REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case No: D407/11

In the matter between:

EWART HADEBE **Applicant**

and

LAFARGE INDUSTRIES (PTY) LTD **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

G GERTANBACH **Third Respondent**

Heard: **11 October 2012**

Delivered: **31 May 2013**

Summary: Review and counter review applications – Commissioner alleged by both parties to have misdirected himself in instances where he found against each party No misdirection found - distinction between reviews and appeals to be observed.

JUDGMENT

CELE J

Introduction

[1] The arbitration award dated 17 March 2011 issued by the third respondent as a Commissioner of the second respondent is the subject of two review applications. Both applications are in terms of section 145 of the Act[1]. The first application is by the applicant. He seeks to have the arbitration award reviewed and set aside. The second is a counter review application by the first respondent seeking an order that:

1.1 paragraphs 25, 29, 30 and 31 of the third respondent's arbitration award be reviewed and set aside;

1.2 that paragraph 25 of the arbitration award be replaced with a finding that the applicant was found guilty of the photocopying charge and that he be dismissed in respect of this charge;

1.3 that paragraphs 29, 30 and 31 of the Arbitration award be replaced with a finding that the Commissioner exceeded his powers, alternatively, that the first respondent did not commit a procedural irregularity;

1.4 Alternatively,if the Court finds that the Commissioner did not exceed his powers and that there were procedural irregularities, that these were not such as to render the procedure as a whole unfair.

[2] There is opposition to each application by the corresponding party.

The factual background

[3] The applicant was employed by the first respondent hereafter referred to as the company or the respondent on 1 September 2006 as its Account Manager at the Richards Bay grinding plant until his dismissal on the 7 October 2010. He held a degree in chemical engineering and a National Higher Diploma in Business Management. His cost to company salary at

[1] The Labour Relations Act Number 66 of 1995.

the time of the dismissal was R63261.29. He was also entitled to a certain share allocation valued at R470873.29 as at 19 April 2007. He was head-hunted by the respondent as part of its transformation strategy and was its first Black Manager. The company had Ms B Sibiya as its Dispatch Clerk, Ms T Economou as an Administration Assistant or Receptionist, the Human Resources (HR) Director was Ms Gwamanda and the Financial Controller was Mr. Buitendag.

[4] It was clear at work that the employees were unhappy with the manner they were managed by the applicant who was the most senior personnel at the workplace. The applicant was counselled by Ms Gwamanda and yet, despite the counselling, the relationship did not improve and the respondent decided to engage the applicant in discussions, in an attempt to conclude an amicable separation agreement, and not to institute formal disciplinary proceedings against him. Alternative employment was sought for the applicant internally. Whilst Ms Gwamanda was in Paris, she received a conference telephone call from the applicant and from Mr Mohammed who advised her that the meeting with the applicant had gone well and that the applicant had accepted the offer of amicable separation, but that he remained concerned about his share options.

[5] On 30 July 2010, the applicant reported for duty, coming in his motor vehicle and had to pass through the gate serviced by security guards, one of whom was Mr Robert Mncwango. At about 14h15, the applicant exited the company premises and was subjected to the usual searching by Mr Mncwango.

[6] A report was then made to the company that on 1 August 2010 Ms Sibiya had been told by Mr Mncwango that he had observed the applicant leaving the company premises on 30 July 2010 with some sugar, coffee, Cremora powder milk and some juice in his motor vehicle. Later, Ms Gwamanda received correspondence that the applicant was unhappy about the settlement agreement. After further consultations with the applicant and when he did not accept the settlement proposals, the company decided to take disciplinary action against the applicant for poor performance. At the

meeting held on 7 August 2010, Mr. Buitendag advised her that there was a theft case against the applicant and she instructed him to investigate the matter. Mr Buitendag had received an e-mail from Ms Economou wherein she alleged that the applicant was involved in the theft of files, tea, coffee and juice belonging to the company.

[7] The applicant was suspended from duty on 11 August 2010. There was also an allegation that the applicant had made a lot of photocopies possibly of sensitive information of the company. According to Ms Gwamanda, the applicant was arrogant and he refused to speak to her about the allegations and he also refused to return any documents of the company involved in the copying. All he returned was his procurement card.

[8] The company decided to charge the applicant with misconduct which it described as:

8.1. theft, alternatively unauthorized possession of company property thereby causing a breakdown in trust in their relationship in that he was found in possession of Cremora milk powder, coffee, sugar and juice, all of which belong to the first respondent while exiting the Company's premises on 30 July 2010;

8.2. theft, alternatively unauthorized copying and removal of company documents, causing a breakdown in the trust relationship as between the applicant and respondent in that;-

(a) during the last three weeks of July 2010, the Applicant allegedly systematically copied and removed company documents from the First Respondent's premises in Richards Bay, and;

(b) when confronted by the First Respondent on 11 August 2010, the Applicant refused to respond to its reasonable request for an explanation.

[9] The chairperson of the internal disciplinary hearing appointed was a senior counsel, Advocate Snijder, with the company saying it wanted an external person to ensure fairness and that there was no bias. The disciplinary inquiry was postponed on 27 August 2010 because the applicant wanted legal presentation and it was reconvened on 17 September 2010. The applicant was denied legal representation on the basis that the respondent needed to deal with disciplinary issues internally and the respondent said it could not set a precedent. The chairperson found the applicant guilty of the misconduct on the first charge and not guilty on the second. He recommended the dismissal of the applicant. Because the company was of the opinion that Mr Snijder failed to understand the copying issue, it decided to amend Mr Snijder's recommendation and on 7 October 2010, a letter was written to the applicant advising him that he was found guilty of the theft charge and on the charge which related to the copying of the documents.

[10] He lodged an internal review against the conviction and the dismissal decision, in terms of the company policy. The General Manager of the company, Mr T Legrand presided in the review proceedings. Ms Gwamanda was with Mr Legrand when a letter was drafted to the applicant on 22 November 2010 as a written notification advising him that his review application was dismissed and that the sanction of summary dismissal was upheld. Ms Gwamanda was the author of the notice to attend the disciplinary inquiry, the suspension letter, the settlement agreement letter and had amended the outcome of the disciplinary inquiry. The applicant referred an unfair dismissal dispute for conciliation and later for arbitration. The third respondent was appointed to arbitrate the dispute and his findings were that the applicant's dismissal was substantively fair but procedurally unfair. The respondent was ordered to pay the applicant compensation equivalent to one month of his salary in the amount of R63 261.29, within 14 days of having been advised of the award.

Chief findings of the third respondent

[11] The third respondent made numerous findings in this matter which, to the extent relevant in this application, were *inter alia* that:

Substantive fairness

11.1 There were two mutually destructive versions on what occurred between the applicant and Mr Mncwango on the day in question and it was obligatory to consider the two conflicting versions on a balance of probabilities. There was no onus on the applicant to prove anything other than to present a version of events that could be reasonably, possibly true. Section 188 of the Act had to be noted in terms of which the respondent bore the onus to prove on a balance of probabilities that the applicant's dismissal was procedurally and substantively fair.

11.2 In so far as the theft charge was concerned, the applicant's submission that he was framed, and in particular by Ms Sibiya and Mr Mncwango, had to be dealt with because the applicant said that he had been responsible for Ms Sibiya's earlier dismissal by the company and that she wanted to get rid of him. He also understood the applicant to say that this greater scheme of collusion against him had permeated through the entire workplace to the extent that those employees who were employed at the respondent's Head Office and elsewhere were part of the scheme to get rid of him.

11.3 It was not impossible for a group of employees to mastermind such a grandiose plan to get rid of a troublesome co-employee, such as the applicant. However, to find that it indeed took place, it was necessary to reconstruct that alleged heinous plot which was planned and executed with military precision. The imaginary reconstruction would not have been impossible, but had to be considered against the respondent's version as well as against the evidence which the applicant gave in respect of the theft charge.

[12] The respondent's case in respect of the theft charge was totally dependent on the evidence of Mr Mncwango who was a reliable witness who dealt with evidence clinically and objectively. Although Mr Mncwango made a mistake in respect of the correct weight of the Ricory coffee, Mr Mncwango was very clear in respect of all the other items he saw in the applicant's car and had to be borne in mind that he viewed the items from a distance through the car window.

[13] There was no reason to doubt Mr Mncwango's evidence that he searched the applicant's car in the morning when the applicant entered the premises. The security guard would have seen them, whether it had been in the morning or the afternoon. There was no evidence that Mr Mncwango held any grudges against the applicant and his very short period of employment at the respondent's premises as well as the fact that he was stationed at the gate and not a fulltime employee, suggested to the third respondent that Mr Mncwango was unaware of all the internal turmoil within the employment environment. No negative conclusion could be drawn about the note Mr Mncwango made in his pocket book when he recorded the incident. Mr Mncwango's explanation that he recorded it to protect himself was logical and acceptable.

[14] The applicant's testimony was somewhat flawed in that the applicant at first suggested that the security guard had found nothing in his car but then changed that version under cross examination to say if the security guard had seen goods in his car, it would have been those goods which he had purchased at the supermarket. The applicant furthermore suggested that the time, 19h39, of purchase recorded on his invoice was incorrect as a result of the possible late recording of the sale. That suggestion had to be rejected because the applicant had admitted that he had misplaced the original invoice and returned to the store to obtain a copy for the purpose of the arbitration and his submission was highly improbable.

[15] The only reasonable inference that could be drawn was that the applicant purchased the goods at 19h39 that evening and that being so, those items could not have been in his car earlier that afternoon at 14h15 when the

applicant left his workplace. In the event of having to accept Mr Mncwango's evidence it had to be accepted *in toto* and not on a piece-meal basis, which acceptance led to a finding that the applicant had told Mr Mncwango that the items were given to him by the company.

[16] Ms Economou's evidence that the applicant told her that she owed him his rations for all the years that he had worked, strengthened the respondent's case. The applicant's version, to the effect that if there were goods in his car, it must have been the goods he purchased at the supermarket, was an attempt to fabricate a dishonest defence. It was more probable than not that the applicant removed the goods from the respondent's premises and that the respondent therefore discharged the burden to prove that the applicant was guilty of theft. The applicant's version of the events could not be reasonably, possibly true, and moreover, his defence that he was framed was consequently rejected.

[17] On the charge of the copying and removal of documents by the applicant, the respondent was unable to discharge the burden which rested upon it to prove that the applicant unlawfully copied company documents and unlawfully refused to return the documents. Although the respondent's concern that the applicant might have acted with impropriety was understandable, the fact remains that the offence was not proved on a balance of probabilities. Hence the finding that the Chairperson correctly acquitted him on that charge.

Procedural fairness

[18] The question whether the use of an external chairperson was in contravention of the respondent's disciplinary code and procedure had to be considered with the employer's disciplinary code in mind. Where such code exists, the employer will normally be held to the self-imposed standards though these should not be slavishly followed as they are guidelines rather than binding rules. Where the failure to comply leads to unfairness an employer's decision not to comply should not be upheld.

[19] In this matter, the respondent elected to appoint an external chairperson to ensure fairness and that there was no bias. There was nothing wrong with that decision and the respondent rather needs to be commended, not only because it wanted to ensure that the applicant was afforded a fair and unbiased hearing, as there was no person within the organisation who had the experience and knowledge to deal with the matter, or who was totally oblivious of it and could deal with it in a fair and unbiased manner. The respondent's deviation from its code to appoint an external chairperson was justified and fair under the circumstances.

[20] The second alleged procedural irregularity relates to the respondent's failure to have conducted an investigation into the applicant's conduct prior to proceeding with the formal disciplinary enquiry in terms of section C1 of its code. The suggestion was that there was a clear deviation by the respondent when it failed to conduct an investigation before commencing with the formal disciplinary enquiry against the applicant. Section C1 was ambiguous and badly written and leads to confusion. The investigation referred to in the first sentence does not necessarily refer to an independent and formal investigative process to which an employee had to be party, before formal disciplinary action could be proceeded with by the respondent. The last sentence of the said paragraph states that the employee representative does not have the right to participate in the investigations into the alleged transgressions. There was no deviation by the respondent from its code when it suspended the applicant and proceeded with disciplinary action against him without having conducted an investigation.

[21] The third alleged procedural irregularity relates to the Chairperson's failure to submit his findings within the prescribed 36 hours and whether such failure rendered the entire hearing unfair. Although it is unfortunate that the Chairperson filed his recommendations after the expiry of 36 hours, this error does not render the entire disciplinary process unfair because the code is but a guideline. Moreover, there is no evidence to suggest that the

applicant was prejudiced in any manner whatsoever as a result of the late filing of the recommendations.

[22] The fourth alleged procedural irregularity relates to the respondent's failure to conduct the applicant's review application in terms of the code. The review application was unfair, particularly because of Ms Gwamanda's participation in the process. By her own admission, she was with Mr Legrand when the review was written. It was reasonable to conclude that she advised him. Mr Legrand was entitled to seek advice as is any other decision maker. The fundamental principle which applies in such instances, to ensure that an unbiased decision is rendered, is that, when a decision-maker seeks advice, he must consider that advice independently and apply his mind to the facts before him and make his independent decision. In this instance the probabilities favour the applicant. Ms Gwamanda had a material influence on Mr Legrand's decision because of her involvement in the entire process. It was more probable that Ms Gwamanda's influence on Mr Legrand was such that she had a marked influence on his decision because of her assertiveness and the influence she exerted on everybody who was involved in the disciplinary process.

[23] The fifth alleged procedural irregularity relates to the respondent's refusal to allow the applicant legal representation. The right to representation at a disciplinary enquiry is one of the cornerstones of a fair process and is an elementary element of justice. The respondent's refusal to grant the applicant legal representation was unfair. The applicant was a senior employee and there was no senior or experienced co-employee who could have represented him. The respondent was hell bent on dismissing the applicant. It was unfair to refuse him legal representation and leave him without any representation at all when an employer knew that an employee was charged with serious and dismissible offences and that it intended to do everything within its power (hell bent) to ensure the employee's dismissal. The employer elected to deviate from its code by appointing an external Chairperson and it flies in the face of Ms Gwamanda's evidence that she wanted to ensure fairness. Had this submission been true, the

respondent should have had no objection whatsoever to allow the applicant legal representation. Ms Gwamanda's reasons for the refusal namely, that it would create a precedent and it would lead to a situation where all employees would have to be granted the right to have legal representation at disciplinary enquiries had no merits as each matter needs to be dealt with on its own merits.

[24] The sixth alleged procedural irregularity relates to Ms Gwamanda's decision to reject the Chairperson's recommendation and unilaterally amend it, because the Chairperson allegedly did not understand the respondent's position in regard to the copying of documents. The respondent should at least have advised the applicant of its decision to amend the Chairperson's recommendation in line with the principle of *social justice,* which should be introduced within the realm of Labour Law. Within the context of this arbitration it means that those senior managers who acted on behalf of the respondent were required to move beyond the objective interpretation and application of so-called fair procedures and apply their minds to the ethics of *social justice* and fairness. Notwithstanding the respondent's attempts to have resolved the problems relating to the applicant, initially through alternative means and finally through formal disciplinary action, it still sought its own interests and acted unfairly and unethically when it unilaterally amended the external chairperson's recommendations and did not even have the gumption to advise the applicant of its decision. The respondent's decision to unilaterally reject and amend the Chairperson's recommendations without advising the applicant, was not only unfair, it went beyond the normal procedural irregularities and made a farce of the respondent's suggestion that they wanted to ensure fairness and that there was no bias. It was also devoid of all the fundamentals of conducting a hearing in an ethically fair manner.

T<u>he question of theft in relation to the value of the goods</u>

[25] A dismissal was not an expression of moral outrage; much less was it an act of vengeance. It was, or should be, a sensible operational response to

risk management in the particular enterprise. The applicant's actions constituted theft, were premeditated and planned, no viable relationship remained, he held a senior position of trust, he had a key to the store room and easy access to the goods and the dismissal had everything to do with trust and the respondent's operational needs, and not the value of the goods that were removed by the applicant.

Was dismissal an appropriate sanction to impose on the applicant

[26] Within the applicant's employment environment and given his position and responsibilities, the seriousness of the offence must be considered in conjunction with the breach of the trust relationship between the parties. It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee. A breach of this trust in the form of conduct involving dishonesty was one that went to the heart of the employment relationship and was destructive of it. The dismissal was an appropriate sanction under the circumstances.

Was the applicant entitled to any compensation for having been procedurally unfairly dismissed

[27] On the one hand, the nature of the offence committed by the applicant and the manner in which he set about it, and the fact that he obviously showed no remorse, did not warrant any award of compensation at all. On the other hand, the respondent acted in an a grossly unfair manner when it decided to amend the Chairperson's recommendations to suit it own needs as recorded above. Hence it would be appropriate to award the applicant compensation equal to one month's salary amounting to R63261.29.

Main review application

Grounds for review

[28] There are ten grounds for review outlined by the applicant in the main review application. The first three, the eighth and the ninth grounds relate to

substantive fairness of the dismissal while the remaining grounds pertain to procedural fairness. It is expedient to deal with them in that grouping.

Substantive fairness

[29] The submissions are that the third respondent:

29.1 Failed to accept that on a balance of probabilities, the applicant's version was more probable in the circumstances in that he failed to apply his mind to the material facts placed before him and failed to justify, alternatively, rationally justify why the applicant's version was not more probable, in light of the evidence presented by the applicant as compared to the witnesses for the respondent, more especially as in paragraph 22 of the arbitration award, he concludes in the last sentence thereof that there was no onus on the applicant to prove anything other than to present a version of events that could be reasonably, possibly true.

29.2 The third respondent misconducted himself and failed to apply his mind to the material facts placed before him in relation to the evidence of Ms Economou and the cross examination of her. Ms Economou conceded in her evidence that her stock taking schedules were incorrect, and that there were at least 3 keys to the stock room. This important factor was overlooked by the third respondent in the analysis of the matter.

[30] The third respondent misconducted himself and failed to apply his mind to the material facts placed before him to justify, alternatively rationally justify why, despite recording his displeasure at Ms Gwamanda's role in influencing the CEO in relation to the review of the findings of the disciplinary enquiry and in influencing the external chairperson to reject the applicant's request for legal representation; in deciding to reject the Chairperson's recommendation and unilaterally amending it, he still finds against the applicant, despite having a reasonably, possibly true version from the applicant.

[31] The third respondent placed too much emphasis on the theft charge and clearly misconducted himself in finding the applicant guilty of it. The applicant was not found guilty by the police nor was a criminal report made by the first respondent. The third respondent failed to apply his mind to the evidence before him in that he could have found on a balance of probabilities, the applicant's version was more probable and that there was a conspiracy by the employees of the first respondent to ensure the applicant's dismissal.

[32] The third respondent erred by not scrutinising the material facts presented before him and as a result failed to justify, alternatively rationally justify why he concluded that the applicant's dismissal was substantively fair.

Procedural fairness

[33] During the course of the applicant's dismissal, the first respondent deviated from its own Code without explanation or justification. Much of the conduct displayed by both parties has to be guided by the principals, terms and conditions as set out in the disciplinary code. The third respondent was, accordingly, obliged to take into account each of the various terms and conditions outlined in the disciplinary code in coming to a finding. The third respondent misconducted himself and failed to apply his mind to the material facts placed before him when he concluded that there was no person within the organisation who had the experience and knowledge to deal with the matter, or who was totally oblivious of it and could deal with it in a fair and unbiased manner. With submission, there was no evidence led before the third respondent at the arbitration hearing for him to come to such an irrational, unjustified conclusion.

[34] The third respondent did not apply his mind to the fact that the first respondent's disciplinary policies and codes make provision to an investigation to be conducted prior to proceeding with a formal disciplinary enquiry against an employee. In so doing, the cumulative effect of the third respondent's misdirection of judgment is itself a failure of justice on the applicant.

[35] The third respondent's failure to apply his mind when concluding that the applicant did not suffer prejudice in the delay of receiving the chairperson's decision. It is the applicant's submission that the third respondent had grossly misdirected himself in reaching the aforesaid conclusion.

[36] Despite the third respondent finding in favour of the applicant on the fourth, fifth and sixth procedural irregularities, he still concluded that the dismissal was fair. The third respondent failed to conclude that the applicant would have suffered great prejudice as a result of the procedural unfairness and thus making the dismissal unfair in its entirety. The attitude and mindset of the third respondent droned in against his analysis and conclusion of the evidence in respect of the procedural irregularities conducted by the respondent. In failing to do so, the third respondent showed clear bias in favour of the respondent.

[37] Despite the arbitration proceedings concluding on 25 February 2011, the third respondent failed to transmit the award timeously to the parties. The award was received by both the parties on 28 March 2011, 14 days after the hearing and well after the prescribed period. The failure by the third respondent to adhere to the peremptory provisions of section 138 of the Act renders his decision reviewable.

Grounds to oppose the review application

[38] The respondent made a number of submissions to oppose the granting of the review application on the basis sought by the applicant. Some of the submissions were that:

38.1 The decision of the third respondent fell within the required range of reasonableness based on the probabilities arising from evidence placed before the Commissioner for various reasons including, that the evidence showed that it was probable that the applicant stole the items in question. He had mentioned to a member of staff that he believed he was entitled to the items stolen. It was clear he was not entitled to those items. He had a key to the store room which he denied having. He was seen in the store room while the person

responsible for the area was absent. He was able to remove the items without being detected by the security cameras. A stock taking revealed the items to be missing. A security guard had seen the applicant leaving the premises with the items in question and recorded what he had seen in his notebook. In answer to the allegation, the applicant tendered three contradictory versions regarding the items found in his car.

38.2 The applicant's defence that he was set up and framed and that this was all part of an elaborate plot to get rid of him was improbable and was correctly rejected. If he had been framed, then the security guard would have reported the matter directly to his supervisor on 30 July 2011. The issue would not have arisen accidentally in the course of his conversation with Ms Sibiya on 1 August 2010. Mr Mncwango would have been more accurate in his description of the goods he found in the car. It is common cause that he described the goods he found in the applicant's vehicle as: 2 x 2kg Ricoffy, 1 x 2kg Cremora, 2 x 2.5kg sugar and a 2 litre red juice. Mr Mncwango was not employed by the respondent and had only been seconded to the plant and there is no evidence that he had issues with the applicant.

[39] The applicant also raised the defence that the items identified in the stock take did not exactly correlate with the items found in his vehicle. However, the purpose of this evidence was not to show an exact correlation between the missing stock and the stock found in the applicant's vehicle, but to show that stock, in the nature of the items ordinarily kept by the respondent, was found on the applicant's vehicle, and a number of such items were found to be missing from the storeroom. It was not contended that the applicant stole all of the items found to be missing from the storeroom, but that he had opportunity and access. The fact that more stock was missing does not detract from the fact that there was a reasonable correlation between the items found in the vehicle, the items found missing from the store room, and the items held in stock and

distributed to plant and shift workers. It was submitted that this defence did not alter the balance of probabilities on this issue, and it remains probable that the items in question were removed by the applicant.

[40] Regarding the appropriate sanction, the third respondent concluded that dismissal was appropriate and this finding also accords with the facts. The company code prescribed the penalty of dismissal for theft. Furthermore, the respondent had dismissed other employees for stealing a few bags of cement.

The counter review application

[41] The submissions made by the respondent were basically that:

41.1 At paragraph 25 of the Arbitration award, the third respondent found that the Company was unable to prove on a balance of probabilities that the applicant unlawfully copied company documents and unlawfully refused to return the documents. The company submitted that in coming to that conclusion, the third respondent committed a gross irregularity, alternatively misconducted himself in that he failed to apply his mind to the evidence placed before him, and arrived at a conclusion that was not reasonable relative to such evidence. The company further submitted that the third respondent failed to properly reconcile the contradictory versions on the copying charge, failed to meaningfully assess the credibility of the witnesses on this point, and failed to assess the probabilities arising out of their irreconcilable versions. This constitutes a reviewable irregularity.

Failure to apply his mind

41.2 The third respondent expended only 7 lines in his award regarding the copying charge. In those 7 lines, he does not reconcile or draw attention to the parties' differing versions, does not make factual findings and does not comment on the credibility of the witnesses in respect of their differing versions. He failed to provide reasons or

substantiate why he believed the company had not proved the photocopying charge on a balance of probabilities. This constitutes a reviewable irregularity as a commissioner is required to reconcile contradictory versions, to state which issues he took into consideration in making a decision and to deal with inconsistencies, contradictory versions and improbable explanations.

Findings are not reasonable relative to the evidence presented

[42] Furthermore, the findings of the Commissioner on this point are not within a range of reasonableness relative to the evidence presented. It is apparent from the evidence that Mr Hadebe probably copied documents equivalent to 6 new lever arch files, approximately 3000 pages He did the copying himself whereas previously he had used his secretary to do all copying. The documents being copied appeared to be contracts and emails. The applicant tendered various versions at different times regarding this issue all of which gives rise to a reasonable inference of duplicity and that he could not be trusted.

[43] Mr Hadebe's first response was silence and a refusal to offer any explanation, and the only reasonable inference that can be drawn from this refusal to co-operate on 11 August 2010, is that something sinister was probably afoot. It is probable that if there was an innocent explanation for his copying, he would have tendered it at the time but he deliberately refused to do so. Furthermore, had his conduct been innocent it is probable that he would have shown the company the documents he had copied and would have allowed the company to inspect them, but he refused to do so and this undermines the trust relationship. Mr Hadebe's second version tendered during the pre arbitration meeting was that he denied making copies. Mr Hadebe's third version was that he admitted making copies but they related to his performance. If this was the case he would have said so when asked for an explanation on 11 August 2010 and he would have pointed out the documents to the Company**.**

[44] Mr Hadebe's fourth version was that the copies were to back up his computer because his laptop had once previously been stolen**.** Again if this was the case it would have been stated earlier and would have been raised during the disciplinary enquiry. Mr Hadebe's fifth version was that the copies were to brief his subordinates. However, one of his subordinates to whom he delegated his functions was Mr Sanele Ndebele who testified at the CCMA, but mentioned nothing about documents being issued to him. Furthermore, this version was not put to Mr Ndebele and emerges for the first time during Mr. Hadebe's evidence at the CCMA. It is probable that if this had been the case, the version would have been raised at the disciplinary enquiry and put to Mr. Ndebele who would have been asked to corroborate this version.

[45] Version six was that he had to protect himself against a possible enquiry into the websites he had been viewing on the net. This version emerges for the first time during cross examination and was not raised in his evidence in chief or during the disciplinary or put to any witnesses, and is hence improbable. Version seven was that the documents were his files. However, Tannith testified that she ordinarily did his photocopying and when this was put to him in cross examination he mentioned the "sensitivity" of the documents. Consequently, by implication Mr Hadebe admitted that the documents were confidential as otherwise Tannith would have copied them.

[46] Version eight was that he did not take the documents home but then admits taking them home. Mr Hadebe initially denied removing any files and stated explicitly that he never removed any document. Despite this, he admitted taking documents home and contended that he returned them in a bag on or about 12 August 2010, and he stated explicitly that he returned the following day with a bag. He returned the procurement policy and other documents that were in his possession. This version was improbable as the first time Mr Hadebe raises it was under cross examination. He did not put it to any witness and did not raise it in his evidence in chief or at the

disciplinary enquiry, despite the fact that the removal of documents was a material component of the charges against him.

[47] Version nine was that the files were with his subordinates, Mr Hadebe then contended under cross examination that the reason he had been copying the files was to give them to subordinates. Despite this. he then contended that all the files were in his office. Again this version is improbable as if he had copied the files in order to give them to Sanele and Tshepo as he alleges. It has to be asked why all files were in his office and not given to them and why was this version not put to Sanele.

[48] Despite all of these issues, the third respondent made no credibility finding in this regard and did not draw attention to and made no effort to reconcile the different versions. Consequently, the only inference that can reasonably be drawn is that, with respect, the third respondent failed to properly apply his mind to the facts placed before him on this issue and this renders the matter reviewable.

[49] The company submits that this issue should not be sent back to the second respondent for rehearing, as the evidence necessary to make a determination on this issue is before the Court. The company respectfully submits that the Court is consequently as well placed as the CCMA to make a determination on this issue. The company further submits that the Court should find that Mr Hadebe was guilty of the photocopying charge. The Company further submits that this Honourable Court should find that the trust relationship has been irreparably destroyed and the Court should find that dismissal is the appropriate penalty in respect of this offence.

Internal Review

[50] .At paragraph 29 of the award, the third respondent found that the internal review (appeal) was not conducted in accordance with the company's disciplinary code. Paragraph 4.1.1.4 of the pre-arbitration minute provides that the third respondent is required to ascertain whether the respondent failed to conduct the applicant's review application of his dismissal in terms of its disciplinary code and policy, and if so whether such failure

constitutes a sufficient basis for finding the procedure as a whole unfair. Consequently the third respondent's terms of reference on this issue are confined to whether the company complied with its code and the third respondent is not entitled to have regard to other issues. The company's disciplinary code provides at paragraph 6:

> 'Review Procedure
>
> 50.1 An employee and the employer shall have the right to have the outcome of a hearing reviewed.
>
> 50.2 A review application must be lodged with a third party who will be a senior manager, within 5 (five) days of the disciplinary hearing having taken place.
>
> 50.3 The review constitutes a review of the proceedings and the finding of the Disciplinary Hearing. No additional evidence shall be presented. The Review Chairman will be provided with all relevant documentation including the Code'.

[51] It is clear from the evidence presented at the arbitration that the company granted the review, it was lodged timeously, no additional evidence was led and the Chairman of the review was provided with all relevant documentation. Consequently, it is evident that the provisions of the disciplinary code were complied with and the third respondent's enquiry should have ended there. Despite this, the third respondent considered issues regarding Ms Gwamanda's assistance that go beyond compliance with the code, and all findings which deal with issues other than whether the code was complied with, are ultra vires. Parties are bound by the pre-trial minute.

Legal Representation

[52] At paragraph 30 of the arbitration award, the third respondent finds that the company's refusal to allow Mr Hadebe legal representation during the disciplinary enquiry was procedurally unfair. However, the third respondent exceeded his powers in determining this issue as the pre-arbitration

minute which determined the terms of reference of the arbitrator did entitle him to consider the issue of legal representation. Even if the third respondent had not exceeded his powers, then it is evident that he did not apply his mind to the law and issues which need to be considered before making a determination regarding legal representation and in so doing committed a reviewable irregularity. The third respondent's failure to apply the correct legal principles renders the award reviewable. There is no evidence that the third respondent considered:

a) The provisions of Schedule 8 of the LRA;

b) The fact that the company was not legally represented.

c) The respective prejudice to the parties and the cost, inconvenience and delay associated with allowing legal representation.

d) The degree of factual and legal complexity. Had he applied his mind to this issue, he would have concluded that the issue of simple theft and photocopying charges are not complex.

e) The ability of the employee to represent himself, considering that Mr Hadebe is highly educated and there is no evidence he was unable to present his case in the absence of legal representation.

f) The third respondent decided that Mr Hadebe should have been allowed legal representation solely because he was unable to secure the services of a company representative.

g) It would create a very unsavoury precedent in our law if all that was required by an employee to secure legal representation was a simple averment that he has been unable to find a person internally.

h) The Company submits that the third respondent failed to properly apply his mind on this issue and arrived at a conclusion that is not reasonable relative to the law and facts.

[53] Consequently, the Company respectfully submits that paragraph 30 of the arbitration award should be reviewed and set aside.

Amendment of the outcome of the disciplinary enquiry

[54] At paragraph 31 of the arbitration award, the third respondent concluded that the company had committed a procedural irregularity in partially modifying the outcome of the disciplinary enquiry. It is submitted that this issue is also *ultra vires* and the third respondent exceeded his powers in making this finding. The terms of reference of the third respondent are set out in the pre-arbitration minute, and no-where was the third respondent empowered to consider this issue. Furthermore, the extent of the amendment and the reasons therefore were not traversed or considered by the third respondent in the arbitration award. He concludes that the circumstances are not exceptional but he provides no reason for why he regards the circumstances as not being exceptional. He merely makes the comment without corroboration or reference to the issues raised above, and hence he has clearly failed to apply his mind to the issues. Hence the decision of the third respondent contained in paragraph 31 should be set aside on this basis.

[55] In opposing the counter review application, the applicant submitted that the respondent was unable to prove on a balance of probabilities that the applicant unlawfully removed documents and unlawfully refused to return any documents. He said that the deponent to the respondent's founding affidavit made spurious allegations that she had witnessed the unlawful photocopying and further saw the nature of the documents that were copied. That allegation was said to have fallen on the face because the respondent failed to lead evidence to the proof thereof. Neither did it provide any exhibits to the documents unlawfully copied by the applicant, so the submission went. In respect of the other grounds of review, the applicant basically reiterated the reasons given in the award by the third respondent.

Analysis

[56] In a nutshell, the submission of both parties put together amounts to that the third respondent in making the arbitration award erred in that he came to conclusions which were not rationally connected to the facts, evidence and material placed before him at the arbitration, misrepresented the facts, evidence and material placed before him, failed to apply his mind properly to the facts, evidence and material, seriously and grossly did not conduct himself in a proper manner and was clearly biased in favour of the respondent. The submissions call to mind the provisions of section 145 of the Act which, to the extent relevant read:

> '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-.
>
> (2) A defect referred to in subsection (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.

[57] In addition to the review grounds outlined in section 145 of the Act, in review applications, lies a further consideration whether the decision reached by commissioner is one that a reasonable decision maker could reach.[2]

[2] See *Sidumo v Rustenburg Platinum Mines* (2007) 28 ILJ 2405 (CC) at para 110.

[58] Commenting on the reasonableness in *Sidumo* decision (supra), the Court in *Edcon Limited v B Pillemer NO and Others*[3] said that:

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between the appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'…

[59] With these legal principles in mind, the decision of the third respondent will be considered. In his view, there was sufficiency of evidence to prove the guilt of the applicant on the charge of theft. It stands out clearly in the award that the third respondent placed much reliance on the evidence of Mr Mncwango to find the applicant guilty on the first charge. At paragraph 24, the third respondent, *inter alia*, said:

> 'At first glance it appears as if the Respondent's case in respect of the theft charge is totally dependent on the evidence of Mncwango. I found him to be a reliable witness who dealt with his evidence clinically and objectively. Although he made a mistake in respect of the correct weight of the Ricory coffee, he was very clear in respect of all the other items he saw in the Applicant's car and it has to be borne in mind that he viewed the items from a distance through the car window. I have no reason to doubt his evidence that he searched the Applicant's car in the morning when the Applicant entered the premises. As stated above, the items were displayed on the table before us and if the items were in the car in the

[3] (2008) 29 ILJ 614 (LAC) at para.22.

morning, I confidently find that the security guard would have seen them, whether it had been in the morning or the afternoon. There is no evidence that he held any grudges against the Applicant and his very short period of employment at the Respondent's premises as well as the fact that he was stationed at the gate and not a fulltime employee, suggests that he was unaware of all the internal turmoil within the employment environment. I also cannot draw any negative conclusion (as Mr. Naidoo suggested) about the note Mncwango made in his pocket book when he recorded the incident. His explanation that he recorded it to protect himself is logical and acceptable. The Applicant's testimony was somewhat flawed in that he at first suggested that the security guard had found nothing in his car, he then changed this version under cross examination and testified that if the security guard had seen goods in his car, it must have been those goods which he had purchased at the supermarket. He furthermore suggested that the time (19h39) of purchase recorded on his invoice was incorrect as a result of the possible late recording of the sale. I reject this alibi because the Applicant admitted that he had misplaced the original invoice and returned to the store to obtain a copy for the purpose of this arbitration and his submission is also highly improbable. The only reasonable inference that I can make in this regard is that the Applicant had indeed purchased the goods at 19h39 that evening and that being correct, those items could not have been in his car earlier that afternoon at 14h15 when he left his workplace.'

[60] Apart from the generalised allegation in review ground one, the applicant did not attack the findings of the third respondent with respect to the assessment of the evidence of Mr Mncwango. Yet this evidence was of so strong and highly persuasive value that the probabilities favoured its acceptance, when seen against that of the applicant. Any such attack should have been in the pleadings and not in supplementary heads of argument as such was nothing but an afterthought. As none of the five grounds of review on substantive fairness specifically sought to challenge the third respondent's findings, no defect has been shown by the applicant to have been committed by the third respondent. On the contrary, the award shows that the third respondent properly applied his mind to the

relevant issues and reached a decision a reasonable decision maker could have reached in the circumstances.

[61] The applicant was clearly on a wild goose chase in this respect. It is not surprising that he made submission such as that the third respondent placed too much emphasis on the theft charge and clearly misconducted himself in finding the applicant guilty of it and that the applicant was not found guilty by the police nor was a criminal report made by the first respondent. The third respondent had to apply his mind to the theft charge. Police never find the accused or suspects guilty as this is a function of the courts. Failure of the employer to lodge a criminal charge has never been either a ground for review or a consideration whether the award is reviewable or not.

[62] The evidence of the other witnesses of the respondent had the effect of merely adding on, to what Mr Mncwango had said. True indeed, Ms Sibiya probably had an exe to grind with the applicant, who it seems, was pivotal in her prior dismissal and she probably underplayed that part. Indeed, more employees had access to the grocery stock at the workplace of the respondent and more such stock went missing at the time. Yet the evidence of Mr Mncwango stood as an edifice, forcing the applicant to present various contradictory versions.

[63] In my view, therefore, all five grounds of review traversed by the applicant on substantive fairness must fail.

[64] On procedural fairness, it remained common cause that the applicant was the most senior employee at the Richard's Bay workplace.[4] If this were not true, the applicant failed to show who he reported to at that workplace. Nor has the applicant shown successfully how the respondent deviated, as alleged, from its policy by appointing an outside person to chair the disciplinary hearing. Not much need be said about the alleged failure to conduct investigation as the reasoning of the third respondent stands pertinently clear in paragraph 27 of the award. Whether one agrees or

[4] See also submissions by applicant on legal representation.

disagrees with the third respondent's clear application of his mind on the issue, it is irrelevant. The same holds for the delay in submission of the findings by the chairperson within the prescribed 36 hours.[5] In my view, the other grounds amount to no more than appeal grounds and therefore need no further consideration. All five grounds on procedural fairness must accordingly fail.

The counter review application.

[65] The first ground related to whether there was sufficient evidence by the respondent to prove the second charge. The respondent bore the onus to prove the fairness of the dismissal relative to this charge as the dismissal was common cause.[6] The third respond found that the respondent failed to prove this charge. The submission is that in coming to that conclusion the third respondent committed a gross irregularity, alternatively misconducted himself in that he failed to apply his mind to the evidence placed before him, and arrived at a conclusion that was not reasonable relative to such evidence. The company further submitted that the third respondent failed to properly reconcile the contradictory versions on the copying charge, failed to meaningfully assess the credibility of the witnesses on this point, and failed to assess the probabilities arising out of their irreconcilable versions. This constitutes a reviewable irregularity.

[66] To say the least, the evidence of the respondent for the second charge was very vague for lack of particularity. The applicant was still on duty at the relevant times of copying documents. From the evidence, he was not prohibited from making photocopies. The giving of instructions to a junior staff did not mean he was not allowed to do it himself. No evidence was produced of what documents if any, could never be lawfully copied. No evidence of what copies he made was produced. Effectively, the respondent shifted the burden of proof and placed it on the applicant to prove himself innocent. The third respondent saw this and properly cut the inquiry short. This ground has no merits and therefore stands to fail.

[5] See paragraph 28 of the award.
[6] See section 192 (2) of the Act.

[67] The next ground related to Ms Gwamanda's role in the review proceedings. The third respondent found that the internal review (appeal) was not conducted in accordance with the company's disciplinary code. Paragraph 4.1.1.4 of the pre-arbitration minute provided that the third respondent was required to ascertain whether the respondent failed to conduct the applicant's review application of his dismissal in terms of its disciplinary code and policy, and if so, whether such failure constituted a sufficient basis for finding the procedure as a whole unfair. The submission was that the third respondent's terms of reference on this issue were confined to whether the company complied with its code and that the third respondent was not entitled to have regard to other issues. The respondent averred that it was clear from the evidence that the company granted the review, it was lodged timeously, no additional evidence was led and the Chairman of the review was provided with all relevant documentation. Consequently it was evident, so the argument went, that the provisions of the disciplinary code were complied with and the third respondent's enquiry should have ended there.

[68] If the three factors listed by the respondent were the only ones for the consideration of the review process by the respondent, it would make a mockery of the review process. The respondent seeks to reduce its review process to a form devoid of substance and this cannot be. According to this submission, it would be enough for the review process if the employee has submitted papers with the review application in time and a reviewing official merely reads the papers and then puts them away, contending that the matter has been reviewed. In my view, it was within the mandate given to the third respondent to consider the substance of the review process. That is what he just did. Accordingly, this ground stands to fail.

[69] The next ground relates to a finding of the third respondent that the applicant was entitled to legal representation during the internal disciplinary hearing and that the company's refusal to allow him legal representation was procedurally unfair. The submission was that the third respondent exceeded his powers in determining this issue as the pre-

arbitration minute which determined the terms of reference of the arbitrator did entitle him to consider the issue of legal representation. The respondent said that even if the third respondent had not exceeded his powers, then it was evident that he did not apply his mind to the law and issues which needed to be considered before making a determination regarding legal representation and in so doing committed a reviewable irregularity.

[70] There is no statutory provision for legal representation during the internal disciplinary hearing. Schedule 8 to the Act provides for representation of an employee by a trade union or by another employee. Where an employee represents another practice has it that such employee should be senior to the one being represented. In this case, the applicant was the most senior to his colleagues. Whether it is fair for an employee to be legally represented at the internal disciplinary hearing is a matter to be decided on the facts of each matter. It is ideal is to keep the proceeds at this stage as simple as possible, taking into account various factors.[7] The respondent has correctly identified those factors for consideration.

[71] The third respondent found that it was unfair to refuse him legal representation and leave him without any representation at all when an employer knew that an employee was charged with serious and dismissible offences and that it intended to do everything within its power (hell bent) to ensure the employee's dismissal. He said that the employer elected to deviate from its code by appointing an external Chairperson and it flies in the face of Ms Gwamanda's evidence that she wanted to ensure fairness. While it could not be determined at the disciplinary hearing how complex this matter could be, the reality is that it has become very bulky, due to numerous issues raised by both parties for consideration. The issue was raised by the applicant at arbitration and the third respondent had to respond to it. In so doing, he did not exceed his powers. While the third respondent did not identify each factor for the consideration of fairness to

[7] Such as the respective prejudice to the parties, the cost, inconvenience and delay associated with allowing legal representation, the degree of factual and legal complexity, the ability of the employee to represent himself, etc.

legal representation, he appeared to have been alive of them and outlined the pertinent issues[8].

[72] At paragraph 31 of the arbitration award, the third respondent concluded that the company committed a procedural irregularity in partially modifying the outcome of the disciplinary enquiry. The submission was that this issue was *ultra vires* and the third respondent exceeded his powers as set out in the pre-arbitration minute, as no-where was he empowered to consider it. The extent of the amendment and the reasons therefore were said not to have been traversed or considered by the third respondent in the award. He was said to have concluded that the circumstances were not exceptional, without providing reasons for his finding but he merely made the comment without corroboration or reference to the issues raised, and hence failed to apply his mind to the issues.

[73] The respondent had to prove the fairness of dismissal premised on it having had to amend the finding of the chairperson acquitting the applicant of the second charge and replacing it with a guilty verdict. The third respondent had therefore to deal with the issue. That the third respondent merely said that he found no exceptional circumstances without corroboration or reference to the issues raised and hence failed to apply his mind to such issues, remained an incomplete criticism, until it was shown what exceptional circumstances were proved to exist, for him to have considered. No such exceptional circumstances were ever shown to exist. In respect of this ground, the respondent did what it had done best in these proceedings, to shift the burden resting on it to others, this time to the third respondent. This ground of review had no merits.

[74] In the circumstances, Court will accordingly issue the following order:

74.1 The main review application is dismissed;

74.2 The counter review application is dismissed;

74.2 No costs order is made.

[8] As permitted by section 138 (1) of the Act.

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Cele J

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Mr J P Broster
Instructed by:	Naidoo and Company Inc. Durban.
For the respondent:	A L Cook.
Instructed by:	Solomon Holmes Attorneys, Johann

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