IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO.

D906/01

In the matter between:

NINIAN & LESTER (PTY) LIMITED

APPLICANT

and

THE COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION **FIRST RESPONDENT**

R J T McCANN **SECOND RESPONDENT**

EUNICE BABHEKILE LANGE **THIRD RESPONDENT**

FLORENCE THOKO NGCONGO **FOURTH RESPONDENT**

DUDUZILE WITNESS SHABANE **FIFTH RESPONDENT**

LILIAN MADLANGA **SIXTH RESPONDENT**

JUDGMENT

NDLOVU AJ

Introduction:

[1] This matter is brought up by virtue of section 145 of the Labour Relations Act 66 of 1995, in terms whereof the Applicant seeks an order reviewing and setting aside an arbitration award, which was issued on 21 May 2001.

[2] The Applicant is a clothing manufacturing company whose business comprises several departments, including manufacturing sections where garments are assembled by operators, who are also referred to as machinists. The Third to Sixth Respondents ("the four Respondents") were employed by the Applicant as machinists. They were, however, dismissed by the Applicant on 3 March 1998 after a disciplinary hearing. They claimed that their dismissals were unfair and, as a result, referred the dispute to the First Respondent for conciliation.

[3] After the dispute remained unresolved it was, originally, arbitrated by Commissioner Setiloane, appointed by the First Respondent. On 12 August 1998 Commissioner Setiloane issued an arbitration award whereby the dismissal was declared to be fair. The four Respondents were not satisfied and referred the matter to this Court for review.

[4] On 19 August 1999 the Court reviewed and set aside Commissioner Setiloane's award and directed that the matter be remitted to the First Respondent for a fresh arbitration by a commissioner other than Commissioner Setiloane. The fresh

arbitration was conducted by the Second Respondent who issued his award on 21 May 2001. In terms of that award (which is the subject of this review), the Second Respondent found that the sanction of dismissal of the the four Respondents was too harsh, implying it was unfair. He ordered their reinstatement by the Applicant, with effect from 1 June 2001. It is against this award that the Applicant seeks an order by this Court, reviewing and setting it aside.

The Facts:

[5] On 3 March 1998 disciplinary hearings were held against the four Respondents and one other employee. They were arraigned on a charge of:

> "The fraudulent use of bonus coupons, i.e. using coupons which do not pertain to your operation to enhance your performance/bonus earnings".

[6] The Applicant kept track of the number of garments produced by each machinist by a system of coupons, in terms of which once a garment was complete, the relevant coupon was stuck onto a self-gummed score sheet in respect of that particular machinist. The number of coupons, therefore, represented the number of jobs completed by that machinist on a particular day and this formed an intrinsic part of the Applicant's work performance management and bonus scheme in respect of individual machinists.

[7] All four Respondents pleaded not guilty to the misconduct charge, save the Fifth Respondent who pleaded guilty.

[8] Both at the disciplinary enquiry and the arbitration hearing it was contended on behalf of the Applicant that the four Respondents were guilty of the misconduct charge, in that:

8.1 False or blank coupons that had been obtained from unknown sources were wrongfully attached on the four Respondents' individual daily
score sheets.

8.2 As a result of the above, each of the four Respondents acquired undue credit in that her daily productivity was wrongfully increased, which, in turn, unduly increased her bonus earnings, thereby defrauding the Applicant.

8.3 The efficiencies recorded by the Work Study Department/Costing Department were inflated, which could lead to incorrect costings and thereby incorrect selling prices of the Applicant's product, which could probably result in a loss of revenue to the Applicant.

[9] It was not disputed by the four Respondents that they attached false or blank coupons to their daily score sheets and that as a consequence thereof their individual productivity was inflated, which gained them undue bonus earnings. In her evidence before the Second Respondent, the Fourth Respondent admitted that she was aware that what she did was wrong. The Sixth Respondent, however, denied awareness of any wrongfulness of her actions.

[10] Both Respondents (Fourth and Sixth Respondents) contended that they did what they did upon instructions by their supervisor, Ms Cookie Moodley. In other words, they were complying with their supervisor's instructions. According to them, the idea

behind the whole scam was ensuring the enhancement of Ms Moodley's good work performance image to the management. They admitted that they generally failed to satisfy the daily target production. They submitted that their low daily productivity had attracted a lot of criticism of Ms Moodley by the management, as their supervisor in the production line. Thus, Ms Moodley issued the instruction to avoid this criticism, which was attracting her fall out with the management, a possible prelude to her own dismissal.

[11] The Applicant's Human Resources Manager, Mr Bernard Gama, gave evidence which was rather of a formal nature, not directly implicating anyone of the four Respondents. This evidence focused mainly on the procedural and operational system employed by the Applicant in the production department where the four Respondents were employed as machinists, under the supervision of Ms Moodley. The system involved, *inter alia*, the completion and submission of coupons and score sheets, from which an individual machinist's productivity was determined.

[12] Since the Fourth and Sixth Respondents admitted to having attached false coupons on their daily score sheets and falsely inflating their daily productivity, as alleged, most of Mr Gama's evidence became mere confirmation.

[13] In terms of the Applicant's operational coupon system aforesaid, there was an incentive in the form of bonus money which was payable to an operator only upon the operator having achieved more than 68% efficiency, which was determined from the daily score sheets. The higher the operator achieved beyond this percentage target then the greater the bonus money she would

receive. Therefore, through the scam, the four Respondents attained regular undue bonuses.

[14] Mr Gama was only employed by the Applicant on 4 May 1998. The four Respondents committed the alleged misconduct during February 1998, some three months before Mr Gama joined the Applicant. For this reason, his evidence could not be held to incriminate anyone of the four Respondents in any direct way.

[15] Ms Moodley testified that she was the production supervisor at the Applicant's factory where she was in total control of Line 17, which was the line on which the four Respondents worked as machinists. She was responsible for the quality of garments produced as well as the production thereof. Therefore, she had to check step-by-step that the garment was correctly assembled. In all, there were about 24 machinists working under her supervision.

[16] The operators were required to cut out the coupon that came up with the garment. The coupon contained certain information including the size of the garment, the quantity, and the "standard minute value" (smv), etc. The last-mentioned aspect related to the average or standard time allocated to the sewing of a particular garment by the machinist. At the end of each day the machinist would attach all coupons she had finished on her daily score sheet and submit it to the supervisor, who was, of course, Ms Moodley in the case of the four Respondents.

[17] Ms Moodley further testified that at the end of each day she would collect the score sheets from each machinist on Line 17 (including the four Respondents) and then would work out the efficiency percentages thereon in respect of each one of them.

She put the percentages on the score sheets for the various machinists, which then represented their percentage performance towards the target for a particular day. In calculating the percentage she relied on the quantities as reflected on the score sheets. On the following morning she would hand the score sheets over to the Work Study Department. It was important that each score sheet reflected an smv measure on it, without which it would not be possible to calculate the efficiency percentage aforesaid. Therefore, a coupon without an smv measure reflected on it would not be attached on the score sheet of the machinist concerned, implying that it would be disregarded.

[18] She denied, under cross-examination, that she had ever instructed anyone of the four Respondents to stick false or blank coupons on their score sheets. She further denied that she had ever instructed any operator to remove coupons from regular work they had not done and put them on their score sheets. She also denied that she authorised anyone else to do this. It was put to her that she used to walk around with a pocket full of blank coupons which she would hand out to machinists. This, she also denied. She argued that she would not gain anything out of what the four Respondents did.

[19] Ms Moodley explained that the garment with a sewing fault would be returned to the responsible machinist for repairs, which would then affect that particular machinist's production time and, thus, her daily productivity. When a machinist was called upon to perform repair work not of her own making, such factor would be taken into account in ensuring that her efficiency percentage was not adversely affected thereby. The period during which she

performed repair work not of her own making was called “down time” and was endorsed on the machinist’s score sheet by the supervisor, in this case, Ms Moodley.

[20] It was put to Ms Moodley that the four Respondents had done numerous repairs not of their own making and that she, as the supervisor, had been too busy to acknowledge this on their score sheets, that is, recording their “down time”. That, as a result, she had instructed them to attach blank coupons on the score sheets. She vehemently denied this allegation.

[21] Ms Moodley admitted, however, that Line 17 was always a problematic line. She attributed this problem to the fact that it was a new line with new and inexperienced operators. But she regarded the problem as a teething one. She also admitted that she was answerable when the Line was under-performing.

[22] She further stated that on the following morning before taking the score sheets to the Work Study Department she would have first discussed each score sheet with her manager. The manager would then sign the score sheet before it was handed over to the Work Study Department. As a matter of fact, it was the Work Study Department which eventually detected the scam when it was realised that operators were reaching 80% efficiency but the units productivity remained low and did not correspond to that high efficiency percentage.

[23] Another witness who testified at the arbitration hearing on behalf of the Applicant was Ms Prem Naidoo. She had started working for the Applicant in 1985 when she had been engaged as a work study clerk, involved with the calculation of bonuses for each

machinist. As from 1988 she had been promoted to a training instructor. Part of her instruction programme pertained to the bonus system of the Applicant. A machinist was entitled to a bonus payment when she scored a daily productivity of 68% or higher. This was one of the aspects that she taught to the trainees. She had further taught the trainees about the coupon card system, including the smv system. She stated, however, that of the four Respondents only the Fourth Respondent attended her training programme. She could not, therefore, comment about the other three Respondents in this regard.

The Law:

[24] It is now settled law that an arbitration award is an administrative act issued by an arbitrator in his or her capacity as a public functionary in the performance and exercise of his or her public function and public power, respectively. ***(Carephone (Pty) Ltd v Marcus NO and Others [1998] 19 ILJ 1425 (LAC) at 1431 H-I).***

[25] In ***Carephone*** the Labour Appeal Court (LAC) formulated the guideline which a review court must follow in determining whether or not the arbitration award is reviewable, which the LAC framed as follows:

"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?" **(at 1435, para 37).**

[26] In ***Pharmaceutical Manufacturers Association of SA and Others: in re: Ex Parte Application of the President of the***

RSA and Others 2000(3) BCLR 241 (CC), the Constitutional Court held that:

"As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the public functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision". ***(at 273/4, para 90).***

Analysis and Assessment of the Application:

[27] After considering all the evidence adduced before him, the Second Respondent concluded, among other things, as follows:

"Taking all of the above into consideration in regard to the issue at hand it therefore presents as a distinct probability that the Applicants (referring to the four Respondents herein) were instructed by their supervisor Ms Moodley to affix blank coupons to their score sheets. It seems that this was done to ensure that not too much down time was recorded on the score sheets. The motive behind this presents as being a need by the supervisor to be able to show to her manager that the performance levels were kept as high as possible and that not too much time and effort was spent on down time - so that the supervisor would then not be criticised for this. Such criticism we heard from Mr Gama could ultimately have resulted in the supervisor being punished for such repetitive poor performance. Hence on a balance of probabilities I find that it is probable that Ms Moodley as the supervisor did instruct the Applicants (the four Respondents) to affix blank coupons to their score sheets from time to time.

Secondly in regard to whether the Applicants knew what they were doing was wrong in affixing blank coupons to their score sheets, clearly in the case of Ms Ngcongo this was so, as she admitted so under cross-examination. However she said she had only done this because she had been instructed to do so by her supervisor. In regard to the evidence of Ms Madlanga, she testified that she did not know at the time that it was wrong to do so. However this evidence is seriously questioned particularly

in the light that she claimed she did not know the percentage at which a bonus was achieved was 68% and was further very vague in stating whether she had received bonuses or not. Thus although she had not been to the training school and therefore had not received direct training about the bonus scheme, it seems to me very doubtful that with something as important as this to an employee she would not have made enquiries from other employees on the line with her and found out that the use of blank coupons was contrary to company policy regarding this system. Therefore on a balance of probabilities I find that Ms Madlanga was also probably aware that she was doing wrong in affixing blank coupons to the score sheets.

As the other two Applicants (the Third and Fifth Respondents) did not give evidence before this arbitration hearing it was not possible to directly establish whether or not they were able to confirm that they knew that they were doing wrong in affixing blank score sheets (coupons??). However it seems reasonable to assume that similar to the other two Applicants (the Fourth and Sixth Respondents) in terms of the probability test used above, that they were also aware that they were doing wrong in affixing blank coupons to the score sheets.

However what does present as being of crucial importance in this regard is that it does present on a balance of probabilities that they were instructed to do so by their immediate supervisor Ms Moodley.

In regard to the third issue of whether dismissal was an appropriate sanction for wrongly affixing blank coupons to their score sheets, what presents as of particular importance here is that from the evidence before me it presents that they did this on the instruction of their supervisor Ms Cookie Moodley. In this regard Mr Gama in his evidence had vindicated that a supervisor would be trusted more than an operator would be trusted due to the level of seniority. Thus being given an instruction to do something by their supervisor, it would be reasonable to expect a subordinate to follow such an instruction. However the critical factor here is the lawfulness of this instruction and in reference to what was mentioned above, it was found that on a balance of probabilities the Applicants (the four Respondents) were probably aware that they were doing wrong in affixing blank coupons to the score sheets. Hence while most of the blame would fall on the supervisor, nevertheless as Ms Prem Naidoo testified, both the supervisor and the operator concerned would be jointly responsible to see that the information sent through to

work study was correct. Hence some responsibility, albeit a lesser responsibility, would also apply to the operators concerned.

Taking all the above into account I am of the view that the sanction of dismissal was too harsh a sanction for the four Applicants concerned (the four Respondents) as what they did was probably under the instruction of their supervisor, even though on a balance of probabilities it seems likely that they were aware that what they were doing was wrong. What would therefore present as a more appropriate sanction would be a final written warning to be given and that furthermore their reinstatement would not be retrospective".

[28] In my view, the evidence presented at the arbitration hearing does not tend to support any justifiability link between it and the decision made by the Second Respondent and, in relation to the reasons he gave for the decision (as expressed in his award). This view is based on the Second Respondent's own findings, as well as the inherent probabilities of the case.

[29] The Second Respondent concluded that it was proven, on a balance of probabilities, that the four Respondents were, indeed, instructed by their supervisor, Ms Moodley, to attach false or blank coupons to their daily scoresheets. Nevertheless, he found that what the four Respondents did was wrongful and, further, that they knew, as at the time they did it, that it was wrongful.

[30] In our law there is no justification on the part of a subordinate to obey an unlawful instruction given by his/her superior and particularly so, as in the present case, where such subordinate is aware that the instruction is unlawful. Even in a war scenario, the order given to a soldier by his/her commander must have been a lawful one, before the soldier may justifiably act upon it. As for the test applicable in determining the lawfulness or

otherwise of the order or instruction, the learned authors ***Burchell and Mitchell*** had this to say:

> "The test is whether objectively viewed the order is lawful or unlawful. If it would appear to a reasonable person (rather than a reasonable soldier) that the order is unlawful, the soldier ought not to obey it and if he does, his act is unlawful and he is liable to punishment".
> ***(Principles of Criminal Law", 2nd Edition, 1999, at 181-2). See also: S v Banda 1990(3) SA 466 (B), at 485 E-H***.

[31] ***In Banda*** Friedman J stressed that, for the purpose of this test, a reasonable soldier should not be regarded as different from a reasonable civilian. In other words, an objective test is applied. That being the case, there is no way that Ms Moodley's professed instruction (assuming she gave one), objectively viewed, could be lawful, as, it would have required the four Respondents to commit a criminal misconduct. Therefore, I do not accept it as a lawful defence that the four Respondents did what they did because they were complying with Ms Moodley's instructions.

[32] The four Respondents' motive for the transgression was irrelevant, for the purpose of determining their guilt or otherwise of the transgression. In other words, whether the four Respondents' motive was for the protection of Ms Moodley's position to the management or for their own personal pecuniary gain, in the form of bonus earnings, was irrelevant on the question of whether or not they were guilty of the misconduct charged. This would only be relevant on the question of sanction. My understanding of the Second Respondent's finding on this point was that he also saw it the same way.

[33] The misconduct in question involved the element of dishonesty of

a very high and serious degree, as between employer and employee, and which, in my view, rendered the continued normal working relationship and trust between the Applicant and the four Respondents intolerable, if not utterly impossible.

[34] Apart from the evidence of the Fourth and Sixth Respondents, the Second Respondent seemed to put reliance on the testimony of Mr Gama in concluding that Ms Moodley instructed the four Respondents to perpetrate these wrongful and dishonest acts. Mr Gama had testified, among other things, that Ms Moodley, as supervisor, could probably ultimately be punished (including being dismissed) for the poor performance of the four Respondents. However, I fail to appreciate how Mr Gama's testimony could possibly directly implicate either Ms Moodley or the four Respondents in the perpetration of this transgression. Mr Gama was not yet there when the misconduct was committed. His evidence could, therefore, be accepted only to the extent that it was admitted by the four Respondents. In any event, as I pointed out earlier, his evidence remained one of a formal nature, whose importance was, it seems to me, over-emphasized in the mind of the Second Respondent.

[35] The Second Respondent made a negative credibility finding against the Sixth Respondent. He essentially found that the Sixth Respondent was not telling the truth when she said she was not aware that what she did was wrong. The Third and Fifth Respondents did not testify at the arbitration hearing. However, the Second Respondent made what he regarded as a "reasonable assumption" and found that they also committed the transgression, well knowing it to be so. He also held that they did this on instruction by Ms Moodley.

[36] I am unable to understand how the Second Respondent arrived at

this conclusion. Whilst there was evidence implicating the Third and Fifth Respondents in the perpetration of the transgression, there was no admissible evidence presented to the Second Respondent exculpating them, or even suggesting that they were also instructed by anyone to commit the misdeed. The Fourth and Sixth Respondents did not, as witnesses, give any evidence which tended to exonerate the Third and Fifth Respondents, except only trying to save their (the Fourth and Sixth Respondents') own skins.

[37] Significantly, under cross-examination, the Fourth Respondent conceded that she did not hear Ms Moodley giving the same instruction to her co-Respondents, namely, Dudu (presumably the Fifth Respondent) and Eunice (presumably the Third Respondent). ***(Arbitration record, at page 127 of the Bundle).***

[38] The Sixth Respondent testified on her own behalf only. Among other things, she stated:

"I was doing the repairs (tape unclear) Cookie used to issue blank coupons during the repair process (tape unclear) proceed with (tape unclear) for placing blank coupons (tape unclear) I had to come back on the day of the hearing in the meeting I (tape unclear) and I told them that I was acting on instructions from my supervisor and I gave my explanation why I used those blank coupons but I was dismissed...." ***(Arbitration record, at page 159).***

[39] Under cross-examination, the Sixth Respondent said she could not recall whether anyone else witnessed Ms Moodley giving her the blank coupons. ***(Arbitration record, at page 162).*** She further said that she did not challenge Ms Moodley's instruction but simply carried it out. ***(Ibid, at page 166).***

[40] I am, therefore, mystified, really, on what basis the Second Respondent deemed it proper and competent for him to make the so-called "reasonable assumption" and treat the Third and Fifth Respondents on the same basis as the Fourth and Sixth Respondents, who adduced evidence. In my view, the Second Respondent misdirected himself in this regard. Indeed, his "reasonable assumption" benefitted the Third and Fifth Respondents when he apparently conclusively assumed that they were similarly instructed by Ms Moodley to use false or blank coupons in the manner that they did.

[41] Indeed, as I have said earlier, the Second Respondent appeared to accept that the four Respondents were guilty of the misconduct charged, but only that the sanction of dismissal was rather too harsh. That is why he felt that a final written warning would have been more appropriate. However, in my view, the transgression was serious enough to have justified and entitled the Applicant to impose a summary dismissal on the four Respondents. The fact that the Second Respondent found the four Respondents to have "probably" been instructed by Ms Moodley did not, to my mind, render their misconduct less serious and to justify a more lenient sanction. The Code of Good Practice provides, *inter alia,* as follows:

"(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, ..., are gross dishonesty, ..." ***(Item 4, Schedule 8 to the Act).***

[42] In my view, the four Respondents' transgression did involve gross dishonesty. They fraudulently acquired undue financial gains at

the expense and to the detriment of the Applicant. To my mind, this was an illegal operation so serious that it had the potential of crippling the viability and survival of the Applicant. Indeed, the four Respondents bit the hand that was feeding them. If employers should be disabled to rid their workplaces of grossly dishonest employees, such as in the present case, then they would better simply close down their business operations until the workplace is relieved of such heinous elements by some other means.

[43] The Second Respondent appeared to have based his conclusion that the sanction of dismissal was too harsh on his finding that the four Respondents committed the misconduct, "probably" on the instructions of Ms Moodley, who was herself not even charged with the misconduct. This perception on the part of the Second Respondent suggested that the Applicant was, therefore, not consistent in the treatment of its employees. It seems to me the Second Respondent was missing the point here. In the first place, the Applicant never believed that Ms Moodley committed any wrong, even if the evidence before the Second Respondent might have aroused some suspicion that Ms Moodley was possibly or probably aware of what was going on. Whatever Ms Moodley's real status was in this regard, the fact of the matter was that the Applicant could not reasonably have been expected to retain such dishonest employees (the four Respondents) in its employ. By the way, it was revealed that Ms Moodley also left the Applicant (albeit of her own accord) shortly after the four Respondents' dismissal.

[44] I am, accordingly, satisfied that the Second Respondent's decision (as expressed in his award) was not rationally

objectively justifiable in relation to the material properly available and presented to him at the arbitration hearing, taking into account the reasons he gave for the decision.

[45] My finding, therefore, is that the dismissal of the four Respondents by the Applicant on 3 March 1998 was both substantively and procedurally fair.

Order:

[46] In consequence whereof, I make the following order:

46.1 The award issued on 21 May 2001 by Commissioner, Dr R McCann, under case No. KN16712 is hereby reviewed and set aside and is substituted therefor with the following.

"The dismissal of the Applicants was both substantively and procedurally fair"

46.2 There is no order as to costs.

NDLOVU AJ

Date of Judgment : 8 May 2003

Appearances:

For the Applicant : Adv P Schumann
Instructed by : Millar and Reardon

For the Respondents : Adv D S Rorick
Instructed by : Seltzer Inc.