

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: P 378 / 03

In the matter between:

Desiree Jafta

Applicant

and

**Commission for Conciliation,
Mediation and Arbitration**

1st Respondent

Botha Du Plessis

2nd Respondent

Makro SA (Pty) Ltd

3^r Respondent

JUDGMENT

CELE AJ

Introduction

[1] This is an application in terms of section 145 of the Labour

Relation Act 66 of 1995 (“the Act”), for the review and setting aside of an arbitration award dated 19 August 2003 issued by the second respondent wherein he found the dismissal of the applicant by the third respondent to have been procedurally and substantively fair.

Background facts

- [2] The facts of this matter as presented during the internal disciplinary and the arbitration hearings were not the simplest of the facts when it came to the implementation of the stock movement of the third respondent. Yet they were germane in the resolution of the dispute between the parties. A repeated reading of the fairly long record became inevitable. The applicant was employed by the third respondent as a returns clerk in the goods receiving department at the Port Elizabeth branch. She was charged with the responsibility of recording the movement of stock sent to suppliers and of repaired items received back from suppliers.
- [3] The third respondent is a wholesaler, selling in bulk to its commercially affiliated customers, to traders and to end users of the product which it was selling. The shop premises of the third respondent, in Port Elizabeth had different departments, including:
- i) The receiving end;
 - ii) The sales floor;
 - iii) The front returns;
 - iv) The damages area;
 - v) The goods returns cage.

The receiving end:

Employees of the third respondent called “buyers” placed orders and the suppliers received such orders and they generated invoices for the third respondent. The suppliers would then deliver the stock through the receiving end where particulars of such stock would be booked into the computer system of the third respondent, resulting in the administrative office thereof being notified of the fact of such delivery. A proof of delivery document would be generated which had to match with the suppliers invoice in respect of the stock delivered. A copy of the proof of delivery would be handed to the supplier’s driver. The receiving end would then transfer the stock to the sales floor.

The sales floor:

This is the area where the stock would be displayed for the public. At that stage a computer recordal would show what stock had been transferred and what was on display to the public. The third respondent used various codes for its departments with S001 being the sales floor.

The front returns:

Where an item purchased was returned by a customer for repairs, it would be received through the front returns. If the item was to be repaired and returned to the customer it would not form part of the stock holding. It would be repaired and returned to the customer through the customer returns area. Such goods would have gone through the goods return cage.

The damage area:

There was stock which the third respondent had to write off because of the extent of its damage. That would be stock which it could neither sell nor return to the suppliers and it had decided to take a loss on. The damage area was referred to as S004.

The goods return cage:

This area was used by the third respondent to provisionally keep stock which had to be repaired or returned to suppliers. The third respondent placed a clerk or clerks in charge of this section. It was a fenced off area, entry to which was limited to the clerk(s) based at it. Duties of the returns clerks included the receipt and dispatching of goods from either the front returns or the sales floor to the suppliers. The reason for the dispatch of the goods to the suppliers would either be for:

repairs - in which case the (returns clerk) had to generate a goods repair note for the goods in question and then send it to the relevant suppliers, or

returns - in which case the (returns clerk) had to generate a goods return note and then send it to the relevant supplier.

[4] Once a supplier had repaired an item it returned it to the third respondent, through the returns clerk. Where an item was returned to the supplier, the third respondent would either be credited for it or it would be replaced.

[5] In the business of the third respondent stock would be moved either internally or externally. Such movement was referred to as posting.

Internal posting- that is movement of stock from one department to another, as from sales floor to the cage, from the front returns to the cage and visa versa. Stock would also be moved from the cage to S004 location.

External posting- that is movement of stock to and from the suppliers.

- it also related to inter branch transfers per stock transfer order – the STO. An example was a transfer of stock from the P.E branch to Milnerton branch in Cape Town.

[6] If the posting system and the employees of the third respondent worked well, physical stock in every department had to correspond with a recordal thereof, known as the inventory of storage location report. Everytime posting of stock was done, the system was able to generate a posting document on which the recipient of that stock would sign to acknowledge receipt of such stock. The system also generated stock movement history through which the movement of any article could be traced. The returns clerk was in charge of all records in the cage department.

[7] Each and every employee of the third respondent who worked on the computer system of the third respondent had a user name and a unique identity number or code, which enabled access to the computer system of the third respondent. The computer system of the third respondent worked in such a manner that any transaction effected on the computer recordal was identifiable with the user name and code (profile) used in gaining access to the system at that

time. In terms of the policies and practices of the third respondent, none of its employees was allowed to use the profile of another and every employee was responsible for transactions executed with his or her profile. The computer system of the third respondent was referred to as the SAP system. Each time the computer system was down, transactions had to be recorded manually. Once the computer system was up and running, there had to be an update and the manual recordal had to be kept on file with the relevant computer records clipped thereto.

- [8] A returns clerk had access to all reports in the cage department and had to check the physical stock in the cage, at least once a week if not daily, against the records.
- [9] The third respondent engaged the services of a private security company to control the stock movement at its premises, such as in Port Elizabeth. In the cage department, whenever a security officer or a driver of a supplier brought in stock, the returns clerk had to sign to acknowledge receipt thereof. When a returns clerk prepared stock to dispatch to suppliers or to one of the branches for whatever reason, a security officer had to check such stock during the packaging and dispatching processes. The security officer thereafter had to append his or her signature on a relevant posting documentation as declaration of having done the checking. Any person who received stock from the returns clerk also had to sign on an appropriate posting record to acknowledge such receipt. Apart from records kept by the staff of the third respondent, the security company kept its own records for the stock movement where their officers were involved.

- [10] The applicant was a goods returns clerk at the times material to this matter. She reported to Mr Robb. There were times when she was given clerks to assist her in the cage department.
- [11] The shop of the respondent had serious stock shrinkage problems which it estimated at 0,25% at its Port Elizabeth branch alone. In monetary terms this shrinkage was estimated to come to R 600 000 to R 700 000 per year. The shrinkage problem was attributable to such factors as theft, stock losses, improper handling of documentation and improper handling of stock.
- [12] The third respondent ran an induction-training course for its staff and various topics were covered in such training, including shrinkage awareness. The applicant also underwent such a training course. On 7 May 1999 the third respondent issued a letter to the applicant purporting to record a counselling of the applicant by the third respondent which would have taken place on that day against failure of the applicant to adhere to company procedure on stock handling. She was warned against further breaches of company procedures failing which disciplinary action could be taken against her.
- [13] On 17 July 1999 the third respondent issued another letter addressed to the applicant to inform her that she was to be restrained in the returns procedure. The letter said that the applicant had failed to promptly action all the returns in the area, which failure allowed for a possibility of shrinkage and unnecessary damages.
- [14] On 30 January 2001, the third respondent issued another letter, also addressed to the applicant expressing concern with the amount of

stock which was said to be allowed to pile up without being returned timeously. The effect of allowing the stock pile up was given as resulting in housekeeping in the area as not being in satisfactory standard.

- [15] On 19 April 2002 another letter was issued by the third respondent which it addressed to the applicant. It concerned counselling of the applicant for poor work performance in relation to housekeeping standard pertaining to stock. Certain items were identified as of missing documentation which ought to have been in the repairs file. Numbers of these were given as 4900010505; 4900269521; 4900116649; 4900017509. It was also said in the letter that there were a number of goods return notes that could not be accounted for in the files. The letter recorded that an investigation was underway which might result in an enquiry being held into applicant's negligence. Later, a selected extract of high value items allegedly not found in the cage was drawn and given to the applicant as a matter of priority to investigate.
- [16] On 24 April 2002 the third respondent issued a notification of a disciplinary enquiry to be conducted against the applicant who then signed a declaration as acknowledgement of the receipt of such notice on 26 April 2002. The date of the enquiry was set as 27 April 2002 at 14h00 and the act of misconduct she was charged with was "gross negligence". *Inter alia*, in respect of the high value items as per drawn list.
- [17] The record of the proceedings does not have any responses of the applicant to all the letters of the third respondent up to the time that she was charged with acts of misconduct.

- [18] One Ms Lez Pramjeeth was the chairperson of the internal hearing in which one Mr Mfaniseni Nobinda was the initiator; one Mr Benjamin Ndawo represented the applicant. Mr Mpumzi Lusi was an observer. The third respondent called two witnesses, Mr Stephan Robb and Mr Sarel Myburg. Ms Pramjeeth found the applicant to have committed the act of misconduct with which she was charged and on 30 April 2002, dismissed her. The applicant lodged an internal appeal, the hearing of which was held on 31 May 2002 and on 19 June 2002. The chairperson, Mr Willem Rossouw, suspended the dismissal of the applicant for two weeks to allow her to prove her theory about the missing stock, to the management. On 19 June 2002, Mr Rossouw issued a letter, addressed to the applicant as an outcome of the appeal hearing which had been held on 31 May 2002 and 12 June 2002. Mr Rossouw stated in the letter, inter alia, that the applicant was unable to prove her theory with the result that the stock was still missing or short. In the last part of the letter he upheld the decision of dismissal of the applicant. A dismissal dispute then arose between her and the third respondent. The applicant referred that dispute to the Commission for Conciliation, Mediation and Arbitration (“The CCMA”) for conciliation, which unfortunately was not successful in resolving the dispute. The applicant was issued with a certificate of non-resolution and she referred the dispute to arbitration.

The arbitration proceedings:

- [19] Legal representation was allowed for the parties and so, Mr Forbes appeared for the applicant while Mr Wade appeared for the third respondent. The only witness called by the third respondent was

Mr Nobinda, a Goods Receiving Manager at Makro Port Elizabeth branch. To the extent that evidence of Mr Nobinda sought to implicate the applicant with acts of gross negligence, it was to the effect that:

- He was transferred from Sandton to Port Elizabeth Branch of the third respondent on assignment, to sort out problems relating to stock shrinkage which the Port Elizabeth branch was going through.
- He learnt that the SAP computer system of the third respondent, in the branch, was experiencing operational problems resulting at times, in a failure to post stock. Such stock was limited to the first three months of the system.
- The system was in fact very basic and was devoid of any problems as alleged. On the contrary some staff failed to follow simple procedures resulting in there being perceived problems. Mr Robb was incorrect when he conceded to such problems.
- No documentary proof was generated when stock was posted from S001 to S002 locations. He directed that when such posting was done, a computer print-out was to be generated at S002. That alerted the returns clerk of stock which was to be brought to her long before it was physically brought. She had then to check the inventory against the physical stock, once it was brought to the cage.
- Everytime the applicant had problems in posting stock through the computer system, she had to log a telephone

call with the administration personnel. That would evidence those occasions when she had problems and that was the evidence tendered by Mr Robb at the internal disciplinary hearing. The absence of the telephone logging indicated a failure on the applicant to report any problems which she perceived were existing.

- The posting of stock which was at the sales floor from S001 for repairs was an act of negligence by the applicant. She had to first accept such stock into the cage and into her S002 and from there, post it for repairs or as returns to suppliers. Once the stock came back from repairs she had to receive it into the cage and into her system and thereafter post it to S001 where it was to be sold and had to see to the signing of all relevant documents.
- There was staff of the third respondent called “buyers” who were charged with buying stock for sale. When they placed orders they had to indicate the department where that stock would go to once it was delivered. There was a bulk of stock which was erroneously destined for the cage. Such stock was never physically brought to the cage when delivered. It was taken to the sales floor which created a surplus of stock there and a shortage thereof in the cage, in the computer system. Once that was discovered, such stock was posted appropriately to S001 in the computer system to balance up. Where that was done, instead of having a date of posting, the system wrote a number of zeros. There was no negligence on the part of the applicant in that situation and such stock was not included in the charge.

- In respect of 13 big air coolers which were sent to the cage, the applicant ought to have entered all 13 into her system but she instead entered 10. Thereafter she attempted to post out for repairs 13 out of her system. The system recognized only 10 and rejected the posting of 13. After adding 10 into the system, she had to add 3 more and would successfully post out 13 coolers without a problem. There was therefore nothing wrong with the system.
- In respect of stock which the third respondent purchased from international suppliers, it had local agents to whom such stock would be sent for repairs. The posting of such stock was the same as that of the local stock, even when it had been returned by its customers. There were suppliers who came to the branch and did indoor repairs of their stock.
- **The Milnerton affair: -**
 - the Milnerton branch of the third respondent was short of certain stock whereafter an order thereof was placed with the Port Elizabeth branch. The applicant prepared documentation and packed the stock which was ordered. The security officer who worked with her did not sign documentation to evidence the checking during the packaging. Another security officer was present when the stock was dispatched and he only counted the number of boxes which were to be sent away. The applicant signed the posting documentation to say that the stock and the quantity thereof were correct. When the sealed stock arrived in

Milnerton, it was established that there were stock lines which had a shortage and some had a surplus of what had been sent. It was a mistake of a different kind which was committed by the applicant, whose duty was to verify the quantities of stock sent to Milnerton.

- There are listed high value items which were subsequently found. Stock with item number 4403 was found on the sales floor location S001 and was balanced with one sent out on repairs through location S002. A palm top hand held organizer with stock number 2437760 was found in the cage after a correct article number was punched into the computer system. The discovery took place after the applicant had been briefly reinstated by the chairperson of the internal disciplinary appeal. During that 10 days reinstatement, the applicant was unable to adequately explain any other articles mentioned in the high value stock list. There was a stock movement history relating to a number of Hoover Titan Cylinder vacuum cleaners, yet the applicant failed to account for 2 similar vacuum cleaners which were supposed to be on S002. A computer and 2 Canon Cameras which were part of the high value stock list, were subsequently found and the balancing of stock was done. In respect of other items in the high value stock list, for which she was charged, the applicant did not produce a single document showing that such items had been given to somebody who acknowledged receipt for that item. These are items on the list for which she was not charged.

- After the dismissal of the applicant, more stock was found which she had failed to account for. Such included the Estia Domestic Appliances. Evidence of it was produced to show that reinstatement would not be an appropriate relief, in the event a finding in her favour was made.
- There was stock, the records of which were processed through the profile of Mr Robb. The applicant was held responsible for that stock because she admitted that she was the one who had sent it for repairs.
- The applicant was ill at some stage and took a day off, in her absence, some items were found on the sales floor without a proper posting by the applicant.
- Since the dismissal of the applicant, work in the cage location was going on smoothly with one operator.

[20] Once the case of the third respondent was closed, the applicant called Ms Veliswa Ndyimbana who worked with the applicant from 2000 in the cage location after her post in the receiving gate had become redundant.

[21] The evidence led by the applicant through Ms Ndyimbana was to the effect that:

- When she started working at the cage location with the applicant, she had not been trained into the SAP computer system but was then given about three weeks' training. The stock in the cage was full, it was a mess and there was a lot of stock, some of which

was outside, such as large appliances which they could not accommodate inside.

- In relation to whether there were problems with the SAP system refusing to allow some goods to be punched out from S002 to vendors, she did not know if the problem was with the SAP system. In respect of the applicant, they had found that the stock which was purportedly transferred from S001 to S002 had not in fact been posted in the system and yet the stock had been brought to the cage. They had then thought that the stock was in the S002 computer system and attempted in vain to post it out from S002.
- Mr Nobinda introduced a change so that a print out would be made for the transfer of stock to S002. They would then compare the information on a print out with the physical stock brought to them.
- Some of the problems experienced in the cage location occurred at the front returns. Mr Nobinda instructed the front returns staff to stop posting stock to S002 and instructed the returns clerks to do the posting into their location themselves when stock came from S001. When the work in the cage was manageable, Mr Nobinda reversed the system by telling the front returns staff to do the posting which was followed by a print of the data in the cage location.
- The front returns staff used a Loss Prevention document that the security officers working at the

shop would bring to the returns clerks when stock was posted to the cage. Verification of the stock was done physically and if confirmed against the document it was handed back to the security who in turn had to take it back to the front returns for their record purposes. When the loss prevention document posting stock to the cage was unsigned, it could mean that the stock was never physically sent to the cage, or that a mistake was made in the posting process.

- Every stock sent to suppliers had to be recorded in the cage system and paper work accompanying the stock had to be properly endorsed. Stock coming from repairs was first received by the returns clerk who had to make entries in the cage records of such receipt and had to transfer it to the front sales with the staff in the front sales signing to acknowledge receipt. Manual documents were used in the event there was a problem with the computer system. Where company procedures were not followed, the staff could be held liable for negligence.

[22] In her own testimony the applicant said:

- When she was charged by the third respondent, she knew very well that the allegations in the charge pertained to the stock which was described in the list of the high value stock. The list was contained in a letter which the third respondent had previously served on her. She did have sufficient time to prepare

for the disciplinary hearing.

- She well knew that in the receiving departments of the third respondent, one of the ways through which shrinkage occurred was when the staff did not follow receiving procedures. She also knew that the third respondent regarded a failure in the following of procedures which resulted in shrinkage, as a serious transgression of its rules.
- The third respondent had recordings of stock initially done through a computer system which was subsequently changed in favour of another computer program called the SAP system. She received training for the SAP system. Initially the training was done internally by the third respondent with the result that she experienced problems with the SAP system. The problems with the SAP system lasted longer than three months, such that Ms Ndyimbana who came to assist her left for and returned from her maternity leave while there were still such problems. From the inception of the programme, the system did not work 100%. But for the fact that the system was faulty, none of the problems would have arisen. Two examples of her problems pertained to her inability to transfer or post stock from her location S002 and secondly, her inability to access the storage location S002 in the computer system due to her inability to print out a stock holding document. The third respondent brought into the branch, people who had

installed the SAP computer system with a view to addressing the problems of staff with the SAP system. That helped her resolve her problems with the system, subsequent to such external training. Mr Nobinda even printed a stock holding document through which she was able to see what stock was in her computer system.

- During the initial application of the SAP system, she found it impossible to post stock out of S002 location when such stock was brought to her cage from the sales floor. She reported the problem to her supervisor, Mr Robb, whom they regarded as the super user of the system. In order to transfer such stock to the suppliers, she was authorised to transfer the same through the S001 location straight to the suppliers. The consequence of so doing was that a stock imbalance was created in that her location records remained with a surplus of stock which had physically been sent out for repairs or returned to suppliers, while a surplus of stock was created in the records of location S001 when the transfer of stock, which was not in that location, was done.
- When the staff at the front returns posted some stock to the cage to be actioned upon, some of such stock was never physically brought to her so as to balance with the computer posting. That also created an imbalance in her stock which she could not detect as she received no warning of the same in the computer

system. She only became aware of such posting when personnel physically came to her with the stock whereupon she then signed acknowledgement of it. The problem was firstly addressed by Mr Nobinda when he directed the front returns clerk themselves not to do post stock to location S002 but to have the returns clerks themselves do the posting in their own computer system upon physical receipt of such stock. Mr Nobinda later reverted to the previous system but introduced the printing of all stock when the same was transferred from the front returns to S002. That served to warn the returns clerk of the stock they were to receive from the front returns even before it was physically brought to them, whereupon they were able to compare it with their data. Once the SAP was in full swing, she was even able to reverse any posting of stock whence it came, if she had not received the physical stock in respect of which the computer transfer was done.

The listed high value goods

- She was given a document derived from the inventory of storage location report in which the high value stock was listed to investigate and give a report back on why such stock, although it was in the computer recordal, was physically not in her cage location. Mr Nobinda had granted her time extensions during which an explanation was called for. She worked together with Ms Ndyimbana in responding to the

enquiry and they responded as and when such stock was found. It was not true that she never responded.

- It was her duty to ensure that whenever stock came onto the cage, it was registered into the computer system. Whenever stock was physically removed from the cage, she had to create a document which accounted for it, such as goods return note and a goods repair note with the result that such stock would be subtracted from the computer records.
- Among the items in the list, a silverline computer was sent out on 4 February 2002 through location S001 to the supplier with a goods return note. The supplier signed acknowledgement of the computer on the goods return note which had originally been generated when the computer was posted. The goods return note was with the third respondent's documents. She had not requested a goods return note from the third respondent because of lack of knowledge that it would be needed. The supplier brought the computer back and a return reversal note was made with the computer posted to the sales floor on 10 May 2002.
- In posting the stock to the sales floor, the SAP system could not allow her to "punch back" the goods return. She had to create an order and then she made a reversal on the goods return note. She informed Mr Nobinda of the problem, whereupon he telephoned head office as the specific article number had been blocked. Head office officials opened the article

number and the order was created and the goods return was reversed. At the sales floor, she handed the computer to one employee known as Allie.

- Whenever she was transferring an article to the suppliers, she noted the tracking sticker thereof. On the return of the article, she checked the sticker to confirm that the article returned was the same article she had sent out. Then and only did she proceed to sign the waybill. She showed the documentation to Mr Nobinda.
- There were items on the list on which shrinkage reversal was made and for which she made out a goods return note. These would be items which were found to have been surplus on the sales floor. While surplus on the sales floor could be caused in various ways, in the instant case, such was created when stock from location S001 was transferred instead of a transfer from her location S002. She made out goods return notes for such stock wherein the recipient would sign. She handed all such notes to the third respondent during her employment period.
- In respect of two Canon Cameras and a hand palm top there were goods return notes. The notes were bearing a date in June 2002 because it was in that month that the supplier came to collect the stock and it was transferred in June 2002 from the cage location where it had been. Neither herself nor her attorney had asked for the goods return note from the third respondent,

during the appeal hearing. She could not recall if it was ever put to Mr Nobinda that the goods return note in question existed.

- She had reference numbers of the goods return notes for the items in the high value stock list. She had used the same during the appeal hearing. The references were in a 6 page note.
- On 20 May 2002 the SAP system was working in full swing. She noted on a print out that the front returns staff had accessed the cage computer system whereafter they posted an Epson printer to the cage location without bringing the printer to her. She put a cross mark on the corresponding space of the print out and proceeded to reverse the transaction to the floor location S001. One of the shop floor staff signed the print out to confirm the fact.

The Milnerton transfer

- She parcelled the stock as it was required and the security guard checked what was being packed. She then signed relevant documentation and sealed the boxes. The security guard did not sign the documentation before the packs were sealed because the stock was not to be dispatched on that day, a Saturday. It was only on Monday that the boxes were dispatched and the security guard who was on duty counted the boxes and signed documentation thereof. While that security guard did not oversee the packing

process on Saturday, he had been present and she had seen him speaking to the one who had supervised her when she was packing the stock. She would have not made the mistake on the number of stock which she packed.

Stock subsequently discovered

- On 02 February 2002 she did transfer 175 items of stock from her computer location S002 to location S001 from location S001, the stock was transferred to suppliers. Initially the same stock had been transferred from location S001 to S002, whence it was transferred back. Such posting was not accompanied by a physical transfer of similar stock from the cage to the front sales. The effect of the computer transfer was the reduction of stock by 175 items from her computer records. She had been instructed by Mr Robb to effect the transfer. Accordingly, the transfer was not effectively a scam, nor was it irregular. She did not know why it had not been put to Mr Nobinda that Mr Robb had authorised the transfer. There was a document in the bundle to prove that all 175 items were returned to the suppliers.
- All 175 stock was transferred on one goods return note. That included Best Duty Plant Potjie. The goods return note was not in the computer system and was nowhere to be found. As she was about a year out of the employ of the third respondent, she could not have known what happened to the goods return note in

question. She had searched for it at the third respondent's shop in vein.

- There was a bundle of documents she had which had records of the transfer of stock from S001 to suppliers. [The matter was postponed to allow the witness to peruse the bundle. Matter proceeded on resumption].
- Not all 175 items were returned to the suppliers per goods returns notes as some were forwarded through the stock repair note while the rest of the bundle had never been brought to her storage location. She did not have the original transfer notes with signatures to acknowledge such stock. She asked for the same from the third respondent but was only given reprinted copies.
- Of the 175 items, she agreed that only 21 had been returned to the suppliers from storage location S001. The Best Duty Plant Potjie with article number 1857297 was an example of stock which had not physically been transferred to her location but was computer posted to S002. A goods receipt note was generated thus showing stock movement. A similar erroneous transfer was of Plascon paint.
- An administration Manager, Mr Ali Pieterse took all original transfer notes from her once she had finished working on them. The notes included those for internal departmental transfers. It was during the investigations of the matter that some of the notes

were given to Mr Nobinda. During the appeal hearing, it was stated that Mr Nobinda had been given original signed notes.

- [23] When Mr Wade was cross-examining the applicant, he put a number of challenges to her version. One such challenge was to call upon the applicant to produce proof of a transfer of any one of the stock appearing in the list of high value goods. She identified a computer with the number 4367 which was transferred on 04 February 2002 from location S001 to S002. She said that she then made a goods return note on the very day and dispatched the computer to the supplier using location S001 because of the problem she had with location S002. She said that the computer came back through the return reversal. She forwarded it to the front sales. She involved Mr Pieterse and Mr Nobinda in processing the documentation thereof. From the list of the high value goods the applicant gave an explanation, which the third respondent accepted, in respect of two cameras and a computer.
- [24] The further challenge related to what Mr Wade referred to as a failure on the applicant to present evidence that some original transfer documents were given to Mr Nobinda by the applicant. She was given a chance to peruse the minutes of the disciplinary and appeal hearings whereafter she identified two of such instances in the minutes of the appeal hearing.
- [25] After the third respondent had dismissed the applicant, it found that there were 175 items of stock in the cage which were not properly accounted for. Mr Wade challenged the applicant into producing documentary proof that such stock had been properly transferred from S002 by the applicant. The arbitration hearing was postponed

to allow the applicant to produce such proof. When the proceedings resumed, Mr Wade put it to the applicant that 21 of the 175 items had been posted to the suppliers. The initial response of the applicant was in agreement with the proposal. Later she appeared to be uncertain of the exact number. It therefore became common cause between the parties that, at least 21 of the 175 goods were not in issue between the parties.

The arbitration award

1. Substantive Fairness

[26] The second respondent found, *inter alia*, that:

- The applicant was not a credible witness. Ms Ndyimbana testified against her. Mr Nobinda was unshaken by vigorous cross-examination. He was coherent and consistent.
- The trust of the applicant's case was that the SAP system did not operate the way it should have. It was faulty and caused an imbalance. It did not permit her on certain occasions, to transfer goods out of storage location S002 or the cage. She claimed, " If the system was 100%, she would have done her job correctly". This created an impression that the applicant wanted to admit that she was negligent.
- According to the third respondent, the missing items, except three items on the list of high value stock, formed the basis of the dismissal of the applicant.
- The witness for the third respondent as well as the witness for the applicant testified that a back-up or manual system was in place despite the existence of the SAP system. Even

the applicant alluded to that fact. He therefore could not accept her argument that the system was faulty and would not allow her to transfer goods from the cage. The applicant on the one hand testified that her key function was to record the movement of stock but on the other hand she could not explain what had happened to the missing stock. At the very least, she could have been able to produce some documents to verify her defence.

- She maintained that she had passed inter departmental posting documents onto Mr Nobinda but she failed to challenge him on that. During cross-examination, she testified that she had passed the same documents onto Mr Pieterse. Also during cross-examination, she claimed that the respondent had either destroyed those documents or refused to make them available.
- The fact was that the third respondent's records, which proved the stock movement, did not support the applicant's version. The stock movement reports indicated that only certain of the items on the list were transferred out of the storage location to be returned to the supplier. The applicant's defence did not explain why the items on the list were missing from the cage.
- The applicant was responsible to control the movement of stock. Her actions neutralised the third respondent's shrinkage system.
- He had to conclude that the applicant was grossly negligent as she breached her fundamental responsibility to accurately

record stock movement. She failed to control stock whilst acutely aware of the prevailing system and procedures, as also the importance of the controlling shrinkage.

- Before any disciplinary charges were laid against her, the applicant was requested to clarify the missing items on the list. She was given ample opportunity to do her own investigations and to report back. Her failure to report back to management was viewed in a serious light.
- Where the negligent was so gross that it could be held that the employee foresaw or should reasonably have foreseen the possibility of damage to property or assets, it will be sufficient to justify dismissal.

2. **Procedural Fairness**

[27] The further findings by the second respondent were, in this respect, *inter alia*, that:

- The applicant was afforded a fair opportunity to state her case both in the initial disciplinary hearing and in the subsequent appeal hearing. The applicant's contention that the chairpersons were biased or did not consider mitigating factors was not supported by the minutes of the enquiries. The chairperson of the appeal hearing reinstated the applicant in order to advance her endeavours to locate the missing items. That conduct did not convince him that the chairperson was biased against her. She had also not challenged the alleged biased during the hearing and

could not challenge it thereafter.

- The claim of the applicant that the charge against her was vague was without substance.
- There was no basis for concluding that the third respondent acted in any way procedurally unfairly in pursuing the charge against the applicant.
- An appropriate test for dismissal was whether the conduct of the employee had the result that the relationship was damaged or destroyed or its continuation was rendered intolerable. Dismissal was always justified when an employee was found guilty of a serious act that had undermined the relationship of trust between the employer and the employee. It was doubtful whether the third respondent would trust the applicant again.

[28] He concluded that the dismissal of the applicant was not unfair and that she was not entitled to any relief.

Grounds for review

[29] The review application is premised on the submission, firstly that the award is irrational and unjustifiable and secondly that the second respondent failed to apply his mind to the issues at hand and thus committed a gross irregularity or misconduct.

Analysis

[30] The applicant has placed her reliance on section 145 of the Act for

this application. In so far as is relevant here, section 145 reads:

145 Review of Arbitration awards

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

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

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

(2) A defect referred to in section (1), means –

(a) that the commissioner –

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

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

(iii) exceeded the commissioner’s powers; or

b) that an award has been improperly obtained”.

[31] The first review ground raised is that the award is irrational and unjustifiable. The decision in **Carephone (Pty) Ltd v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC)** provides an appropriate guidance in this respect. In paragraphs 30 - 32 of his judgment, Froneman DJP had this to say:

“[30] It appears from a number of decisions of the High Courts that the effect of, particularly, the administrative justice section in the Bill of Rights is seen as broadening the scope of judicial review of administrative action (See

Tseleng v Chairman, Unemployment Board and another (1995) 16 ILJ 830 (T); ... [31] The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (s 33 and item 23 (b) of schedule 6 to the constitution). This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety. [32] But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal...”

[32] Froneman DJP proceeded to set a test for the review of an award that is assailed on irrational basis as:

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

[33] Then came, among others, the decision in **Shoprite Checkers (Pty) Ltd v Ramdaw NO and others** (2001) 22 ILJ 1603 (LAC) which was arrived at after Zondo JP had carefully examined the **Carephone** decision. He reached a conclusion, *inter alia*, that the term “justifiable” which had been used in the **Carephone case**, although not synonymous to the term “rational”, bears a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in **Carephone**. He held that a decision that is justifiable cannot be said to be irrational and a decision that is irrational

cannot be said to be justifiable.

[34] The second ground of review is that the second respondent committed a gross irregularity. It is not merely a high-handed arbitrary conduct which is described as a gross irregularity. Behaviour that is described as perfectly intentional and bona fide, though mistaken may come under that description. The crucial question is whether it prevented a fair trial of the issues. See **Goldfield Investment (Pty) Ltd and another v City Council of Johannesburg and another 1938 (TPD)** at 560.

[35] The first attack on the award is based on the second respondent's conclusion that the trust of the applicant's case was that the SAP system did not operate correctly or 100% with the result that she was not able to transfer goods in and out of a specific storage location, S002. That then created an impression in the mind of the second respondent that the applicant wanted to admit that she was negligent. To this, the submission by the third respondent is that the applicant's own witness testified that, quite regardless of the problems with the SAP system, a proper back-up or manual system would have enabled the relevant articles to be traced one way or the other.

[36] A proper reading of the evidence of the applicant, in my view, does not in any way justify this impression that she wanted to admit that she was negligent. At the time she was responding to a question that probed whether she agreed that she was negligent in not following the simple posting procedure. Her first part of the answer was that she did not agree that she was negligent. She went on to say that had the system worked 100% it would have made her posting task easier. I am however unable to agree with the

applicant that the impression created in the mind of the second respondent is an irrational or unjustifiable conclusion. The second respondent clearly misdirected himself in allowing such an impression. He however did not stop with that impression but went on to assess the rest of the evidence. Individually, this misdirection does not indicate to me, that he necessary failed to apply his mind to the issues at hand. See **S v Pillay 1977 (4) SA 531 AD** at 534.

- [37] The applicant submitted that it was common cause that there were problems with the SAP system. She says further that, the problem impacted directly on her in that it did not allow her to generate goods return notes and therefore could not perform her functions as she was trained on the SAP system. She said that how it impacted on her duties was common cause. I do not agree with these submissions. There are instances where Mr Forbes sought to elicit a concession from Mr Nobinda that the SAP system was problematic. He did not succeed. Mr Nobinda conceded though, that Mr Robb had testified, in the disciplinary hearing, to the effect that the SAP system had problems. Mr Nobinda clearly did not share the same view as Mr Robb. Mr Nobinda said that the stock posting process was very clear to somebody who had been trained, who knew how the system worked. He said that all there was, was to post, or transfer stock to location S002 and from there the stock could be posted to S001, thus generating a posting document on which stock recipient would have to sign. That, he said, had the result of reducing stock on the location system of S002. The same effect would result if the stock were transferred to the suppliers through a goods return note. Mr Nobinda displayed a comprehensive understanding of the SAP system such that his image, as a truthful witness was left untouched. When called upon

to, and when given a chance, he gave details of how the system worked. The transcript record showed it out.

[38] One aspect of Mr Nobinda's evidence which stood conspicuously out, was his appreciation of the lack of understanding of the SAP system by Mr Robb, the applicant and some other staff of the third respondent. According to his evidence, that is where the problem lay, and not with the system itself. I find support for this in the evidence of the applicant herself. Before the intervention of Mr Nobinda and the SAP system support staff, the applicant had problems with the system. After such intervention, she even spoke of the SAP system working in full swing on 20 May 2002, her last working day.

[39] It was an undisputed fact that, at some stage, Mr Nobinda, stopped the front returns staff from posting stock to the cage. Instead they had to physically bring such stock to the cage whereafter the returns clerk posted the stock into their location S002. That worked well. He thereafter reversed the procedure but introduced the printing out of whatever stock that was transferred from S001 to S002. The return clerks were then able to see what stock had been put into their system. Where it was not physically brought, they were able to query that or reverse the posting.

[40] In respect of how the SAP system worked, I accordingly find no justification in any attack on the second respondent's acceptance thereof.

[41] The next submission of the applicant related to the finding of the second respondent that the applicant could not explain what had happened to the missing stock and that, at the very least, she should

have been able to produce some documents to verify the defence. The applicant submitted that the second respondent ignored material evidence and so committed a gross irregularity. The submission by the third respondent, in this respect was that, not identified at all, was the evidence supportive of the conclusion that the documents comprising the annexure, in fact explained all the missing items. On any assessment of the evidence, they clearly did not. What the third respondent has done in this respect is to accept the existence of such documentary evidence and thereafter assessed its evidential weight. That is not what the second respondent did, he rejected the existence of such documentary evidence, in so doing he closed the door for its evidential assessment. That, I find was a misdirection on his part which denied the applicant of a fair trial of the issues at hand. In this respect, the second respondent committed a gross irregularity as suggested by the applicant. See **Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others (1997) 12 BLLR 1632 (LC)** at 1636 D-H.

- [42] Another attack on the respondent was towards the finding by the second respondent that where the negligence was so gross that it could be held that the employee foresaw or should reasonably have foreseen the possibility of damage to property or assets, it will be sufficient to justify dismissal. The third respondent submitted that there was absolutely no substance to the applicant's criticism of the arbitrator's alleged finding in this regard. It was submitted that, on any reading of the arbitrator's award, it is clear that the extract quoted by the applicant represented the arbitrator's own reference to an academic work. It remains unclear to me why the second respondent took the trouble of making reference to an academic

work, in the manner he did in this case. I need say no more.

[43] The applicant submitted that the finding by the second respondent that it was doubtful whether the third respondent would trust the applicant again was unjustifiable and irrational. She correctly pointed out that no evidence was adduced in that regard and that, in fact, it was never the third respondent's case that the relationship had broken down. A comparison of the evidence, which was properly available to the second respondent and the conclusion he reached in this respect, shows, in my view, an absence of a rational objective basis which would justify such a connection.

[44] In his analysis, the second respondent began by noting that section 192 of the Act placed the onus to prove that a dismissal is fair and just on an employer party. After listing those facts found to have been common cause between the parties, he immediately made an adverse credibility finding against the applicant. He found that the witness for the applicant testified against her. He then found that the sole witness for the third respondent was not shaken up despite vigorous cross-examination. He proceeded to make a favourable credibility finding in favour of the third respondent. As he began to analyse the evidence, he started with the evidence of the applicant. He interposed by briefly stating the evidence of the third respondent to the issues canvassed by the applicant. This approach is conspicuous throughout his analysis of the evidential material until he reached his final conclusion.

[45] I cannot help but observe that the second respondent, even after stating the law correctly on where the onus of proof laid, he at least unconsciously, placed the onus on the applicant. In so doing, the second respondent denied the applicant a fair trial of the issues and

thus committed a gross irregularity.

- [46] Had the second respondent approached this matter appropriately, he would have found that what the third respondent did, was to produce an inventory of the stock which was supposed to have been in the cage. I put aside for a moment that evidence which pertained to how the SAP system worked. Thereafter the third respondent called on the applicant to give an account of the whereabouts of such stock as was listed in the inventory. The method followed when an item of stock was posted to the cage or S002 location was never adopted by the third respondent in presenting its case.
- [47] It behoved of the third respondent to have produced proof of documentary nature, of all items of stock which it alleged had been transferred to the cage location. That would have been proof of the physical transfer of the stock to the cage. The third respondent had the means and personnel to use to achieve this goal. Instead, it relied on the computer records and possibly on some admissions by the applicant for the physical receipt of some of the stock.
- [48] When the applicant produced proof that not all the stock in the computer recordal or inventory, had been physically brought to the cage, the second respondent should have been alerted to the weakness there was in the third respondent's case. When the applicant slowly began to meet up to the challenges thrown at her by Mr Wade, even if it is conceded that new discrepancies were thereby introduced, the second respondent should have realised that the adequacy of proof in the third respondent's case was under serious attack. The consequence is that the applicant was burdened with an onus which never was hers, in the first place.

- [49] The negligence of the applicant could only be proved in respect of the stock which was not only in her SAP system but which would have been proved to have been physically brought to the cage. In the absence of the second leg proof, she could not rightly be accused of being negligent in respect of stock which she might not have even physically received in the first place.
- [51] In challenging the award, the applicant submitted, as already pointed out, that the second respondent committed a gross irregularity. She however failed to place reliance of the defect on section 192 of the Act. A court of law and equity would, in my view, not permit such gross irregularity to escape detection.
- [52] The finding of the second respondent on the procedure, in my view, merits no criticism.
- [53] A proper conspectus of all the evidential material before me informs me that the award of the second respondent is to be reviewed and set aside.
- [54] The applicant has asked that in the event of the application being granted, she be reinstated. There is no evidence that the working relationship between the applicant and the third respondent was damaged or destroyed. Both Mr Nobinda and Mr Robb have since left the employ of the third respondent. They were the supervisors and even in relation to them, there appeared to have been no element of animosity towards the applicant. After the intervention of Mr Nobinda, except for the charge, the applicant appeared to have had a better understanding of the SAP system. Accordingly reinstatement appears to me, to be appropriate, the issue of the 175

items of the stock notwithstanding.

[55] The decision in **Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 292 (LAC)** provides me with the guidance on retrospective reinstatement. Zondo JP stated the law in paragraph 116 thus:

“In the light of all the above, I conclude that it is not competent to order retrospective operation of a reinstatement order (even if limited) which is in excess of 12 months in an ordinary unfair dismissal case. In this matter, retrospective operation of the order of reinstatement that I propose to grant has to be 12 months or less, but not more. That is part of the limitation on my discretion to order that reinstatement of the individual appellants operates with retrospective effect.”

[56] The applicant was dismissed by the third respondent on 30 April 2002. This is apart from the brief reinstatement consequent upon the appeal hearing. Four years have since gone by. The award being reviewed is dated 19 August 2003, which is almost three years to date. The period of retrospective reinstatement may however not be more than 12 months.

[56] Accordingly the following order will issue;

1. The arbitration award of the second respondent dated 19 August 2003 in case number EC 3716-02 is reviewed and set aside.
2. The third respondent is ordered to reinstate the applicant to the position which she occupied on dismissal or to one of equal or better ranking with effect from 04 August 2006.
3. The third respondent is ordered to give the applicant any

additional and improved benefits which have since been instituted, if any,

4. The applicant is to be compensated for the lost wages and benefits from 04 August 2005 until the date of reinstatement.
5. The applicant is to report at the premises of the third respondent at Port Elizabeth for duty on 07 August 2006 at 08H00.
6. The third respondent is ordered to pay the costs of this application.

CELE AJ

**ACTING JUDGE OF THE LABOUR COURT
OF SOUTH AFRICA**

Date of hearing : 14 November 2005

Date of Judgment: 04 August 2006

Appearances

For the Applicant : Mr J Forbes

Instructed by : **JOSEPH FORBES ATTORNEYS**

For the Respondent: Mr R Wade

Instructed by : **CHRIS BAKER & ASSOCIATES'**

