

## **REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**CASE NO: D 448/02**

In the matter between:

**UNIVERSAL PRODUCT NETWORK (PTY) LTD**

Applicant

and

**THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION (CCMA)**

First Respondent

**COMMISSIONER S PATHER** Second Respondent

**H GOSLIN** Third Respondent

## **JUDGMENT**

**NTSEBEZA, AJ:**

### **INTRODUCTION**

[1] The Applicant in these proceedings is Universal Product Network (Pty) Limited (Universal), a registered company carrying on business as a distribution centre for the Woolworth chain of stores. It is headquartered in Cape Town. The issues for this application relate to its branch in Durban.

[2] The Third Respondent, Heather Goslin (Goslin) was ordered to be reinstated, with retrospective effect, to her position as an employee of Universal, (details of which I will deal with hereunder). This order for reinstatement, [and other reliefs] were in terms of an award handed down by the Second Respondent, Sungaree Pather (Pather), who had been acting as a Commissioner arbitrating the matter under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The award was handed down on the 7<sup>th</sup> February 2002. It is against that award that this application is brought. I am asked to review and set aside Pather's award and substitute it with one which I may deem fit.

## **BACKGROUND**

[3] Goslin was an employee of Universal since June 1993, and at the time of her dismissal on 1 August 2001, she was a Human Resources Administration Manager. Charges against her were that she had processed, irregularly, time sheets that led to fraudulent salary payments. She was also charged with fraudulently claiming discount in respect of purchases made on behalf of the company, and, lastly, she was accused of breaching company procedures by processing wages for casual employees without supporting documents.

[4] Having been found guilty on all of the counts on which she was charged, the disciplinary hearing's chairperson, after hearing pleas in mitigation,

dismissed Goslin, giving her an opportunity to appeal to the Operations Director, one Steward Matlala. Having referred the matter to the CCMA, Goslin referred the matter further to arbitration when she and Universal were not able to resolve the dispute by way of conciliation. Arbitration commenced on 3 December 2001 and was completed on 30 January 2002.

## **BASIS FOR THE REVIEW**

[5] In its founding papers, Universal, through its Employee Relations Advisor, Mr Mark van Buuren, alleges that Pather's award falls to be reviewed in terms of Section 145(2)(a) of the Labour Relations Act 66 of 1995, as amended (the LRA). Van Buuren deposed that Pather's award (he called it his (*sic!*) award!) is not rationally justifiable on the evidence that was before her.

[6] Van Buuren deposed that Pather unjustifiably and/or incorrectly failed and/or committed an irregularity in failing to take into account the fact that Goslin was employed in a position of trust and was ultimately responsible for the actions of one Mavundla (about whom later). On the same basis, Pather was attacked for finding that Goslin's version was more probable than that of Universal's representatives at the arbitration, which she rejected as improbable. Van Buuren went on to cite about fourteen (14) specific instances that, in his submission, showed the unjustifiability of the award. He, for example, charged that Pather had been unable to appreciate the seriousness of the fact that Goslin had

failed to properly, *“reconcile major inconsistencies between her versions at the disciplinary enquiry and at the arbitration”*.

[7] Goslin had not been unfairly dismissed, so deposed Van Buuren, and Pather’s finding that she had been, was unjustifiable or incorrect or amounted to committing a gross irregularity. The award that retrospectively reinstates Goslin was unjustifiable or incorrect and/or grossly irregular, as was the order of compensation from 1 August 2001 to date of reinstatement.

[8] In her analysis of all the evidence and argument placed before her, Pather, with regard to the first charge, had found that Goslin’s evidence, and that of her witness, Snyman, was that during the period under consideration, the person who processed the wages of the casual employees was one Mavundla. Pather found that this evidence had not been disputed. Even though there had been an issue about Goslin being ultimately responsible for Mavundla’s work, Pather accepted evidence which she held was undisputed, namely, that Mavundla had been accountable to his Commercial Manager, one V Pather.

[9] Snyman had testified that the gate-control register was used to control access of casual employees for purposes of their attendance at fire drills. Since, as casuals, their names and numbers were not stable – like permanent employees – the gate-control register was a mechanism to monitor the goings in and out by casuals. The gate-control register, Pather

held Snyman to have testified, was not a register authorised by managers for the purposes alleged in the charge. For example, there were occasions when the gate-control register would be signed by the casuals on arrival when they came to the premises **only** for weekly union meetings and for nothing else, certainly not to work. Pather had found this evidence compelling, reasonable and probable.

[10] She rejected as improbable that a rule existed that required that the gate-control register had to be checked before the processing of casual employees' wages. If such a rule existed, the Human Resources Manager would have ensured that every staff member was aware of both the rule and the penalties for non-observance thereof. On that basis she had refused to find Goslin guilty of the charge she was accused of with regard to the casual workers' wage payments.

[11] With regard to the fraud charge, Pather found it highly improbable that Goslin, after eight (8) years of loyalty and competent service to the company, could have attempted to defraud Universal for what to Pather were "*insignificant amounts*". Pather firstly attacked Universal's reconciling system for lack of structure and control in that an employee was expected to, for example, submit a claim to the petty cash clerk, receive a refund of the amount "*owed*" to her, and having received this "*refund*" then have to "*refund*" from her own refund the amount representing the 12% discount on all transactions made from Woolworths involving the use of a credit card. Pather found that it would far rather

have been better if the petty cash clerk could have calculated the discount, deducted the relevant amount before refunding the amount of the purchase to Goslin.

[12]Pather found that the evidence had been inconclusive as to whether Goslin had deliberately failed to refund the discount. For example, the petty cash clerk had two receipt books operating at the same time, and that whereas at one stage the allegation had been that she had, on two occasions, taken staff discounts for her own benefit, it had subsequently been established that she had in fact paid in the amount of R17,99 (seventeen rand ninety-nine cents) although this was not reflected on the petty cash schedule. In such circumstances, Pather had concluded that even if this inconclusive evidence showed that some R17,99 had not been paid in, this could be attributed to human error rather than to fraud. It would therefore be unfair to convict Goslin for fraud when in all probability she had, to Pather's satisfaction, done all she had been required to do with regard to the refunding of the 12% discount in trying to meet the demands of an "*inadequate accounting system*".

[13]With regard to the third charge, Pather dismissed it offhand on the basis that Bosch, Universal's witness, had made several concessions the nature of which rendered the charges devoid of substance. Bosch had stated, Pather found, that Goslin could have provided the supporting documents she was accused of having failed to produce. Besides, it was the petty cash clerk's responsibility to ensure that all supporting documents were

on record. No evidence had been led to show that Goslin had not provided the supporting documents, as charged. This meant that Universal had failed to discharge an onus resting upon it, of proving their case against Goslin, Pather found.

[14] Pather did not consider that there was a major issue to be made of what she termed, *“the minutes of the disciplinary hearing”* and Goslin’s *“apparent conflicting evidence at this hearing”*. Pather, firstly, found Goslin to have been an honest and credible witness before her. She found her evidence was corroborated in all material respects by Snyman, whom she found also to have been *“credible and solid as a witness”*. Pather found Goslin’s explanation for what she termed *“minor inconsistencies”* to be acceptable, reasonable and probable, regard being had to what Goslin had described as a trauma of her sudden suspension that disorientated her, and had made it difficult for her to apply her mind properly. In any event, Pather held, the arbitration before her was a hearing ***de novo*** and, by implication, she was going to be in the least influenced by what the record of the disciplinary hearing showed, particularly if the content of that record was being relied upon to persuade her against Goslin’s acceptability as a reliable witness.

## **GENERAL LEGAL POSITION**

[15] I will upset the findings of an arbitrator, (when his or her award is sought to be reviewed and set aside on Section 145(2)(a) grounds), only if the

award lacks “*rationality*” or “*justifiability*” in relation to the evidence placed before an arbitrator. Our law is replete with cases that bear out this proposition.

[See: **Shoprite Checkers (Pty) Ltd v Ramdano NO & Others** [2000] 9 BLLR 1011 LAC at 1022 B and 1024 H.]

[16] “*Misconduct*” as a ground of review must relate to some form of bad faith (***mala fides***) or conduct that is obviously wrong in the circumstances.

[See: **County Fair Foods (Pty) Ltd v CCMA & Others** (1999) 20 ILJ 1701 (LAC).]

As “*gross irregularity*” is also a ground relied upon in this review, Universal’s will succeed to have Pather’s award reviewed and set aside on that basis only if I am persuaded that Pather misconducted herself so irregularly that it can clearly be said there was no proper hearing.

[See: **Maarten & Others v Rubin NO & Others** (2000) 21 ILJ 2656 (LC) at 2659, para. 4.]

[17] An arbitrator’s award will not be reviewed by a judge merely because the review judge would have come to a different conclusion had a judge been sitting as an arbitrator. It is impermissible to do so. The judge, if satisfied that the arbitrator considered all the facts, and applied relevant legal



principles, must not review and set aside an award merely because s/he thinks the arbitrator is incorrect in his/her conclusions because his/her conclusions are different to what his/hers would have been had s/he sat as an arbitrator.

[See: **Carephone (Pty) Ltd v Marcus NO & Others** [1998] 11 BLLR 1093 (LAC).]

[18] Insofar as there is a call upon me to substitute my own award for that of Pather, I will do so only if I am satisfied that the findings of the arbitrator, and the reliefs she granted, are a travesty of justice in that they make no sense and exhibit a lack of care and reasonableness in the way the arbitrator approached all the evidence before her. After all, the arbitrator has one definite advantage over me. She listened to the evidence, formed an impression of the witnesses, and is therefore in a far better position than I to make a credibility finding, for example, with regard to the witnesses and the evidence they gave.

[See: **Rex v Dhlumayo** 1948 (2) SA 678 (A).]

Against this backdrop, I now turn to the arguments of the parties' legal representatives.

## **ARGUMENTS BY COUNSEL/LEGAL REPRESENTATIVE**

[19] I am deeply indebted to the legal representatives for their able, oral

arguments. I was quite disoriented by the written Heads filed on behalf of Goslin. For one thing, the page references were altered as we went on. For another, there was one reference to case law, the **Carephone** case (***supra***). That was the sum total of Mr Reardon's reliance on case law in support of his submissions. I am disappointed in a Respondent's legal representative, who in all likelihood responds to Applicant's Heads in which a body of case law is relied upon, but who finds it unnecessary to articulate the jurisprudence that underpins his submissions on the facts. Once again, I find it necessary to remark that Heads of Argument are intended to assist judges to come to appreciably just findings on both the facts and the law. They are not to be filed merely to meet deadlines.

[20] Perhaps before I begin an analysis of the oral and written argument that was put before me on the 8<sup>th</sup> April 2003, I need to deal quickly with the condonation application by Goslin for her late filing of her Answering Affidavit. Insofar as the application is not opposed, and also to the extent that reasons have been given to explain the delay, it is not something that should further delay me. By her account, Goslin was 36 (thirty-six) days out of time. There is no objection by Universal to her application for condonation. To the extent it is necessary for me to make a formal pronouncement there anent, I grant the condonation accordingly.

[21] I propose to deal with the evidence charge by charge. I proceed to do so.

### Charge 1

Universal heavily relied on what its witness, Chadinah, claimed was Goslin's main duty, namely to ensure that the processing of payrolls was accurate in that all relevant documentation was attached to them. On Universal's behalf it was argued that in order to process casual employees' wages, Goslin had to satisfy herself that the casuals had attended **work** before processing their wages. This she could do only if she reconciled the access control register kept at the gate with the attendance register in the office.

[22]Fraudulent claims of wages had been so prevalent that Goslin herself had implemented this system in order to curb the fraud. Chadinah had testified that an audit she conducted had established that between April and May 2001 four casual employees had been paid in respect of days on which their names did not appear in either the gate control register or the attendance register. The employees were Kerwin Snyman, Carlos Abranches, Remanus Shandu and Maureen Archibald. Chadinah testified that under no circumstances should Goslin have processed hours for payment purposes where the attendance register had not been signed by the employee concerned.

[23]In her defence, Goslin had testified that the gate access control register had been set up for safety and emergency purposes, **not** as an official

mechanism for the payment of wages. She denied that she had told Chadinah anything otherwise. She testified that the gate access register was used if queries arose in respect of staff who worked night shift. It was Mavundla who processed the wages of casuals. Goslin denied that as Human Resources Administration Manager, she was accountable for the processing of casual employees' wages.

[24] Mr Myburgh argued that on a closer examination of her evidence, despite her denial that she was accountable, as Human Resources Administration Manager, for Mavundla's work, one observed that Goslin, under cross-examination, made concessions that proved otherwise. She had, for example, conceded that in processing the casual wages, Mavundla was doing part of her job and standing in for her; that she would have been the person Mavundla would have raised his queries with; that if Chadinah herself, her direct superior had any problems with processing of wages, she would have raised same with her, Goslin, in her capacity as the "*accountable person*"; that ordinarily she was accountable for ensuring that the information presented which triggered employment was correct and that persons in exactly the same position as she who had failed in their accountability had been dismissed in the past.

[25] Insofar as reliance was placed on the corroboration of Goslin's evidence by the evidence of Aubrey Snyman, Mr Myburgh argued that Snyman's evidence could not be relied upon. Mr Reardon had argued that Snyman's evidence had been to the effect that Goslin would not have regard to the

gate control register if a worker had signed the attendance register. She would only peruse the gate control register if the attendance register had not been signed, just to make sure that the worker had indeed been at work. It was at his (Snyman's) suggestion that this mechanism had been resorted to in order to avoid the necessity of telephoning shift managers at home whether workers who had not signed the attendance register had in fact been at work.

[26] Snyman had further testified that Goslin, on going on leave, had been required to hand over her duties to Mavundla who was accountable to V Pather as aforementioned. Mr Reardon argued that save for the gate register for the 23<sup>rd</sup> April 2001, Goslin had placed in dispute all the gate control registers relied upon by Universal. On various occasions throughout the proceedings, Goslin had challenged the correctness of the registers for gate access control. On that basis, it was argued, I must endorse Pather's conclusion that Goslin had not committed the alleged misconduct.

[27] In arguing against Snyman's testimony, Myburgh argued that in cross-examination, it had transpired that Snyman had in fact been dismissed by Universal and that one of the charges giving rise thereto related directly to the operation of the gate access control register. Myburgh argued that far from Snyman corroborating Goslin in any respect material to the charge, Snyman, in the end conceded that as Human Resources Administration Manager, Goslin was accountable for the processing of

wages and that ordinarily, it was her responsibility to ensure that the data had been captured correctly. It was her responsibility to ensure that the hours worked by casuals were correctly captured onto the system. In that sense, in the position she held, she was accountable.

[28] In the light of the arguments presented by Myburgh, and with clear and copious references to the evidence, even in a review (as distinct from an appeal) it is difficult to find on what basis Pather could rationally and justifiably have come to the conclusion that Goslin was not guilty of gross misconduct of negligence in respect of processing of irregular time sheets leading to fraudulent salary payments. Nothing that was argued before me, and nothing that I have found in reading the transcript, convinces me that Pather did not conduct herself irregularly in concluding, in essence, ***inter alia***, that “*since Mavundla had processed the wages in question, there can be no question that [Goslin] breached the rule.*” Pather took too peripheral a view of all the evidence and her conclusions in this regard cannot be justified in the light of the evidence that was placed before her.

Charge 2: Claiming of discount in respect of purchases made on behalf of the company

[29] Universal, in support of this charge, relied on Bosch’s evidence. Bosch testified that if an employee made a purchase from a Woolworths store – Universal being a wholly owned Woolworths subsidiary – and the employee used a Woolworths card, the employee was entitled to a 12%

discount on such purchase, refundable to the employee through salary. Where a purchase was made for Universal, by an employee using a Woolworths card, on claiming the refund of that payment from Universal, the employee would be required to repay the amount of discount to avoid the employee receiving a double benefit of that discount. Goslin had previously transacted purchases that called upon her to refund Universal, said Bosch. In a purchase of R149,88 (one hundred and forty-nine rand and eighty-eight cents) that Goslin had made on behalf of Universal, using her Woolworths card, there had been no record that she had made a R17,99 (seventeen rand and ninety-nine cents) refund to Universal. This Bosch had discovered in the course of a commercial audit.

[30] Whilst Goslin did not dispute these details, she testified that she had originally been charged for two separate incidents of not refunding a discount. On requesting copies of receipts issued to her, she had received schedules that showed that one of the discounts had been refunded by her. Charges against her were dropped. She was confident she had refunded the other R17,99 (seventeen rand ninety-nine cents) in question. Her confidence was boosted by her recall of an occasion when an employee, Vedna, who had kept two receipt books, had approached her with regard to an excess of R17,99 (seventeen rand ninety-nine cents) in her petty cash account. Mr Reardon argued that in the circumstances, Goslin could not be held liable for anything, if at all, worse than that there had been a human error that could account for the failure to establish whether or not the discount had been paid in. Besides, Universal bore the

onus of proof of wrongdoing on the part of Goslin and had failed to do so.

[31] Mr Myburgh, not unexpectedly, did not accept this version and argued that Goslin's inconsistencies were glaring. In the disciplinary enquiry, she had stated that she had not paid the discount due to an oversight. At the arbitration she maintained that she had repaid the discount. For the confusion, Goslin had proffered the reason that she had been disoriented by the treatment which she got from Universal, an explanation that Pather found reasonable in the circumstances.

[32] I cannot fault Pather's findings with regard to this charge merely because I would have found differently had I been sitting as Arbitrator. Pather had taken the attitude that the proceedings before her were ***de novo***, that she was not going to be influenced, for that very reason, by what had taken place at the disciplinary hearing. She had been quite happy to accept that, at worst, Goslin had committed a human error. I cannot rule that that observation was wrong. In the view that she took of the evidence she viewed the contradictions as "*minor inconsistencies*" and that probably was due to the fact, also, that the amounts involved are infinitesimal. I am not able to find on the evidence that fraud, by whatever interpretation, has been proved. I decline to upset Pather's findings on this charge. I do not think she was correct in her evaluation but I do not think she misconducted herself as contemplated in Section 145(2)(a) of the LRA.



Charge 3: Breach of procedure, processing of wages without supporting documents

[33] Again, Bosch's evidence was relied upon for this offence. According to him, Universal's procedure for payment of wages outside the normal roll required the preparation of a schedule indicating who was to be paid, what amounts had not been paid, and so on. This kind of documentation would be handed over to the petty cash clerk who was required to make out a cheque requisition which would be authorised by the Commercial Manager or Senior Manager.

[34] The cheques in question were those of the 22<sup>nd</sup> and 23<sup>rd</sup> June 2000, accompanied only by coinage analysis. In respect of both cheque requisitions, it was Goslin (and not the petty cash clerk) who had signed the requisitions. In her defence, and in argument on her behalf, it was contended that Goslin had indeed signed the requisition – (which would normally have been signed by the petty cash clerk) – because the petty cash clerk was not at work. Besides, she had provided pay slips showing under-payments for the amounts of the requisitions for which the cheques were sought and that constituted the necessary supporting documentation. Mr Reardon therefore argued that Bosch's evidence was far from conclusive that the supporting documentation had not been provided. The Arbitrator had correctly held that there was no substance to the charge.

[35] Mr Myburgh argued that Universal's Human Resources Manager's procedure for the payment of wages outside the normal payroll cycle was a control mechanism designed to prevent theft. A failure to follow this procedure could constitute gross negligence. On the two days, Myburgh argued, Goslin had completed a cash/cheque requisition and had herself received the money (R396,89 (three hundred and ninety-six rand and eighty-nine cents) on 22 June 2000 and R673,03 (six hundred and seventy-three rand and three cents) on 23 June 2000). The only supporting documentation was a coinage analysis, as aforementioned. Myburgh argued that in the absence of real supporting documentation in the form of "*payslips, or a schedule, or spreadsheet indicating who would receive the casual wages and why,*" the whole purpose of the procedure was defeated.

[36] Mr Myburgh argued that in chief, Myburgh stressed that it was the petty cash clerk who ought to have made out and signed the requisition (with the supporting documentation) and not Goslin. In response to Goslin's speculative response that the supporting documents must have been mislaid by the petty cash clerk when she returned, hence they could not be found, Bosch had testified that the result of his audit was that the supporting documents were not there.

[37] Mr Myburgh further argued that Goslin's own evidence on this change had been peppered with mendacity. Goslin could not explain satisfactorily why she, and not the replacement petty cash clerk, had filled out the

requisition form (which she could not do, and **still** be the one to receive the money). She had testified it was because the replacement petty cash clerk would not have been familiar with how to fill in the form. In the end, so argued Myburgh, Goslin had been forced to concede that she had effectively stood in for the petty cash clerk, on her own version. The responsibility had thus become hers to ensure that supporting documentation was attached to the requisitions.

[38] In the light of Myburgh's analysis of all the evidence in regard to this charge, I find Pather's conclusions completely unjustifiable. Almost with a wave of a hand, she dismissed the charge as one without substance. It seems to have been on the basis of her acceptance of Goslin's evidence, without subjecting it to proper analysis. The cardinal question of why Goslin prepared a requisition, submitted it herself, and received the money herself was not answered by Pather, particularly in view of Bosch's evidence that the procedure that the requisition, with supporting documentation should be by the petty cash clerk, and submitted to the Commercial Manager for authorisation, had been designed to prevent theft.

[39] On both days, Goslin herself had taken over the roll of petty cash clerk, without anyone to act as a check and balance mechanism. Requisitions had to be accompanied by documentation, with the details already referred to hereinabove. The obligation to supply the documentation with the requisition, was hers, and hers alone.

[40]Pather clearly grossly misconducted herself in holding otherwise. She was precipitate in holding that only Goslin and Snyman's evidence was credible – and failed to appreciate the ring of truth in Bosch's evidence on this charge, particularly. In any event, it was her duty to look at all the evidence. I am satisfied that on this third charge, her findings are not justified and have no rational connection to the evidence put before her. They cannot stand. They must be reviewed and set aside.

[41]It remains for me to determine whether I am persuaded that this an appropriate case which I can, in reviewing and setting aside Pather's award – which I do – substitute it with one that I deem fit. Had I not found as I did in respect of the second charge, I would have had no hesitation in seriously considering that route. However, I elect to order as follows:

41.1 The application for the review and setting aside of the award of the Second Respondent, handed down on the 7<sup>th</sup> February 2002 under case no. KN 8135/01 hereby succeeds and is upheld. The award is accordingly reviewed and set aside, and it is so ordered.

41.2 The Third Respondent is ordered to pay the costs of the application.

41.3 The matter is remitted to the First Respondent to be dealt with

further, if needs be, by a different commissioner.

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**D B NTSEBEZA**

Acting Judge of the Labour Court of South Africa

Date of Hearing: 8 April 2003

Date of Judgment: .....

For the Applicant: **Adv A Myburgh**

Instructed by: Perrot, van Niekerk & Woodhouse  
Inc.

Durban

For the Third Respondent: **Mr B A Reardon**  
From: Millar & Reardon  
Durban