IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Reportable
Case NO. JA 30/10

In the matter between:

WOOLWORTHS (PTY) LTD	Appellant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER KAUSHILLA GUNASE	Second Respondent
C MASOLENG	Third Respondent

Date of hearing : 26 May 2011

Date of Judgment : 26 July 2011

J U D G M E N T

NDLOVU JA

Introduction

[1] This is an appeal, with the leave of the Court below, against the whole of the judgment of the Labour Court (Molahlehi J) handed down on 14 December 2009, in terms of which the Court below dismissed with costs the review application launched by the appellant for the review and setting aside of the arbitration award issued on 29 August 2005 under reference number GAJB 4629-05 ("the arbitration award") by the third respondent ("the Commissioner").

Factual Background

[2] On 1 April 1982 the appellant, Woolworths (Pty) Ltd, employed Miss Christine Masoleng ("the employee") at the appellant's branch in Cresta, Gauteng. However, on 3 February 2005 the employee appeared before the appellant's disciplinary enquiry charged with gross misconduct. The charge sheet read as follows[1]:

> "Gross misconduct in that you concealed merchandise without paying for it, which resulted in a loss to the company. This occurred on 19/01/2005 and 18/01/2005."

[3] The employee was convicted of the gross misconduct as charged. On 10 February 2005 she was dismissed from the appellant's employ. At the time of her dismissal she held the position of customer service supervisor at the gross salary of R5 400 per month.

[4] As she was not satisfied with her dismissal which she considered was unfair, the employee referred an unfair dismissal dispute to the CCMA where the matter eventually came before the Commissioner for arbitration. In terms of the arbitration award, the employee's dismissal was found to be procedurally fair but substantively unfair. Consequent to this finding, the Commissioner made the following directions in the arbitration award::

> "2. The respondent is directed to reinstate the applicant on the same terms and conditions that prevailed at the time of her dismissal and without any loss in benefits. The applicant is to report for duty at

[1] Page 32 of Indexed Bundle.

> the respondent's Cresta branch within three days of her receipt of this award.
>
> 3. The aforesaid reinstatement order is retrospective to the date of dismissal and is coupled with a final written warning for the unauthorised use of company property on 18 January 2005. Said warning shall be valid for the period of one year, the date of commencement thereof being the date on which the applicant reports for duty as aforementioned. Further the respondent is to pay the applicant remuneration for three months only being the sum of R16 200,00 calculated as follows: R5400,00 x 3. Said amount is to be paid less any tax and legal deductions. The applicant is not entitled to any other back pay.
> 4. The sum specified in paragraph 3 hereinabove is to be paid to the applicant within thirty days of the date on which she reports for duty.
> 5. There is no order as to costs."

[5] The appellant was dissatisfied with the outcome of the arbitration process; hence it referred the matter to the Labour Court by way of a review application. As stated, the Court below handed down its judgment on 14 December 2009, dismissing the review application with costs. It is against this judgment that the appellant now appeals to this Court.

The arbitration hearing

[6] On 16 August 2005 the arbitration hearing was held and, as indicated above, the award was issued on 29 August 2005. At the arbitration hearing, two witnesses presented evidence on behalf of the appellant, namely, the appellant's branch manager, Mr Stephan Boonzaaier ("Boonzaaier") and its store manager Mr Donovan

Slabbert ("Slabbert"). The latter had chaired the employee's disciplinary enquiry. The employee also testified but called no further witnesses.

[7] The appellant sought to establish that on two consecutive days, namely 18 and 19 January 2005, the employee, whilst on duty, committed acts of gross misconduct and that she was dismissed for a fair reason, after a properly convened disciplinary hearing.

[8] It was common cause that the misconduct charges preferred against the employee were based on the images, involving the employee, seen on the DVD footage captured from a surveillance (CCTV) camera on 18 and 19 January 2005 at about 09h15 and 13h45, respectively. The camera was installed at some strategic point within the workplace so as to enable the capturing of movements inside the customer service section including, particularly, the area at or around the desk from where the employee worked. This section was located in an office-like room or space in which a variety of clothing items were stored.

[9] These clothing items were basically "returns" or "second-grade" goods, which were "degraded" due to a number of reasons, including non- compliance with the appellant's required quality standard; those goods which were damaged or soiled and those returned by customers. Indeed, it was also not in dispute that, in terms of the appellant's policy, these items would be disposed of in various ways; for example, by returning them to the respective manufacturers or suppliers, selling them to staff at a reduced price, or donating them to charity. It appeared that the manner of disposal depended on the particular situation in relation to the item concerned but lay exclusively in the appellant's discretion.

[10] The DVD footage was played at all the proceedings, namely, at the disciplinary enquiry, the arbitration hearing and, indeed, during the argument before the Court below. In this regard, the Commissioner recorded that the following facts were not in dispute[2]:

> "1. The video tape footage which the respondent tendered as evidence (played from a DVD via a notebook computer at this hearing), related to events recorded on 18 and 19 January 2005 in the respondent's customer services department;
> 2. Said footage was tendered as evidence at the applicant's disciplinary enquiry, and
> 3. The content of the minutes of the disciplinary enquiry reflect what transpired at the time."

[11] Given the fact that the DVD footage constituted part of the evidentiary material in the proceedings before the Court below, we considered it appropriate for us to view the footage as well, which we did in chambers before proceeding to hear argument from counsel.

[12] The two incidents as seen on the DVD footage showed the employee performing acts or engaged in movements which may be summarised as follows:

12.1 On 18 January 2005: The employee is seen taking what appears to be a white ladies' top/vest/blouse ("the blouse") from a rack or shelf; placing it on the desk; folding it about twice or thrice; momentarily walking away from the camera; but then quickly returning and picking

[2] Arbitration award, at p.65 of Indexed Bundle.

up the blouse (which is then neatly folded) and tucking it underneath her clothes in the breasts region. Thereafter the employee continues with her work.

12.2 On 19 January 2005: The employee is seen carrying a belt which appears to have at its one end a small white rectangular-shaped piece or object hanging or attached. She rolls the belt into a coil or spiral and then tucks it underneath her clothes in the breasts region.

[13] It was on the basis of this DVD footage that the employee was charged and convicted of gross misconduct, in that she "concealed merchandise without paying for it, which resulted in a loss to the company", in violation of the appellant's disciplinary code.

[14] Boonzaaier's and Slabbert's factual evidence, in support of the appellant's case, was premised virtually entirely on the DVD footage. Boonzaaier also confirmed that the employee was not found in possession of the blouse or the belt on either of the dates in question. In this regard, however, he explained that, in practice, the appellant generally conducted a 'discreet search', which ensured that the privacy of an employee was respected. Further, the reason why the DVD footage was not obtained much earlier was because the footage, which was shot over approximately a week at a time, was on a 'long-play videotape' which then had to be analysed. As a result, video clips, which were converted to a DVD base for easy access, would then be supplied to the relevant store manager. Due to this lengthy process, any possible disciplinary action against any suspected transgressor could only be taken after about a month.

[15] According to the appellant, the employee's conduct fell within the definition of gross misconduct in terms of the appellant's disciplinary code. This code was easily accessible to all employees via the "internal internet"; it was published and posted on the notice boards and also discussed during general meetings, communication forums and induction courses. With her long service of some 23 years it was reasonably expected that the employee knew what constituted misconduct in the workplace. The appellant further submitted that, as a result of the employee's gross misconduct, the relationship of trust between the parties had irreparably broken down.

[16] In her defence, the employee admitted having handled the items, namely the blouse and the belt, on the relevant dates and in the manner as shown on the DVD footage. However, she denied having committed any misconduct or other wrongdoing to the appellant. Although she admitted that the blouse was the appellant's property, she said it was then a "waste garment" which had "no value" and which she had taken in order to absorb sweat on her as it was hot in the office where she worked.

[17] As for the belt, the employee alleged that it was her own. She had come to work wearing it that morning. When she felt the heat in the office she had then taken it off and placed it somewhere in the office, but when she had to go out for lunch she went to retrieve the key which she needed and which was attached to the belt. She took the belt, rolled it up and placed it in her breast and then went out. When asked by the Commissioner why she had not openly carried the belt, if it was her own belt, in her hand instead of putting it in her breast underneath her clothes, her answer was

that she did not like to do so and that she simply "felt like putting it there"[3] (in her breast).

[18] In summing up her findings on the two incidents, constituting the alleged gross misconduct against the employee, the Commissioner stated, among other things, as follows:

Re: The incident of 18 January 2005[4]:

> "Given the video footage, alluded to elsewhere, it is plain that the applicant placed the top/vest underneath her clothing. However I am unconvinced that her conduct amounted to concealment in the circumstances. As the respondent levelled this allegation it was incumbent on it to prove the applicant's culpability on a balance of probabilities. This included adducing evidence to disprove the applicant's justification in the instance. In my view the respondent did not establish that the applicant's reasons for placing the item of clothing underneath her own was improbable. I have commented on the applicant's candour elsewhere and I repeat at this juncture that her version on this score was not impeached. The respondent also failed to prove that the applicant harboured any dishonest intent in the circumstances or that such an objective could be inferred from the facts and evidence adduced. I add that during the hearing it was put to the applicant that borrowing merchandise is an offence. However, this is not the charge that was levelled against her nor was she found guilty of same (p. 19). This is not to say that the applicant committed no offence. She did.

[3] Arbitration record (as reconstructed), at p.190 line 19 of the Indexed Bundle.
[4] Arbitration award, at p.73 of Indexed Bundle.

However in my view her conduct, given the facts and circumstances before me, was more akin to the unauthorised use of company property."

Re: The incident of 19 January 2005[5]:

"Neither of the respondent's witnesses was in a position to dispute the applicant's contention that the belt in question belonged to her at the time. Thus it is evident that the respondent relies solely on the fact that the applicant placed the belt under her clothing in order to prove the transgression in this instance. Whilst I accept that the respondent also markets such an item there is no evidence before me to substantiate the claim that the belt, which the applicant placed under her top, was indeed company merchandise. This had to be proved, on a balance of probabilities, in order for the charge to be well-founded. In my opinion the applicant was a reliable witness. Whilst she was clearly unfamiliar with disciplinary proceedings and questioned same on the basis noted elsewhere, I am not convinced that this was a reflection of a lack of candour on her part. I add that in my view Mr Slabbert's assertion that her statements at the disciplinary enquiry were contradictory (pp 13 & 17) is difficult to appreciate, as in both instances the applicant records that the belt belonged to her. Further, apart from my determination on the applicant's honesty, her version is not improbable in the light of the other proven facts in the instance. Placing what was hers underneath her clothing does not render her guilty as charged. Thus in the light of the above I am not satisfied that the respondent has proved the offence which is alleged to have occurred on 19 January 2005."

[5] Arbitration award, at p.72 of Indexed Bundle.

[19] Based on these findings, the Commissioner set aside the employee's conviction in relation to the blouse incident and substituted it with a conviction for *"unauthorised use of company property"*. The Commissioner considered that this was a less serious misconduct and that, on this basis, the trust relationship between the appellant and the employee had not broken down. In the circumstances, she considered that the sanction of dismissal was not appropriate; hence she substituted it with a final written warning which was to be valid for one year commencing from the date on which the employee would have resumed duty in terms of the award. Regarding the belt incident, the Commissioner exonerated the employee completely.

The Labour Court

[20] After the review application was launched, it transpired that the record of the arbitration proceedings was either lost or mislaid. As a result, on 7 August 2007 the Commissioner and both parties' representatives (including the employee) convened at the CCMA offices where the reconstruction process of the arbitration record was carried out, mainly with the aid of the Commissioner's manuscript notes. The Commissioner read out line by line from the notes and explained where necessary. Both parties were satisfied that the content of the Commissioner's notes constituted an authentic reflection of what transcribed during the arbitration hearing. The Commissioner's notes were accordingly transcribed and filed with the Labour Court in lieu of the arbitration record[6] and the review application was argued on that basis.

[6] See at pages 91–202 of the Indexed Bundle.

[21] It is apposite to refer entirely to what appear to be the reasons for judgment in the Court below. Under the heading "Evaluation" the learned Judge stated the following[7]:

> "[28] Turning to the facts in the present instance, it is apparent that the commissioner in determining the fairness of the sanction was influenced by the factors mentioned is said *(sic)* in the above quotation from the arbitration award.
>
> [29] The other factor which the commissioner took into account in his evaluation of the appropriateness of the sanction was the 23 (twenty three) years of service which the employee had with the applicant. This long period of service was accompanied by a clean disciplinary record. There is no suggestion from the facts and the circumstances of this case and in particular taking into account the length of the service and the clean record that the employee is likely to commit the same offence in the future and therefore should not be given a second chance but be given the most severe punishment of dismissal. I share the same view as that of the commissioner that for this reason alone the dismissal of the employee was unfair and accordingly the decision of the commissioner which is so well reasoned in as far as this aspect of the matter is concerned cannot be faulted.
>
> [30] Accordingly, the applicant's review application stands to be dismissed. I see no reason why costs should not both in law and fairness follow the results."

There is nothing else that I have found on the record, which appears to indicate further "evaluation" of the merits of the matter by the Court below.

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[7] Labour Court judgment, at p.298 of Indexed Bundle.

The Appeal

[22] Mr *Myburgh SC*, for the appellant, submitted that the fundamental problem with the judgment of the Court below was that the Court seemingly approached the matter on the basis that the review was restricted to an attack on the Commissioner's decision on sanction. He contended that the Court below completely overlooked the fact that the appellant's grounds of review were in respect of both the Commissioner's findings on the merits of the dispute (related to both incidents of 18 and 19 January 2005, being the blouse and the belt incidents, respectively), as well as the sanction substituted by the Commissioner and which related only to the blouse incident.

[23] Counsel further submitted that, in its judgment, the Court below did not deal with the reasonableness or otherwise of the arbitration award. He argued that the Commissioner's findings on the merits were unreasonable and ought to have been rejected by the Court below. He further submitted that the DVD footage evidence constituted a *prima facie* case of concealment against the employee which shifted the evidentiary burden to the employee to adduce exculpatory evidence. He referred us to the decision in *Federal Storage Co Ltd v Angehrn and Piel*[8] for his proposition.

[24] However, Mr Brown, for the employee, contended that, from a careful reading of the judgment of the Court below, it was clear that the Court also dealt with the Commissioner's factual finding on the guilt or otherwise of the employee. He submitted that the learned Judge in the Court below correctly accepted the Commissioner's finding that the employee had furnished a probable and credible

[8] 1910 TS 1347.

explanation of the circumstances surrounding her possession or handling of the blouse and the belt when she was caught on camera.

Analysis and Evaluation

[25] I am unable to agree with Mr Brown's submission that the reading of the judgment of the Court below, from whatever dimension or perspective, indicates that the learned Judge considered the issue of guilt or otherwise of the employee, other than only the question of sanction. Instead, I find that there are compelling reasons to conclude that the Court below may indeed have overlooked several grounds of review pleaded by the appellant during the review application proceedings. The learned Judge appeared, in my view, to have concentrated only on the Commissioner's reasons for the award which the learned Judge favourably referred to fairly extensively in the judgment. Unfortunately, he omitted to deal exhaustively with the fundamental grounds of review presented before the Court. It was clear from the appellant's grounds of review that the attack on the Commissioner's findings was directed at both the finding of guilt and the consequent sanction. To the extent relevant to the finding of guilt, I propose to refer to the appellant's grounds of review before the Court below[9] (as deposed to in the founding affidavit on the appellant's behalf):

> 7.3 I submit, with respect, that the Commissioner's award falls to be reviewed in terms of section 145 of the Act and/or the principles of fair administrative procedure and/or because her award is not rationally justifiable on the evidence that was placed before her, for, *inter alia*, the following reasons:

[9] Para 7 of the appellant's founding affidavit in review application, at pp 26-29 of Indexed Bundle.

7.3.1 The Commissioner unjustifiably and/or incorrectly found and/or committed a gross irregularity in finding that the evidence led by the Applicant's witnesses was contradictory: the evidence led by the witnesses was substantiated, corroborated and well-founded. On the contrary, it was the evidence led by Masoleng that was contradictory.

7.3.2 The Commissioner unjustifiably and/or incorrectly found and or committed a gross irregularity in failing to have regard *alternatively* failing to have proper regard to the fact that the Applicant proved the existence of its 'wasted' goods rule and that this rule is both reasonably and commercially rational. It is established law that an employer is entitled to set its own standards of employee conduct, provided that the standards are reasonable. The Applicant has a clear policy regarding the unauthorised possession or removal of products from the workplace. Masoleng intentionally attempted to remove clothing items from the Applicant's premises without the necessary permission, which could have led to a loss to the Applicant. …

7.3.5 The Commissioner unjustifiably and/or incorrectly failed to attach significant relevance and/or committed a gross irregularity by failing to attach significant relevance to Masoleng's *modus operandi* in her deceptive actions. It is evident that Masoleng had made a devious and premeditated decision to conceal property belonging to the Applicant under her clothing in circumstances where she had not been entitled to do so.

7.3.6 The Commissioner unjustifiably and/or incorrectly found and/or committed a gross irregularity in finding that Masoleng was a reliable witness. Not only was her evidence confusing and contradictory, but Masoleng also failed to provide any convincing evidence to corroborate her version of events. …"

[26] Indeed, I find no reason why, if the Court below had properly dealt with the matter, the content of the judgment of the Court below under the heading "Evaluation" should only refer to matters related and relevant to sanction but devote no attention to the Commissioner's factual finding of guilt. In this regard, I am constrained to find that the Court below committed a gross irregularity and misdirection in relation to the issues before it. Hence, this Court is not only entitled but has the duty to interfere.

[27] The review of an arbitration award issued by a CCMA commissioner is governed by section 145 of the Labour Relations Act[10] ("the LRA"), which to the extent presently relevant, provides:

> "(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) …
>
> (b) …
>
> (2) A defect referred to in subsection (1), means –
>
> (a) that the commissioner-
>
> (i) committed a 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 powers, or
>
> (c) that an award was improperly obtained."

[10] Act 66 of 1995.

[28] It is now settled law that the test to be applied on whether or not an arbitration award passes muster of judicial review in terms of section 145 of the LRA, should be found in an answer to the question*:* "Is the decision of the commissioner one that a reasonable decision-maker could not reach?"[11] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,*[12] the Constitutional Court stated as follows:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the compelling interests involved and the impact of the decision on the lives and well-being of those affected." Footnote omitted.

[29] The appellant's "Honesty Code of Practice"[13] provided, amongst others, the following guidelines relating to what actions an employee had to avoid at all times:

> ❖ "DON'T 'Put away' stock under counters for any personal reasons.
> ❖ DON'T Use company property (equipment, office supplies etc.) for private use.
> ❖ DON'T Borrow merchandise. Rather buy merchandise and if it is unsuitable you can obtain a refund."

[11] *Sidumo and Another v Rustenburg Platinum Mines Limited* and Others [2007] 12 BLLR 1097 (CC) at para 110.
[12] 2004 (7) BCLR 687 (CC), at para 45.
[13] At pages 56 – 60 of Indexed Bundle.

[30] Further, and more importantly, the appellant's *"*Disciplinary Code: Policy Amended 15/5/2000*"*[14] was, it seemed to me, the basis for the employee's charge, conviction and dismissal. It provided a schedule in which was listed various acts of misconduct, classified under the heads "Less Serious Transgressions"; "Serious or Dismissible Transgressions"; Dismissible Transgressions" and "Repetition of Transgressions". The category of "Dismissible Transgressions" is pertinent to the present instance and the following examples, amongst others, are mentioned thereunder:

> "3. Dismissible transgressions listed below will result in dismissal for a first transgression following a formal disciplinary procedure.
>
> - Any form of dishonesty or unauthorised possession, including but not limited to: theft, fraud, unauthorised possession or borrowing, eating or drinking of company property, unauthorised removal of company property from the workplace, or unauthorised removal of property from customers, suppliers or fellow employees, refusal to be searched in suspicious circumstances or being in breach of the honest code of practice. …
> - Unauthorised use of company property or funds for unauthorised private purposes. …
> - Breach of trust."

[31] Having viewed the DVD footage, I am inclined to agree with Mr Myburgh that the employee's conduct in respect of both incidents amounted to concealment of the items concerned. Significantly, the Commissioner also noted: "Concealment denotes

[14] At pages 61 – 63 of Indexed Bundle.

an intention to hide or keep secret, per the definition of the word"[15] According to the dictionary, the meaning of to "conceal" is "to prevent someone or something from being seen; keep something secret"[16]*; (or) "*refrain from disclosing or divulging. Put, remove, or keep out of sight or notice."[17] There can therefore be no doubt in my view that "concealment", in the present context, denoted an element of dishonesty.

[32] Unlike in criminal proceedings where it is said that "the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient"[18], the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux and Van Niekerk[19] where the learned authors offer a suitable example, with which I agree:

> "Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and

[15] Arbitration award at p.73.
[16] Soanes and Hawkes (eds) *Compact Oxford English Dictionary for Students*, 3rd ed. (Oxford University Press, 2006) at.200.
[17] Brown (ed) *The New Shorter Oxford English Dictionary: The New Authority on the English Language* 3rd ed vol 1 (Claredon Press Oxford, 1993), at 465.
[18] Section 84(3) of the Criminal Procedure Act51 of 1977. See also *R v Mnguni* 1958 (4) SA 320 (T); *S v Ngoala* 1979 (2) SA 212 (T); *S v Mangqu* 1977 (4) SA 84 (E).
[19] PAK le Roux and Andre van Niekerk: *The South African Law of Unfair Dismissal*, (Juta & Co, 1994), at 102.

> the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed."

[33] To my mind, the misconduct charge against the employee was framed in such manner as to have sufficiently embraced most of the specific acts of misconduct listed in the appellant's "Honesty Code of Conduct" and the "Disciplinary Code: Policy Amended 15/5/2000", which I have referred to above. Granted, it was not proved that the appellant suffered a loss in the sense of the items having been permanently removed from the appellant's premises. However, as stated above, concealment of the items *per se*, in the manner that the employee did, was sufficient to prove dishonesty on her part.

[34] The DVD footage evidence established, in my view, a *prima facie* case of "concealment" and, therefore, an element of dishonest intention on the part of the employee, which then shifted the evidentiary burden to her to present such evidence as would exonerate her from blame in that regard. In *Federal Cold Storage*[20]*,* above, the Court stated, in part:

> "But the burden of proving to be honest what admittedly on its face looked dishonest rested upon

[20] Above n8 at p.1352. See also *De Beers Consolidated Mines Ltd v NUM and Another* [1998] 12 BLLR 1201 (LAC) at para 34*; Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC) at para 35; *Mzeku and Others v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) at para 35; *Alusaf (Pty) Ltd v Mathe* (1992) 1 LCD 124 (LAC).

> the respondents themselves, not upon the appellants. Once the appellants had proved a *prima facie* case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood *prima facie* justified, the burden of proof was shifted, and it lay upon the respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the *prima facie* case against them must prevail and their guilt, justifying dismissal, must be taken to be established. With all respect to the learned Judges of the Supreme Court, they seem to their lordships to have failed to keep steadily before their minds this shifting of the burden of proof, and to have erred in consequence. They seem to have thought that the respondents were entitled to the benefit of any doubt, as to the convincing nature of the explanation and justification of their own action."

[35] Indeed, I find it difficult to comprehend the reasonableness of the grounds on which the Commissioner came to the conclusion that the explanation furnished by the employee as to her possession or handling of the blouse and the belt, in the manner that she did on those successive days, was honest and probable. In my view, these explanations by the employee were highly improbable, on the papers alone without even the aid of viewing the DVD footage. A viewer of the DVD footage is left without any doubt that the employee's version ought to have been rejected, not only as highly improbable, but as a glaring and shameless fabrication. It is also to be pointed out that the employee herself conceded that concealing her own belt in the

manner that she did was "a stupid thing"[21] for her to have done. Therefore, in my view, it could hardly be imagined that such conduct lent any credence to the employee's explanation of events, relating to the belt incident, to warrant or deserve description of her version as honest, credible and probable, as the Commissioner found to be the case here.

[36] I also noted on the DVD footage that the blouse appeared to have a somewhat shiny texture and it was thus rather strange to me how such material or garment could have been used, or intended to be used, as she alleged, namely as a perspiration absorbent. In any event, in her defence the employee pleaded that when she took the blouse it was because she did not have a paper towel to absorb her sweat and that she had, therefore, used the "waste garment" in a situation which she described as one of emergency. What I still found strange, though, with this explanation was that when I watched the DVD footage the employee did not, upon picking up the blouse, immediately use it to wipe off any sweat on her. It was not in dispute that all that she did with the blouse was to fold it neatly about twice or thrice and thereafter she tucked it under her clothes in the region of her breast. In other words, whilst she claimed to have used the blouse in the so-called "state of emergency", this claim was not supported by the real evidence shown of the employee on the DVD footage immediately upon her taking possession of the blouse.

[37] Clearly, the appellant's case depended on evidence, derived from the DVD footage and the inferences that can be probably drawn therefrom. The test regarding

[21] Arbitration award, p. 69 line 11 of the Indexed Bundle.

inferential proof in civil proceedings is well known. In *Cooper and Another NNO v Merchant Trade Finance Ltd*[22] the Supreme Court of Appeal recalled:

> "It is not incumbent upon the party who bears the *onus* of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the 'two cardinal rules of logic' referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the *onus* rests he is entitled to judgment." Footnote omitted.

[38] In my view, the most probable inference, in the circumstances of this case, was that the employee wrongfully concealed the blouse in her breast, intending thereby to use it for her own private purpose and thus permanently depriving the appellant of its ownership of the blouse, in the manner which was akin to misappropriation or theft; or attempt to commit such transgression or misdemeanour.

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[22] 2000 (3) SA 1009 (SCA) at 1027 para.7. See also *Law Society, Cape of Good Hope v Berrange* 2005 (5) SA 160 (C) at 171*; Macleod v Rens* 1997 (3) SA 1039 (E); *Mohammed & Associates v Buyeye* 2005 (3) SA 122 (C) at 129D.

Whether or not the employee successfully removed the items from the appellant's workplace premises without being detected by the appellant's security personnel, was, in my view, a matter of no relevance. Nothing detracted from the fact that the employee concealed the items in her breast in a manner which clearly constituted an act of concealment of the items. I am satisfied that this conduct was correctly characterised by the appellant as manifesting a dishonest intent on the part of the employee.

[39] Indeed, it was not a coincidence that on two consecutive days the employee happened to have concealed two items in her breast whilst on duty. To my mind, this conduct only showed a clear *modus operandi* on her part in the commission of the transgressions in question.

[40] It was not in dispute that the employee's defence that the blouse was hers was something which was raised by her, or on her behalf, for the first time in her closing statement at the disciplinary enquiry[23]. This discrepancy was pointed out by Slabbert during the arbitration hearing and it was not disputed by the employee. Indeed, her allegation of ownership of the belt turned out to be her main and only defence. If it was so, it seemed inexplicable how it occurred that the employee did not raise the defence at the outset. In my view, this aspect of her defence also smacked of an afterthought; in short a real fabrication.

[41] The employee's allegation that the white object hanging on the belt was in fact her key and not a price tag, was also highly improbable. It was a lame and implausible excuse. There was simply no key attached to the belt, which could be

[23] See the employee's closing statement, at p.41 of Indexed Bundle.

seen, but only an object which very closely resembled a price tag. It is also noted that the employee acknowledged that the appellant was selling similar belts as the one which was the subject matter of this dispute.

[42] Further, the employee's story that she came to work wearing the belt and that when she felt the heat in the office she removed it, that also sounds ordinarily strange and improbable. Her explanation that since she was a hefty or fat person she felt the heat in the office, whence she had taken off the belt, was difficult to accept as having any credence.

[43] In any event, if the belt were hers, she would have put it on when she went out for lunch. She did not do so. At the least, she would have openly carried it in her hand. She did not do so either. Instead, she rolled up the belt and tucked it in her breast underneath her clothes. As stated by me already, this amounted to concealment of the belt. She could not plausibly explain why she had to conceal the belt if it was hers. Her simplistic explanation was that she "felt like putting it there". That was a desperate answer from a liar who had no further explanation to offer. To my mind, the employee's version ought reasonably to have been rejected completely by the Commissioner.

[44] Consequently, I cannot find any rational basis by which the Commissioner found the employee to be an honest and credible witness who gave probable explanations in relation to her possession of the blouse and the belt. As stated earlier, the DVD footage evidence created a *prime facie* case against the employee which shifted the evidentiary burden to her to demonstrate her lawful or innocent possession or handling of the two items in question. In my view, she dismally failed

to discharge this onus. Hence, the Commissioner ought to have found that the appellant, as the employer, discharged its overall onus of proving, on a preponderance of probability, that the employee was guilty of gross misconduct involving gross dishonesty.

[45] Accordingly, I find that the decision made by the Commissioner, in terms of the arbitration award, was one which a reasonable decision- maker could not reach. Therefore, the arbitration award does not, in my view, pass judicial scrutiny under section 145 of the LRA.

[46] Earlier in this judgment I found that the judgment of the Court below did not deal with the Commissioner's factual finding on guilt, but that the Court below simply dealt with the issue of sanction. On this basis alone, the judgment of the Court below cannot stand.

[47] For the reasons I have set out, I am satisfied that, in both instances, the employee concealed the blouse and the belt, both of which were the property of the appellant, with the dishonest intention to misappropriate or steal the same, and for that reason, she was justifiably convicted of gross misconduct. As the misconduct involved the element of gross dishonesty, being a first-time transgressor was not, in my view, necessarily a life line that could save the offender from dismissal.

[48] It has long been held that the employer's decision to dismiss an employee will only be interfered with if that decision is found to have been unreasonable and

unfair[24]. The fact that an employee has had a long and faithful service with the employer thus far is indeed an important and persuasive factor against a decision to dismiss the employee for misconduct, but is by no means a decisive one. In *Toyota South Africa Motors (Pty) Ltd v Radebe and Others,*[25] this Court held:

> "Although a long period of service of an employee will usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty."

[49] Accordingly, notwithstanding her long service with the appellant, the employee committed, on two successive days, acts of gross misconduct involving gross dishonesty, in circumstances which, in my opinion, justified the appellant's assertion that the trust relationship between it and the employee broke down irreparably.

The Order

[50] In the event, the following order is made:

1. The order of the Court below numbered paragraph [31](i), condoning the third respondent's late filing of the answering affidavit, is confirmed.

[24] *County Fair Foods (Pty) Ltd v CCMA & Others* [1999] 11 BLLR 1117 (LAC) .See also *De Beers Consolidated Mines v CCMA and Others* [2000] 9 BLLR 995 (LAC).
[2000] 3 BLLR 243 (LAC), at para 15.

2. The order of the Court below numbered paragraph [31] (ii), dismissing the appellant's review application with costs, is set aside and substituted with the following order:

> "1. The arbitration award issued by the second respondent on 29 August 2005 under Case No. GAJB 4629-05 is hereby reviewed and set aside, and substituted with the following order:
> 'The dismissal of the applicant was both procedurally and substantively fair.'
>
> 2. There is no order as to costs of the review application."

3. There is no order as to costs on appeal.

Davis JA and Sandi AJA concur in the judgment of Ndlovu JA.

Appearances:

For the appellant	:	Mr AT Myburgh SC
Instructed by	:	Perrott van Niekerk Woodhouse & Matyolo Inc
For the respondent	:	Mr Desmond Brown
Instructed by	:	Kgotleng Attorneys