REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 12/10

In the matter between:

SUPUDU REUBEN MATSEKOLENG **Appellant**

and

SHOPRITE CHECKERS (PTY) LTD **Respondent**

Heard: **22 February 2012**

Judgment: **1 November 2012**

Summary: **Review test of 'Reasonableness' of CCMA awards – *Carephone* and *Sidumo* tests only semantically different. (SCA's *Edcon* v *Pillemer* restated). Uncertainty/confusion whether employee's conduct constituted a punishable transgression as envisaged in employer's disciplinary code. (Alleged theft of 2 litre milk donated for tea club). Employee not guilty of misconduct. Therefore, issue of sanction; proportionality doctrine and zero tolerance policy - of no relevance. Dismissal substantively unfair. However, continued employment relationship intolerable. Hence, no reinstatement ordered, only compensation awarded.**

JUDGMENT

NDLOVU, JA

Introduction

[1] This appeal is against the judgment and order of the Labour Court (Cele J) handed down on 18 October 2006 in terms of which the Court *a quo* dismissed with costs the review application launched by the appellant, thus upholding the arbitrator's award whereby the appellant's dismissal was declared to be both procedurally and substantively fair. On 29 October 2009, the learned Judge *a quo* refused the appellant leave to appeal which, however, was granted by this Court on 26 May 2010, by way of petition procedure.

Factual Background

[2] The appellant was employed by the respondent on or about 4 December 1981[1] at its Groblersdal branch. During the period, which is material to this matter, he occupied the position of receiving clerk in the respondent's receiving department, which position he had held for eleven years before he was dismissed on 9 April 2003 for misconduct. At the time of his dismissal, he was earning R3989-00[2] per month. The alleged misconduct arose from the events set out hereunder.

[1] It was not disputed by the respondent that this is the correct date of the appellant's employment with the respondent, despite the fact that in the judgment of the Court *a quo* it is stated, apparently mistakenly, that the appellant commenced employment 'sometime in 1984'.

[2] Although different amounts appear at different places in the papers, for example, the amount of R3189,00 was alleged by the appellant (See Vol. 7, at 625 para 6.1.3.10.1) and the arbitration award reflected R3169-00 (See Vol. 7, at 608), I am inclined to accept that R3989-00 is the correct amount, given the fact that it was the amount recorded as common cause between the parties at the pre-arbitration meeting (See Vol. 3, at 242) and was, most importantly, subsequently specifically admitted by the respondent (See Vol. 13, at 1211 para 60). It is, therefore, safe to assume that the other amounts were most probably typed as such in error; and this is supported by the respondent (See Vol. 13, at 1211 para 61.2).

[3] It was common cause that on 24 February 2003 a donation of a 2 litre plastic bottle of milk was delivered to the respondent by Schoeman Melkery (Dairy) and was received by the appellant who signed for it on the receipt/delivery slip. It was not in dispute that the appellant then took the signed receipt together with the milk to the security guard whom he requested to "cancel" the milk (apparently the term used to mean removal of an item as part of stock) on the basis that the milk was a donation to the tea club of the receiving department staff, of which the appellant was part. It was also common cause that the donated milk was duly "cancelled" by the security guard and, therefore, not entered by the appellant in the store's records as stock for sale. In the normal course, when stock was received, it would be entered in a "Goods Received Voucher" (or commonly the "GRV") hence the acronym "GRV" gave rise to the procedure associated therewith being colloquially referred to in the workplace as (expressed in verb form): "to grv", "grv'ing" or "grv'ed", depending on the tense applicable. In the present instance, the appellant was accused of failing to "grv" the donated milk and this conduct constituted part of the misconduct charges subsequently preferred against him. After the appellant had shown the milk together with the signed receipt to the security guard, he had then opened the milk, went to the tea room where he used it for tea and shared it with his colleagues.

[4] The security guard approached the branch manager and reported the incident. The branch manager told the security guard that donated milk ought to have been "grv'ed". On this basis, the appellant was alleged to have contravened rule 13 of the respondent's disciplinary code by not following the respondent's receiving or GRV procedure. The value of the milk in question was about R9-49, being the extent of the financial loss the respondent allegedly suffered consequent to the appellant's action.

[5] On 25 February 2003 the appellant was served with a notice of suspension with full pay effective immediately, pending a misconduct enquiry. The notice to attend the disciplinary hearing on 3 March 2003 was simultaneously served on the appellant, in terms of which the following misconduct charges were preferred against him:

'(a) Misappropriation of company property in that you opened a plastic bottle of 2 litre milk intended for sale, causing a financial or potential financial loss to the company.

(b) Serious misconduct in that you misled a company security guard in cancelling unauthorised company merchandise.

(c) Serious misconduct in that you did not follow company receiving procedures causing financial or potential financial loss to the company.'

[6] At the conclusion of the disciplinary enquiry, the appellant was convicted of the misconduct as charged and summarily dismissed. He lodged an internal appeal which was heard on 29 April 2003. However, the appeal was dismissed and the sanction of dismissal upheld.

[7] As the appellant was not satisfied with his dismissal, which he believed was unfair, he referred an unfair dismissal dispute to the CCMA for conciliation. The dispute, however, remained unresolved as at 4 June 2003 and the certificate of outcome to that effect was issued accordingly. Following on that, the matter was referred to arbitration before commissioner Thabe Nkadimeng who, after hearing and evaluating the evidence, issued the arbitration award on 9 February 2004, whereby he found the appellant's dismissal to be both procedurally and substantively fair; and, accordingly, dismissed the appellant's claim.

[8] The appellant then took the matter up on review to the Labour Court in terms of Section 145 of the Labour Relations Act[3] (the LRA). However, the Court *a quo* dismissed the review application with costs. It is against this judgment of the Court *a quo* which the appellant now appeals.

The arbitration proceedings

[9] The arbitration hearing was held on 8 October 2003 and continued on 19 January 2004. On the former date, the appellant was represented by Mr Masutu, the union (SACCAWU) official but on the latter date he appeared in

[3] Act 66 of 1995.

person. Mr Oosthuizen, the respondent's regional personnel manager, appeared for the respondent on both occasions.

[10] The witnesses who testified on behalf of the respondent included the following: Mr Renier Grobbelaar (regional manager); Mr Corne Meyer (administration manager); Mr Gert Strydom (branch manager); Mr Alfred Mahlase (sales manager) and Ms Lorraine Stammer (IBI internal security officer). The appellant was the only witness for his case.

[11] It was the respondent's case that the appellant's conduct rendered him guilty of the three counts of the misconduct charged. Mr Meyer testified that, as the receiving clerk, the appellant's duties included primarily to receive and check all goods or stock that was delivered to the store in terms of quality and quantity thereof and to record it, accordingly, in the GRV. He briefly described the GRV process thus:[4]

> '[I]t is one of the steps in the receiving process which the receiving clerk uses, a GRV voucher itself gets stamp *(sic)* onto an invoice and thereby the company acknowledge(s) that the goods have been received through the correct procedure and that they accept the charges on the invoice to which it refers to *(sic)*… he must ensure that the correct amount of goods and the correct goods are coming into the shop. If he is not doing his job properly the company can lose a lot of money…
>
> The truck pulls up at the receiving gate, the invoice gets given to the receiving clerk, he then checks that it is for the correct shop, the goods get offloaded into the cage where the receiving clerk go(es) and check(s) that it is the correct quantity and the correct stock. He then goes out, the I.D.I. company which is our double checkers, they go in, they double check the stock and they go out and they are also (checking?) that the stock is correct, it is G.R.V.ed." … Basically I.D.I. is an outside company that is subcontracted by our company to double check on the quality and the quantity of goods that gets (sic) received at our stores due to the fact that high shrinkage or high losses can occur at our receiving.' (underlined for emphasis).

[4] Arbitration record, Vol 3 of the indexed papers, at 258-259.

[12] Mr Meyer further testified that, on 24 February 2003, the appellant received a delivery from Schoeman Dairy of two litres of milk, which the appellant failed to 'grv' in terms of the receiving procedure. According to Mr Meyer, the appellant had then gone to the security guard and lied to her, saying that the manager had authorised the cancellation of the goods thus delivered and asked the security guard to cancel the goods accordingly, which meant the goods could then be used.[5] The appellant was in charge of incoming stock and his conduct, coupled with his poor disciplinary record had destroyed his trust relationship with the respondent.

[13] Under cross-examination by Mr Masutu (the union official representing the appellant), Mr Meyer stated that "the company policy about donation is the same as the company policy about any other stock that gets delivered to the company."[6] In other words, the fact that the two litre milk was a donation to the respondent did not change the position that it was still the property of the respondent.

[14] Mr Meyer was later re-called to testify on the procedure which was applied at the disciplinary enquiry and submitted that it was a fair procedure. It was put to him that an unfair procedure was followed at the enquiry. For example, when the appellant sought some clarity from Mr Meyer, who was the enquiry initiator, in relation to counts 1 and 3 of the misconduct indictment, the chairperson, Mr Grobbelaar, simply took over and read the charges to him again. In other words, Mr Meyer was prevented by the chairperson from furnishing the information requested. The appellant alleged that the chairperson also prevented the cross-examination of Mr Mahlase by the appellant's representative and, instead recalled Mr Meyer to answer those questions.

[15] The chairperson, Mr Renier Johannes Grobbelaar, testified as to the procedure he followed when he conducted the disciplinary enquiry. Prior to the date of the enquiry the appellant was placed on suspension with full pay and was served with the notice to attend the enquiry which accorded him

[5] Arbitration record, Vol 3 of indexed papers, at 267.
[6] Arbitration record, Vol 3 of indexed papers, at 272.

sufficient time to prepare for the hearing. At the commencement of the hearing, he assumed the responsibility of fully explaining the charges to the appellant, particularly as to the meaning of the expression 'financial or potential financial loss to the company' referred to in counts 1 and 3 which the appellant had sought to be clarified to him. Witnesses for the respondent had testified and the appellant was given the opportunity to cross-examine them. The appellant was also granted the opportunity to testify, which he did. Upon his conviction and dismissal, he was accorded the right to appeal, which he duly exercised, albeit unsuccessfully.

[16] In his testimony Mr Strydom stated, amongst others, that the appellant was "some kind of a gate keeper at our back door where all the stock comes in which we pay for, if he is a person we cannot trust then we can lose a lot of money in that position." (underlined for emphasis). As branch manager, he had never authorised the cancellation of the donated milk delivery, nor had he given permission to the appellant to open and use the donated milk. He stated that the appellant's conduct of not recording the stock had damaged his trust relationship with the respondent. Under cross-examination, he stated that free stock and donation were "exactly the same", there was no difference because both of them were not paid for by the respondent. However, Mr Strydom could not deny that donated milk was previously (during 1997 to 2001) used for tea because he had only started working at the Groblersdal branch in January 2003.

[17] The security guard, Ms Lorraine Stammer, was the one who confronted the appellant about the milk which the appellant had not 'grv'ed'. She said the appellant told her that he was going to open the milk and share it with his colleagues. Ms Stammer then reported the matter to Mr Strydom who reaffirmed that the milk should have been grv'ed and be placed on the shelves. The witness further testified that free stock and donation were treated as the same thing, "because both the products you do not pay for, it is a free gift."[7] In conclusion, under cross-examination, Ms Stammer said:[8]

[7] Arbitration record, Vol. 3 of the indexed papers, at 308.
[8] Arbitration record, Vol. 3 of the indexed papers, at 313.

> 'As I.B.I, I report directly to management and I have to report any incident that does not seem right to me, that is my work. So it did not seem right to me, that is why I go to my supervisor and go and find out what is the right procedure so we can stop shrinkage. That is my job sir. My job is (to) stop shrinkage, we all want a nice bonus at the end of the day.'

[18] However, it transpired that Ms Stammer was not the security guard whom the appellant allegedly requested to cancel the milk 'invoice' of the donated milk. The security guard involved at that stage was Ms Susan Mabala who was, without explanation, called by the respondent as a witness during the arbitration hearing.

[19] Mr Mahlase's evidence only sought to confirm that the "free stock" received at the respondent was handled in the same way as all other incoming goods/merchandise for sale.

[20] In support of his case, the appellant testified that the two litre milk in question was delivered to the respondent as a donation to be used at tea by the staff at the receiving department. It was common practice that he and his colleagues would use the donated milk in making their tea and further that the respondent had provided them with a kettle which was kept in the receiving merchant room. He pointed out that one of the respondent's employees, Minah Masemola, was called by the respondent to testify at the disciplinary enquiry and she had confirmed that it was indeed not the first time that milk was donated to the respondent and used for tea by the workers.

[21] The appellant further sought to substantiate his claim that the milk was only a donation for tea and, therefore, did not form part of the respondent's stock by producing an affidavit from Schoeman Dairy attesting to that fact. However, the respondent's representative, Mr Oosthuizen, objected to the admission of the affidavit on the ground that he would not be able to cross-examine the deponent to the affidavit. The commissioner upheld the objection and disallowed the admission of the affidavit. In this regard, the commissioner held as follows:

> 'It was not in dispute that Schoeman Dairy was delivering donation of milk to the respondent. The respondent's rules and procedures bind the respondent's employees and not Schoeman Dairy. Matsekoleng did not testify that he also grv'ed for receipt of goods for Schoeman Dairy. The affidavit would not prove that the donated milk was not supposed to be grv'ed. The respondent did *(sic)* not have the right to cross-examine the author of the affidavit. I find that the affidavit is irrelevant to the issues before me and inadmissible.'

[22] The appellant acknowledged that he was aware of the existence of the rule 13 of the disciplinary code, but he denied that he violated the rule, in that a donated item did not form part of the respondent's property as it was not listed as a commodity of the respondent in terms of the rules. Further, the fact that he had only signed the acknowledgement of receipt of the donated milk but had not grv'ed it meant that the donation was excluded from the respondent's ownership.

[23] The commissioner found that the donated milk was indeed the property of the respondent and that the appellant "could not prove that he had obtained (management's) authorisation before he opened the milk for consumption". On this basis, the commissioner also found, that the appellant had breached the respondent's receiving rules.

[24] In his concluding remarks, the commissioner stated:

> "Matsekoleng did not show any remorse for breaching the respondent's rule. He maintained that the milk delivered to the respondent was not the respondent's property. He also alleged that the respondent was victimising him in order to dismiss him. Matsekoleng had a poor disciplinary record. Matsekoleng repeated the same misconduct though he was warned not to.
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> Matsekoleng's written warnings have all expired. Matsekoleng shows that he has a discipline problem. All the respondent's witnesses testified that the employer-employee relationship is irretrievably damaged. I do not think that a healthy environment and working relationship would ever be restored between Matsekoleng and the respondent."

[25] The commissioner, accordingly, found that the appellant's dismissal was both procedurally and substantively fair.

Proceedings in the Labour Court

[26] The appellant's grounds of review can briefly be summarised as follows:

26.1 That the commissioner committed a gross irregularity in the conduct of the arbitration proceedings by, amongst others, ignoring the relevant evidence presented before him or failed to apply his mind to such evidence.

26.2 That the commissioner was generally grossly biased and, in particular, when he rejected the evidence on affidavit of Schoeman Dairies on the ground that the respondent would not have the right to cross-examine the author of the affidavit.

26.3 That the award was not justifiable and/or rational in relation to the evidence brought before the commissioner.

[27] The Court *a quo* remarked, in passing, that "[a]n attempt was made to hand in affidavit in substantiation of his (the appellant's) claim that there was such practice which had been standing over time on how donated milk had to be dealt with". However, the Court *a quo* made no finding on whether the refusal by the commissioner of the appellant bringing in such affidavit evidence was proper or not, alternatively, how the commissioner ought to have dealt with the situation.

[28] In the course of his judgment, the learned Judge *a quo* said the following, amongst others, the significance of which is alluded to later in this judgment:

> 'I got a bit worried, looking at the experience of the applicant, 21 years of experience, being dismissed in a case for misappropriation of property worth about R9.46 but one has to remember that there is a bigger picture. He went to a security guard and created an impression that he had been authorised to appropriate the milk…'

[29] Then after referring to authorities in relation to the Labour Court's powers on review the learned Judge proceeded:

> 'Can it be said that in the present case that the award is irrational? I have not heard Mr Pillay say so. If I look at the papers and try to determine the review grounds as distinct from the grounds that would have been appropriate for appeal purposes, I have been unable to find any submissions that make me to arrive to the conclusion that the application for the review has merits...
>
> Here I am unable to find, when I look at the award, that the evidence that served before the commissioner, looking at the reasons he gave for the award and also looking at the award itself that the decision he arrived at is irrational.'

[30] On this basis, the Court *a quo* dismissed the review application. Concerning the issue of costs, the Court *a quo* further found that this was a case where it would be fair that costs should follow the result and, accordingly, ordered that the appellant must pay the costs of the review application.

The Appeal

[31] It was apparent that most, or virtually all, of the appellant's papers were drawn up by himself personally. As a result, lack of the requisite professional knowledge, skill or insight into what was required of him to do in relation to each procedural step along the way, regrettably reflected in his papers. They frequently comprised of prolix, repetitive and generally irrelevant material, the extent of which was sometimes stressful reading, to say the least. The appeal record consisted of some 1266 pages bound in 13 volumes, excluding the appellant's heads of argument which consumed some 67 pages. At the end of the day, what was otherwise a run-of-the-mill appeal matter, took unnecessarily longer to peruse and prepare.

Grounds of appeal

[32] From what I could gather from the appellant's papers, his grounds of appeal can briefly be summarised as including the following:

32.1 The Court *a quo* erred in disregarding the material error made by the commissioner in his award, namely, where the commissioner reflected that the appellant was earning R3169-00 per month at the time of his dismissal whereas it was common cause that he was earning R3989-00 per month.

32.2 The Court *a quo* erred in not attaching weight to the delivery receipt from Schoeman Dairies which stated clearly that the two litre milk was a donation.

32.3 The Court *a quo* erred in not finding that there was inconsistency in the respondent's treatment of its employees in that only the appellant was charged with misconduct; whereas the security guard, Ms Mabala, who cancelled the receipt and the other colleagues who shared the milk with the appellant, including Ms Masemola, were not charged.

[33] Mr Malan, who appeared for the respondent, submitted, firstly, that the delivery slip dated 24 February 2003 from Schoeman Dairies which accompanied the donated milk did not reflect that the donation was to be used for tea by employees. Secondly, in any event, it was not for Schoeman Dairies to dictate to the respondent what it had to do with the milk once donated to, and received by, the respondent. He pointed out that the appellant, as a senior employee, was aware of the relevant respondent's rule that, all stock received, whether it be free stock or donation, had to be 'grv'ed', which rule the appellant had violated.

Analysis and Evaluation

[34] A review court ought always to remind itself of the fine and subtle distinction between reviews and appeals when dealing with review applications under section 145 of the LRA. In *Shoprite Checkers (Pty) Ltd v CCMA and Others,*[9] the Supreme Court of Appeal stated thus:

[9] 2009 (3) SA 493 (SCA) at para 28. See also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* 2007 (1) SA 576 (SCA); (2006) 27 *ILJ* 2076 (SCA); [2006] 11 BLLR 1021 (SCA) at para 30.

> 'There may well be a fine line between a review and an appeal, particularly where – as here – the standard of review almost inevitably involves a consideration of the merits. However, whilst at times it may be difficult to draw the line, the distinction must not be blurred. (footnote omitted). The drafters of the LRA were certainly alive to the distinction. They accordingly sought to introduce a cheap, accessible, quick and informal, alternative dispute resolution process. In doing so, appeals were specifically excluded.'

[35] Both the award and the judgment of the Court *a quo* in this matter were issued and delivered prior to the Constitutional Court decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[10] Prior to *Sidumo*, the standard of review of a commissioner's award under section 145 of the LRA was whether the award was rationally justifiable in relation to the material properly presented before the commissioner and the reasons given for it.[11] However, in terms of the *Sidumo* test, in order to pass muster of judicial review under section 145 a commissioner's award must meet the constitutional standard of reasonableness. The Constitutional Court formulated the test as follows:[12]

> "To summarise, *Carephone ((Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425; [1998] 11 BLLR 1093) held that sect 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that sect 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star (Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); (2004 (7) BCLR 687)): Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour

[10] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).
[11] *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 at para 31-37; *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* [2001] 8 BLLR 857 (LAC) at para 60*;* (2001) 22 ILJ 1575 (LAC); *Adcock Ingram Critical Care v CCMA and Others* [2001] 9 BLLR 979 (LAC) para 22*;* (2001) 22 ILJ 1799 (LAC); *Waverley Blankets Ltd v CCMA and Others* (2003) 24 ILJ 388 (LAC); [2003] 3 BLLR 236 (LAC) at para 41; *Branford v Metrorail Services (Durban) and Others* (2003) 24 ILJ 2269 (LAC); [2004] 3 BLLR 199 (LAC) at para 20; *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at para 53; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 ILJ 1603 (LAC) at paras 7-8.
[12] *Sidumo* (supra), at para 110.

practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

[36] However, in *Edcon Ltd v Pillemer NO and Others,*[13] the Supreme Court of Appeal (per Mlambo JA, as he then was) reasoned that the earlier standard of review was essentially and conceptually no different from the standard of review expounded in *Sidumo,* when the learned Judge of Appeal remarked as follows:[14]

> "[15] … Reduced to its bare essentials, the standard of review articulated by the Constitutional Court (in *Sidumo*) is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him. (Inserted)
>
> [16] It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the commissioner when making the award. It is remarkable that the constitutional standard of "reasonableness" propounded by the Constitutional Court in *Sidumo* is conceptually no different to what the LAC said in *Carephone*. The only difference is in the semantics – the LAC had preferred "justifiability" whilst the Constitutional Court has preferred the term "reasonableness." (underlined for emphasis)

[37] The issue before the commissioner was whether or not the dismissal of the appellant was substantively and/or procedurally fair.

The substantive fairness aspect

[38] The arbitration procedure is a statutory mechanism conducted in the form of quasi-judicial proceedings aimed at resolving labour disputes fairly and in the most expeditious manner possible. The LRA provides:[15]

> "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly

[13] [2010] 1 BLLR 1 (SCA).
[14] Ibid, at paras 15 and 16.
[15] Section 138 (1).

and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities."

[39] In my view, the refusal by the commissioner to admit the affidavit of Mr Charles, the manager of Schoeman Dairies, which the appellant sought to be admitted, was not only a procedural issue but it went into the merits of the dispute between the parties, in that it impacted on the substantive aspect of the appellant's defence. It was the appellant's case that the milk was donated for the tea club and, as such, was intended to be used for consumption by the respondent's staff, which according to the appellant included him. However, as stated earlier, no finding was made by the learned Judge *a quo* on whether or not the decision to disallow the admission of the affidavit amounted to a material mistake of law on the part of the commissioner. I think it did, for the reasons that will become apparent in due course.

[40] The learned Judge *a quo* was correct in not placing the focus on the value of the milk *per se* but rather, as he put it, on the "bigger picture" by which the learned Judge meant to refer (as I understood the context) to the alleged conduct of the appellant going to the security guard and allegedly creating "an impression that he had been authorised to appropriate the milk." However, with respect, what the learned Judge apparently lost sight of here was the fact that the security guard, Ms Susan Mabala, to whom the appellant allegedly lied or created the false impression, was not called as a witness at the arbitration hearing. Thus, any allegation attributed to Ms Mabala, by implication or otherwise, in this regard amounted to inadmissible hearsay, absent any indication that any of the exceptions to the hearsay rule as contemplated in section 3(1)(c) of the Law of Evidence Amendment Act[16] was invoked.

[41] Section 3(1)(c) of the said Act confers a discretion on a court (or tribunal) in terms of admitting hearsay evidence if, in the opinion of the court (or tribunal), as the case may be, it is in the interests of justice to admit such hearsay evidence. The fact that the respondent's representative would not have been in a position to cross examine the author of, or deponent to, the affidavit if it

[16] Act 45 of 1988.

was admitted, was not, in my opinion, a legally sound ground to have refused admission of the affidavit, in the light of section 3(1)(c). That aspect of the matter would only be relevant on the question of the evidential weight to be attached to the affidavit evidence concerned. As the matter stood, it did not appear that the commissioner properly applied his mind on this issue, if at all. In my view, the commissioner's failure in this regard constituted a serious misdirection and a gross irregularity, on the commissioner's part, in the conduct of the arbitration proceedings, which rendered the award reviewable and liable to be set aside.

[42] In any event, it seemed to me that, by applying the pre-1988 strict common law rule against hearsay evidence on the admission of the affidavit, as the commissioner apparently did, the commissioner did not thereby "deal with the substantial merits of the dispute with the minimum of legal formalities" as required of him by section 138(1) of the LRA. In *Local Road Transportation Board and Another v Durban City Council and Another*,[17] the Appellate Division (now the Supreme Court of Appeal) (Holmes JA) stated:[18]

> "A mistake of law *per se* is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined."

[43] In my view, therefore, the failure by the commissioner to apply his mind properly on the issue of admissibility of Mr Roberts' affidavit constituted a material error of law and a gross irregularity on the part of the commissioner which prejudiced the appellant in his right to a fair hearing.

[44] The commissioner noted in his award that "the affidavit would not prove that the donated milk was not supposed to be grv'ed". Clearly, it was not for the commissioner to prejudge the evidential value of Mr Roberts' evidence which the appellant sought to have admitted by way of affidavit. It was apparent from the import of the misconduct charges and the evidence tendered on the respondent's behalf that the respondent was seeking to divert the attention

[17] 1965 (1) SA 586 (A).
[18] Ibid at 598A.

from, or underplay the fact, of the milk being a donation from Schoeman Dairy. In this regard, the respondent was, in my view, giving a misleading impression as though we are dealing here with an ordinary commodity from the respondent's warehouse or kept on its shelves for purposes of sale in the ordinary course of business of the respondent. Objectively speaking, that was clearly not the position here. The affidavit of Mr Roberts would not only confirm that the milk was delivered as a donation, but it would also confirm the appellant's version that the donation was intended for a tea club. Indeed, it would further confirm that this apparent gesture of generosity from the part of Schoeman Dairy towards the respondent had been going on for some time, or had occurred for at least some four years previously. There was no denial that in the past the donated milk was used for tea. Whether it was used by management or by the receiving staff, it is not material, because the appellant was not charged for using milk that was intended for use by the management. There was also no evidence or even suggestion that in the past the donated milk from Schoeman Dairy was ever placed on the store shelves and sold to the public. It had never happened even once and, in my view, the simple and obvious reason was because that was not the purpose for which the milk was donated by Schoeman Dairy and received by the respondent. The information contained in Mr Roberts' affidavit was, therefore, clearly relevant to the dispute at hand and, in particular, to the merits of the appellant's defence.

[45] Strangely though, despite the commissioner's ruling refusing the admission of the affidavit of Mr Roberts, the affidavit still, inexplicably, formed part of the arbitration record before the commissioner and, subsequently, the review record before the Court *a quo*. Indeed, the reasons proffered by the commissioner for declining to admit the affidavit, somewhat tend to indicate some insight, on the part of the commissioner, into the contents of the affidavit. On this basis, I see no reason why the affidavit should, after all, not be considered as part of the evidentiary material presented to the commissioner.

[46] In his affidavit Mr Roberts did not only explain why he would not be available on the date of the arbitration hearing that he was subpoenaed for, but he went

further and somewhat confirmed the appellant's averment that the milk was, indeed, donated to the 'tea club'. The affidavit read, in part, thus:

> "2. I have received a subpoena to witness *(sic)* in an arbitration hearing scheduled for the 25th of September 2003 at 11:00.
>
> 3. In terms of the subpoena, I also have to produce "the whole bundle of donation receipts to Shoprite Groblersdal from 2001 until 24 March 2003."
>
> 4. I wish to advise as follows:
>
> 4.1 I will not be able to witness *(sic)* at the arbitration hearing seeing that I will be on annual leave on the 25th of September 2003.
>
> 4.2 Schoeman Melkery donated 1x4 litres of milk per week to the tea club of the Respondent during the period stipulated in the subpoena. (underlined for emphasis)
>
> 4.3 All documents related to the donations were however discarded with and Schoeman Melkery is not in possession of any documents to confirm the donations. The only documents which were used were the delivery documents which had to be signed by the Respondent…
>
> 5. Based on the information contained in the statements (sic) made above, the commission and the parties are requested to:
>
> 5.1 either postpone the hearing to a date on which I will be available, or
>
> 5.2 withdraw the subpoena based on the fact that no supporting documents are available."

[47] There could be no dispute that a two litre bottle of milk had a relatively paltry value. It was common cause that its value was approximately R9-49. However, it has been held, as a general rule, that the dismissal of an employee who committed a misconduct involving theft or misappropriation of a commodity or other property belonging to the employer, regardless of the

value of the thing stolen (and, indeed, regardless even of the length of service of the employee), is substantively fair; and particularly so in situations where there is an existing shrinkage or suspected pilferage problem in the workplace. There is always an element of dishonesty or gross dishonesty (depending on the gravity of the situation), inherent in misconduct at the workplace involving theft or misappropriation. This phenomenon strikes at the root of the trust and employment relationship. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*[19] this Court (per Zondo AJP, as he then was) stated:[20]

> '[15] … Although a long period of service of an employee will usually be a mitigating factor where such 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. It appears to me that the commissioner did not appreciate this fundamental point.
>
> [16] … I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'

[48] In *Shoprite Checkers (Pty) Ltd v CCMA and Others,*[21] this Court (per Davis JA) reiterated the principle which has been followed all along by this Court in similar cases:[22]

> '[T]his Court has consistently followed an approach, laid out early in the jurisprudence of the Labour Court in *Standard Bank SA Limited v CCMA and Others* [1998] 6 BLLR 622 (LC) at paragraphs 38-41 where Tip AJ said:

[19] (2000) 21 ILJ 340 (LAC).
[20] Ibid, at 344.
[21] [2008] 9 BLLR 838 (LAC).
[22] Ibid, at para 16. Other decisions cited, with approval, by the Court included: *Lahee Park Club v Garratt* [1997] 9 BLLR 1137 (LAC) at 1139; *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Others* (1998) 19 ILJ 1516 (LC) at para 17; *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC) at para 78; *De Beers Cosolidated Mines Ltd v CCMA and Others* (2000) 21 ILJ 1051 (LAC) at para 22; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM and Others* (2001) 22 ILJ 658 (LAC) at para 22.

> "It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."'

[49] The facts of the case in *Shoprite Checkers*, above, were briefly as follows: The employee was captured on 'CCTV' videotape on three occasions eating 'pap' and bread taken from the delicatessen of the appellant's store where the employee worked. He was found guilty of misconduct by the appellant and summarily dismissed. On appeal, the employee's counsel conceded that the employee was guilty of the misconduct, but contended that the sanction of dismissal was too harsh and inappropriate. The Court set out the circumstances that existed in the workplace in relation to the shrinkage problem, thus:[23]

> "In the present case, the uncontested evidence revealed that, during October 2000, appellant's store in Louis Trichardt lost 2.95% of turnover due to shrinkage which equated to a loss of some R144 000. Mr van Staden's uncontested evidence was that employees were aware of the shrinkage problems and of the company rules designed to prevent or control such shrinkage. The shrinkage problem had been mentioned in several meetings, and after every stock take results were posted on notice boards. A feedback meeting was held with all employees during which the company rules were discussed. In the canteen, notices were displayed and the contents thereof routinely reinforced by the store manager. It was precisely because of its attempt to curb shrinkage that appellant had installed surveillance video cameras in the store."

And, in upholding the appeal and declaring the dismissal to be substantively fair, the Court concluded:[24]

> "On 11 October 2000, he (the employee) had consumed three separate bowls of pap. He had thus acted in flagrant violation of the company rules which had

[23] *Shoprite Checkers* (supra) at para 22.
[24] Id at para 25.

been implemented for clear, justifiable operational reasons. Other employees who had been similarly found to have so acted had been dismissed…"

[50] In all the past decisions of this Court referred to above, the issue was whether the sanction of dismissal was fair and appropriate in the circumstances of each case. However, the determination of sanction can only follow upon a sustainable conviction for the misconduct charged. For my part, it is this side of the enquiry with which I have serious concern in the present case. At this time, I propose to recall the three counts of misconduct of which the appellant was convicted and which culminated in his dismissal:

> "(a) Misappropriation of company property in that you opened a plastic bottle of 2 litre milk intended for sale, causing a financial or potential financial loss to the company.
>
> (b) Serious misconduct in that you misled a company security guard in cancelling unauthorised company merchandise.
>
> (c) Serious misconduct in that you did not follow company receiving procedures causing financial or potential financial loss to the company."

[51] Rules 11 and 13 of the respondent's Disciplinary Code were the provisions upon which the respondent primarily sought to rely in preferring and proving its case against the appellant. It is apposite to refer to these provisions, to the extent hereto relevant:

> "Rule 11 – Buying
>
> Employees must comply with the specific staff buying procedures in the workplace. It is the responsibility of employees to declare all goods/merchandice which have been purchased in the workplace and to have such goods/merchandice checked and 'cancelled' by authorised personnel before such goods are consumed in or removed from the workplace. Employees must provide proof of purchase of goods in their possession wherever requested to do so by authorised personnel.

> Employees must comply with the rules and conditions of the Company Buying Card. This Card may only be used for the purchase of merchandise for the Cardholder and his immediate family. The drawing of cash or any other misuse of the card is strictly prohibited.
>
> Rule 13 – Dishonesty
>
> Employees may not be in possession of, or consume or attempt to consume, or remove from Company premises by any means or in any manner whatsoever, any Company, Supplier, Customer or other property of which the employee is not the lawful owner, including stock, without following the correct staff buying procedures or without the specific authorisation of management.
>
> Employees may not hold or store any company property, including stock, on the premises in places which are not recognised or designated as storage areas for that company property, without the specific authorisation of management."

[52] There was no dispute that the appellant was aware of the provisions of rules 11 and 13, referred to above. The question, however, was whether the donated milk fell within the definition and ambit of the respondent's 'property' or 'goods' contemplated in the rules. The respondent claimed it did, but the appellant contended it did not. It was submitted on behalf of the respondent that the financial loss (presumably annual loss) which the respondent suffered through shrinkage in the dairy department was in the region of R460 000-00. On this basis, Mr Grobbelaar submitted that the appellant's dismissal was fair, especially, as he put it, "when you look at the shrinkage that the company experiences these days. It can actually cause a company like ours to close its doors if this sort of thing is not really dealt with in a very severe manner. A company can just not afford to loss *(sic)* the millions that it does at present."[25] I now turn to deal with the misconduct charges *seriatim,* hereunder.

Counts 1 and 3 of the misconduct indictment

[25] Arbitration record, Vol 5 of the indexed papers, at 436.

[53] It is apparent that counts 1 and 3 were formulated on the basis that the donated milk was part of the respondent's stock-in-trade. Indeed, this observation is supported by the qualification in count 1 that the milk in question was 'intended for sale'.

[54] Although the respondent's witnesses sought to establish that the donated milk was indeed 'intended for sale' and that, in terms of the respondent's rules, it was supposed to be 'grv'ed' and placed on the shelves like any other stock, it had to be inquired, nonetheless, on the facts of this case and in relation to the appellant's defence, whether or not there was a reasonable probability that the appellant had laboured under a sincere and genuine belief and conception that the milk was donated to be used for tea by the respondent's staff, including himself, as opposed to being 'intended for sale' by the respondent. In dealing with this inquiry the following observations are, in my view, relevant to consider:

1. The evidence by Mr Meyer, the respondent's administration manager, referred to earlier in this judgment, as to how the GRV system was applied does not appear to me to lend support that the goods contemplated thereby included paltry items such as a two litre bottle of milk donated by a dairy company specifically for use by the respondent's tea club. The GRV system clearly pertained to goods or merchandise purchased or acquired by the respondent for the purpose of sale or, in the words of the respondent, "intended for sale"; and in respect of which the respondent incurred cost and expense to acquire. I refer to some pertinent parts of Mr Meyer's evidence on this point:

    1.1 "[A] GRV voucher itself gets stamp *(sic)* onto an invoice and thereby the company acknowledge(s) that the goods have been received through the correct procedure and that <u>they accept the charges on the invoice</u> to which it refers…."

    1.2 "If he is not doing his job properly <u>the company can lose a lot of money.</u>"

1.3 "Basically I.D.I. is an outside company… subcontracted… to double check… at our stores due to the fact that high shrinkage or high losses can occur at our receiving."

In the present instance, there were no charges on the invoice, no financial loss to the company and no shrinkage problem was involved.

2. Similarly, the evidence of Mr Strydom (the branch manager) added credence to the proposition that the 2 litre donated milk was not intended to go through the GRV system. For instance, at one stage he testified that the appellant was "some kind of a gate keeper at our back door where all the stock comes in which we pay for…" This assertion would clearly not have been intended to include a donation of two litre milk which was not paid for.

3. The receipt or delivery slip number 38 dated 24 February 2003 from Schoeman Dairy stated clearly that the delivered item, namely, 1x2 litres of milk, was a 'donation' which was at no charge (N/C) to the respondent.[26]

4. The affidavit from Schoeman Dairy supported the appellant's version that the milk was donated to the tea club.

5. The respondent's averment that it was not for Schoeman Dairy to dictate to the respondent how the milk was to be disposed of by the respondent would not serve to detract from the fact of the appellant's belief and conception aforesaid being sincere and genuine.

6. There was evidence adduced at the disciplinary enquiry by Ms Minah Masemola, one of the respondent's employees, who was present on 24 February 2003 when the appellant brought the milk to the office where the receiving staff were having tea. Her uncontested evidence constituted part of the material presented to the commissioner.[27] She had testified that it was not the first time that they had got the donated

[26] See indexed papers, at 61.
[27] See the transcribed 'Outcome of Disciplinary Enquiry', at 104-112 of the indexed papers, particularly at 106.

milk from Schoeman Dairy - it had previously happened during 1997 to 2001 and that the milk was used by the management and the receiving staff for their tea. She had further testified that on the day in question, after they had shared the milk, the appellant had then taken it to the manager. Ironically, in his credibility finding on Ms Masemola as a witness, the chairman Mr Grobbelaar remarked: "I found her evidence trustworthy and reliable."[28]

7. The appellant did not discreetly dispose of the milk, but he overtly opened and shared it with his receiving department colleagues, after which he took it to the management, apparently to let them have their share of it. That was, in my view, a conduct *contra naturam sui generis* to that of a conscientious thief.

[55] In the light of these observations, it appears to me that the appellant sincerely and genuinely believed that the donated milk was intended for staff consumption and not for sale, as alleged by the respondent. To my mind, on the facts, his belief was also reasonable in the circumstances. It was highly improbable, unreasonable and far-fetched that any right-minded person in the position of the appellant would have even suspected that an admittedly donated two litre milk would be 'intended for sale' by the store of the respondent's size and stature.

[56] Further, the ordinary reading of the respondent's disciplinary code, particularly rules 11 and 13, does not seem to lend support to the respondent's claim or suggestion that the definition of 'property' referred to in those specific rules was intended to include a two litre milk donated to the respondent's tea club, such as in this case.

[57] In any event, there was no evidence adduced on behalf of the respondent to demonstrate that the respondent suffered any financial or potential financial loss consequent upon the donated milk being consumed by the appellant and his colleagues during their tea break. On this basis, it appears to me that the convictions of the appellant on counts 1 and 3 are not sustainable.

[28] At 106 of the indexed papers.

Count 2 of the misconduct indictment

[58] Ms Lorraine Stammer, the respondent's security officer, testified at the arbitration hearing that she confronted the appellant after the incident. However, it transpired that Ms Stammer was not the company security guard referred to in count 2 whom the appellant allegedly "misled in cancelling unauthorised merchandise" by saying that the cancellation was authorised by the manager. It was common cause that the security guard whom the appellant approached for the said "cancellation" and who duly effected it was Ms Susan Mabala who, inexplicably, was not called as a witness at the arbitration hearing. In other words, any evidence that was attributed to Ms Mabala at the arbitration hearing was merely hearsay. There was no explanation proffered as to why Ms Mabala was not called as a witness at the arbitration hearing.

[59] It is significant that, according to the appellant, he had only explained to Ms Mabala that the delivery invoice was to be cancelled because the milk was a donation intended to be used for tea by the receiving staff. He denied that he ever said to Ms Mabala that the manager had authorised the cancellation of the invoice. It was, therefore, incumbent on the respondent to have called Ms Mabala to testify, which did not happen. Absent any ruling or comment by the commissioner on the admissibility issue of Ms Mabala's hearsay evidence and the reasons thereof, if any, the hearsay evidence remained inadmissible and ought to have been excluded from consideration by the commissioner. In my view, therefore, the commissioner committed yet another material mistake of law which constituted a gross irregularity in the conduct of the arbitration proceedings. Accordingly, the appellant's conviction on count 2 cannot be sustained as well.

Procedural fairness aspect of the dismissal

[60] I am persuaded, on the evidential material properly presented to the commissioner, that the procedure followed by the respondent which culminated in the dismissal of the appellant was, indeed, a fair procedure. The evidence before the commissioner, read with the uncontested documentary

evidence of the disciplinary proceedings, bear testimony that the appellant indeed received a fair hearing.

[61] Despite the appellant's protestation that the chairman of the disciplinary enquiry, Mr Grobbelaar, was grossly biased against him, I was unable to find any evidence in support of that allegation. Instead, Mr Grobbelaar appeared to have conducted the disciplinary proceedings in a fair and efficient manner. The record of the disciplinary proceedings stood as proof thereof. It was also noted that during 2001 the appellant was convicted of misconduct by the respondent's disciplinary tribunal which imposed a sanction of summary dismissal. However, the appellant lodged an appeal with the internal appeal structures. The appeal proceedings were presided over by the same Mr Grobbelaar who, on that occasion, found that there was no sufficient evidence to sustain the appellant's conviction and he upheld the appeal and reinstated the appellant into the respondent's employ. There was no evidence to suggest that Mr Grobbelaar had since 2001 developed any personal animosity or hostile attitude towards the appellant. He appeared to be a fair and impartial adjudicator in the conduct of disciplinary proceedings, as mirrored in his evidence during the arbitration hearing.

[62] Accordingly, for the reasons stated above, I am of the view that the commissioner's award, on the substantive fairness aspect, did not pass muster of judicial review under section 145 of the LRA in that it did not fall within the range of decisions which a reasonable decision-maker could have reached. Hence, the award fell to be reviewed and set aside and substituted with the order that the appellant's dismissal was procedurally fair but substantively unfair.

[63] However, I need to make myself clear on the following: In my view, this case had absolutely nothing to do with the shrinkage problem or the zero tolerance policy that reportedly existed at the respondent's workplace. The issue of sanction or the proportionality doctrine is thus of no relevance. The critical and crisp issue was the guilt or otherwise of the appellant of the misconduct charged, in the light of the particular facts of the case. In other words, the effect of this judgment is not intended to create any precedent which deviates

from the established jurisprudence, discussed above, and which has been followed by this Court in relation to the issue of sanction where an employee is properly convicted of misconduct involving theft or misappropriation of property belonging to the employer.[29] This Court understands and has thus far approved of the zero tolerance policy as a reasonable measure of eradicating shrinkage and pilferage experienced by these large shopping businesses such as the respondent. However, that issue pertains to sanction which can only be embarked upon after a sustainable conviction. The discussion on the issue of sanction follows next.

The appropriate relief

[64] Section 193 of the LRA provides, in part:

> '(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may-
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee.
>
> (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

[29] *Shoprite Checkers* (supra) at para 16 and the decisions cited therein.

(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[65] Therefore, the primary statutory remedy for a substantively unfair dismissal is reinstatement of the dismissed employee[30] which, simply, "… is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.'[31] An order of reinstatement is only inappropriate where any of the conditions referred to in section 193(2)(a), (b) or (c) of the LRA are present.[32] The enquiry into the appropriateness or otherwise of the reinstatement order should, as its focal point, consider the underlying notion of fairness between both the employer and the employee which 'ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.'[33]

[66] Recently, in *Dunwell Property Services CC v Sibande and Others*[34] this Court (per Ndlovu JA) found that an employee who had levelled some "serious and scandalous allegations against certain people in the management level of the (employer)" was, notwithstanding the Court's finding that his dismissal was substantively unfair, not entitled to reinstatement and instead the Court awarded him compensation, on the basis that any continued employment relationship with the employer was intolerable and impracticable.[35]

[67] In the present instance, it would appear to me that the relationship of trust and respect between the appellant and the respondent has been damaged beyond repair. It was common cause that the appellant had a poor disciplinary record in that he had at least four previous written warnings for misconduct, but all of which had expired. The respondent claimed that the previous warnings were not taken into account when the sanction of dismissal was imposed because they had expired, but were merely referred to in order to demonstrate that the appellant had a poor disciplinary record.

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[30] Section 193 (1)(a) of the LRA.
[31] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 29 ILJ 2507; Also reported as [2008] 12 BLLR 1129 (CC) at para 36.
[32] *Mediterranean Textile Mills v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para 28.
[33] *Equity Aviation,* above, at para 39. See also *Billiton Aluminium SA Ltd v Khanyile and Others* 2010 (5) BCLR 422 (CC) at paras 26-27.
[34] (2011) 32 ILJ 2652 (LAC); [2012] 2 BLLR 131 (LAC).
[35] Ibid, at para 32.

[68] Whilst the previous written warnings had expired and, therefore, were not supposed to be taken into account in determining the appropriate sanction (I am not suggesting that the respondent took them into account) it did appear, from the objective and pragmatic perspective, that the sour and strained working relationship between the appellant and the respondent had simply deteriorated over time and it was probable that the appellant's poor disciplinary record had largely contributed to this state of affairs. In other words, whether or not the previous warnings had expired, the fact of the matter was that the relationship of trust between the parties had irretrievably been damaged. It seemed to me that the appellant was being disingenuous when he purported to aver the contrary position in this regard. The appellant did not only make serious accusations against certain management staff of the respondent, he further appeared to concede himself that continued working relationship was no longer tolerable. On this point, it is apposite to refer to some pertinent remarks which the appellant made in his heads of argument:

1. The appellant alleged that the chairperson (referring to Mr Grobbelaar, the respondent's regional manager) 'cowed me into the pleadings of the charges without being asked if I do understand them.'[36] (underlined for emphasis)

2. He alleged that the 'chairperson was bias and not neutral in this matter…'[37]

3. He further alleged: 'My plea to the charges after Mr Grobbelaar had reiterated them was made under duress.'[38] (underlined for emphasis)

4. More significantly, he proceeded and submitted:

> 'I was shouted in the office by Mr Andre Annandale, the Regional Admin Manager, 'shut up', 'Masepa', 'thula, bull-shit' and threatened violence. Mr Wayne Guest and Mr Andre Annandale were not charged nor dismissed for breaching Rule 15… Such language by Mr Wayne Guest, the Branch

[36] Para 10 of the appellant's heads of argument. See also paras 10.2; 34.1.2 and 34.1.2.2.
[37] Para 10.5 of the appellant's heads of argument.
[38] Para 34.1.2 of the appellant's heads of argument. See also para 34.1.2.3.

> Manager and Mr Andre Annandale, the Regional Admin Manager, makes a continued employment relationship intolerable, no wonder when the Commissioner looked at this evidence of previous disciplinary record and said: 'I do not think a healthy environment and working relationship would ever be restored between Matsekoleng and the respondent.'[39] (underlined for emphasis).

Therefore, the appellant's further submission, in the same paragraph, that the working relationship could still be restored if the respondent were ordered 'to redress my dignity' appears, in my view, to be somewhat mutually contradictory.

[69] I am satisfied, accordingly, that the continued employment relationship between the appellant and the respondent would be intolerable; hence the only appropriate remedy, in the circumstances, would be compensation.[40] Given the facts of the case, I consider that compensation in the amount equivalent to eight months' remuneration at the rate applicable to the appellant at the time of his dismissal would be just and equitable. It is common cause that the appellant earned R3989-00 per month at the time of his dismissal.

[70] Concerning the issue of costs, even if the appellant had lost the case it did not appear to me that this was the appropriate instance where the award of a costs order against him was fair and just. Losing his job was a sanction well adequate for him to have further deserved a costs order against him. In my view, there should have been no order as to costs. Indeed, there is no reason why that position should not equally apply on the issue of costs of the appeal.

[71] In the result, the following order is made:

1. The appeal is upheld partly, to the extent that the order of the Court *a quo* is set aside and substituted with the following order:

[39] Para 40.5 of the appellant's heads of argument.
[40] In terms of section 194 (1) of the LRA.

1.1 The commissioner's award under reference number MP2256-03 dated 9 February 2004 is reviewed and set aside and for it the following is substituted:

'(a) The dismissal of the applicant was procedurally fair but substantively unfair.

(b) The respondent is ordered to compensate the applicant with the amount equivalent to the applicant's eight months' salary calculated on the basis of the applicant's remuneration at the time of his dismissal (i.e. R3 989-00 x 8 = R31 912-00).

(c) The respondent is ordered to pay to the applicant the amount referred to in (b) above within 40 (forty) days from the date of this order.'

1.2 There is no order as to costs.

2. There shall be no order as to costs of the appeal.

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NDLOVU, JA

Judge of the Labour Appeal Court

Davis JA and Landman AJA concur in the judgment of Ndlovu JA

Appearances:

For the appellant: In person

For the respondent: Mr ML Malan

Instructed by: Perrot. Van Niekerk. Woodhouse. Matyolo. Inc.