uncontested evidence

The question arises to whether any other reasonable inference could be drawn from the facts. The evidence is clear: were the scanners to have malfunctioned the machines would have indicated this to the third to fifth respondents. That leads to the only reasonable inference: there was a failure to employ the scanners.

As indicated earlier in my judgment, second respondent concluded that there must have been something wrong with the scanners because “even the passengers who were assisted by the SAA employees, their images were not found”. However, in evidence, Mr Olivier testified that the South African Airways personnel had not scanned any of the passengers and, to the extent that they had been involved in boarding procedures, this had taken place for only a five minute period. There is no

basis by which to contend that part of the scanning was undertaken by SAA employees.

There is a further issue raised by Mr Hutchinson. It appears to be common cause that two scanners were employed on the day in question. As Mr Hutchinson rhetorically put it, what are the probabilities that two scanners, employed simultaneously, would both malfunction in exactly the same fashion as urged by third to fifth respondents?

In short, the evidence placed before the second respondent indicated clearly how the scanners were to be used and were employed.

10 There was evidence as to what would occur if a scanner malfunctioned. None of this evidence was ever placed into dispute. Once the speculative “evidence” put up by third to fifth respondents is rejected, the only reasonable inference to be drawn is that only five passengers were scanned and that the respondents omitted to scan the remaining 172 passengers. Upon this conclusion the notion that the employees in question should be dismissed is justifiable, in that their failure to scan in the context of their employment, constitutes an egregious breach of their duties.

20 Reverting to the test which must be employed, on the evidence as I have analysed it, a reasonable decision maker could have come to no other conclusion than that the employees failed to use the scanners as was their obligation. Accordingly a reasonable decision maker would have concluded that the dismissals were substantially fair.

The remaining question that must be examined is the appropriate course of action. I can see no reason to refer the matter back for further

arbitration. Accordingly I would order that the appeal succeed, that the decision of the court *a quo* be substituted with the following:

The award of second respondent is set aside and substituted with an award that the dismissal of third to fifth respondent was substantially and procedurally fair. There is no order as to costs.

LEEUEW JA & NDLOVU AJA: Concur.

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On behalf of the Appellant : Mr Hutchinson

10 On behalf of the Respondents: No appearance