REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C343/2012

In the matter between:

DISTELL LIMITED	**Applicant**
and	
COMMISSION FOR CONCILIATION,	**First Respondent**
MEDIATION AND ARBITRATION	
D DU PLESSIS N.O	**Second Respondent**
SOLIDARITY obo S GOUWS	**Third Respondent**

Heard: 30 July 2013

Delivered: 03 December 2013

Summary: Arbitrator closing his mind to circumstantial evidence and effectively requiring direct evidence to prove guilt of employee. Such approach amounting to latent irregularity. Arbitrator not deciding unfair dismissal dispute fairly. Award reviewed and set aside. Circumstances in which court to substitute decision of arbitrator. Court finding that it was in interests of justice for it to decide the matter. Court finding that dismissal of employee both procedurally and substantively fair.

JUDGMENT

HULLEY, AJ

Introduction

[1] This is an application to review and set aside an arbitration award which was issued by the second respondent on 28 March 2012 and for an order substituting and replacing the award with this Court's "own" award. There is no indication as to what the proposed award ought to be, but I think it is implicit that it should contain a finding that the dismissal was both procedurally and substantively fair.

The factual setting to this application

[2] Mrs Gouws, a member of the third respondent trade union, was in the employ of the applicant since 1988. In approximately 1991 the applicant underwent a merger which resulted in Mrs Gouws being transferred to the J C Le Roux division.

[3] It seems to have been common cause that Mrs Gouws was a difficult personality (she suggested that it was due to the fact that she suffered from obsessive compulsive disorder), which resulted in her constantly clashing with her colleagues and her underlings.

[4] Ultimately, the conflict with her colleagues resulted in a grievance being lodged with the applicant against Mrs Gouws. It was supported by written statements provided by a number of colleagues and former colleagues.

[5] Despite being prepared to provide such written statements the

colleagues were concerned that Mrs Gouws would be vindictive if their written statements or identities were disclosed to her. They thus insisted that their anonymity be preserved.

[6] A grievance hearing was scheduled for Friday, 1 July 2011 at which aspects of the various witness statements were put to Mrs Gouws.

[7] According to Mr Noel Fernandes who testified on behalf of the applicant at the arbitration hearing, he had prepared three files for the grievance hearing, one for himself and one for each of two other grievants, persons he identified as Messrs Vossie Vosloo and Rodney Jones. He later discovered that Mr Vosloo had already made copies for himself, so he returned the additional set to his desk drawer. Mr Fernandes then returned to the grievance meeting which continued for a period of approximately two hours. At the end of the meeting he returned to his office, placed the file which he had in his cabinet, locked the door and then departed for the weekend. Later that day, he received a telephone call from Mr Japie Schippers who informed him that Mrs Gouws was in his office; he wanted to know whether she had permission to be there. Mr Fernandes stated that she did not, but that they would sort the issue out on Monday. Mr Fernandes testified that he then telephoned his foreman, Mr Jan du Plooy, and the production manager, Mr Vosloo. They indicated that the matter would be taken up on the Monday.

[8] According to Mr Fernandes at the time he spoke to Mr Schippers he had forgotten about the file containing the two witness statements which were in his desk drawer. However, when he returned to work the following Monday he immediately checked his drawer and noticed that the two witness statements were missing.

[9] The applicant called a total of eight witnesses. Only two of those

witnesses, Messrs Jacques Simon Daniels and Japie Schippers, actually saw Mrs Gouws in the office of Mr Fernandes in the early evening of 1 July 2011.

[10] Mr Daniels testified that he was in the factory bottling section shortly before 18h00 on that day. He was carrying out certain duties when he noticed Mrs Gouws moving about in Mr Fernandes' office. The door was closed and although the light in the office was off he could clearly see Mrs Gouws's movements through the glass window of the office. He noticed Mrs Gouws move past Mr Fernandes' desk. Mr Daniels called Mr Schippers (who was driving about on a fork lift at the time). The two of them then paid close attention to her movements. It appears that Mr Daniels' suspicions were aroused largely because the administrative staff only worked until 15h30 on a Friday and Mrs Gouws was still in the office well beyond that time.

[11] Mr Daniels testified that Mr Schippers proceeded through an opening between the factory wall and the administration section in order to gain a better view of what Mrs Gouws was up to.

[12] In his testimony Mr Schippers stated that when Mr Daniels drew his attention to Mrs Gouws, she was close to Mr Fernandes' desk. He noticed her move toward the area in front of the desk (which is where the drawers were). Mr Schippers then proceeded through the opening into the dry food section to get a better view. When he got to the dry food section Mr Schippers noticed that Mrs Gouws was no longer in the office but had proceeded from the office and down a flight of stairs with her hands clasped in front of her chest. Mr Schippers immediately telephoned Mr Fernandes to enquire whether Mrs Gouws had permission to be in his office. Mr Fernandes stated that she did not but that the issue would be sorted out on the Monday morning.

[13] Under cross-examination Mr Schippers confirmed what he had observed, but noted that from his vantage point, he was unable to actually see Mr Fernandes' desk. He stated that he was, however, aware of where the desk stood in the office. Mr Schippers testified that he had not actually seen Mrs Gouws remove anything from the desk or open the drawer. According to him, he had been in the office of Mr Fernandes at some stage during the course of that day and had himself closed the door; when he first observed Mrs Gouws in the office, he noticed that the door was closed but after she left in a hurry, he noticed that the door had been left open.

[14] Arising out of the aforesaid events, Mrs Gouws was charged on 17 August 2011 with the following:

> "1. Theft, alternatively unauthorised removal, of a colleague's personal documentation, in that you accessed and removed written statements from the office of Mr Fernandes on 1 July 2011, without his knowledge or consent; and/or
>
> 2. Dishonesty, in that during the investigation process into your conduct as set out in 1 above, you misrepresented the reason for you being in Mr Fernandes' office on the evening of 1 July 2011;
>
> 3. Interfering with an ongoing grievance investigation in that you unlawfully obtained access to statements provided by your colleagues as part of the aforementioned grievance investigation."

[15] An internal disciplinary enquiry was convened. At the conclusion of the enquiry, Mrs Gouws was found guilty on the first and third charges, but not guilty on the second. She was dismissed.

[16] For her part, Mrs Gouws denied the charges. She testified that the grievance hearing, took two hours concluding at approximately

15h00. She had quite a bit of work to do and decided to work late.

[17] In confirmation of the aforesaid Mrs Gouws handed in an e-mail from a Mr Jan du Toit requesting stickers from QC (quality control). (The e-mail was addressed to several people of whom she was one.) She testified that in order to obtain the stickers from QC a so-called drawing instruction (which appears to be a requisition form) had to accompany the request. With the drawing instruction she would then log on to the SAP computer programme to record the release of the stickers.

[18] From what I could gather the SAP programme contained a stock control system which required certain forms (such as the drawing instruction) to be in place before any stock could be released.

[19] Since the request for stickers was not accompanied by a drawing instruction, Mrs Gouws telephoned Mr Ricky Van der Linde to enquire whether one had been issued. He indicated that it had not. Mrs Gouws then attended at the office of Mr Fernandes in the hope that she could locate a drawing instruction there (she testified that they were printed in Mr Fernandes' office, and she believed there was a possibility that she may find a form there).

[20] The door was open so Mrs Gouws walked in, peered around on the desk and in a tray and then walked out. On her version, one gets the sense that the entire transaction lasted for only a few seconds and that Mrs Gouws did not actually fiddle with anything in Mr Fernandes' office. Mrs Gouws disputed the evidence of Messrs Schippers and Daniels that she had moved around the office.

[21] Mrs Gouws testified that she had a personal file and her handbag with her when she entered Mr Fernandes' office. The bag, she said, was slung over her shoulder. She denied that she had clasped

anything against her chest as testified by Mr Schippers. After satisfying herself that there were no drawing instructions, she left the office, went to the security office to hand in a key and then departed for the day.

[22] Mrs Gouws' version was challenged in various respects during cross-examination. What emanated from cross-examination was that she had attended to various other activities (including a personal telephone call) before telephoning Mr Van der Linde to enquire about the drawing instruction. Moreover, Mrs Gouws, for the first time in cross-examination, stated that she had already logged off on her computer and clocked out before she went to Mr Fernandes' office (which is the reason for her having her bag and a personal file with her).

[23] When it was put to her that her intention was to leave for the day rather than to return to carry out any transactions on SAP, Mrs Gouws testified:

> "Ek kan vir u se dit kan moontlik my intensie gewees het om huis toe te gaan maar as ek daai drawing instruction daar gekry het kon ek net sowel ook besluit ek gaan terug – dit is wat ek – ek kon dit ook gedoen het."

[24] I do not understand Mrs Gouws' speculation about her own intentions. In any event, she conceded that without the drawing instruction (which she testified Mr Van der Linde had told her had not been issued), she would not have been able to release the stickers on the SAP system. This called into question why Mrs Gouws had bothered to search for a drawing instruction at all after speaking to Mr Van der Linde and why she found it necessary to go into Mr Fernandes' office. Her answer to this was that she wanted to get her work done because she had been accused (in the grievance

hearing) of not doing her work.

[25] In an e-mail read out in the arbitration proceedings (which I could not locate in the record of documents), it appeared that Mrs Gouws had informed her union representative that –

> "Toe ek die perseel verlaat het is ek na die droë voorrade kantoor om to kyk of iemand daar is, en op to volg of alles wat hulle benodig in plek is vir die nag en Saterdag se produksie."

[26] Mrs Gouws suggested that there was nothing inconsistent between what was contained in the e-mail and her earlier testimony. With respect, the two versions provide completely different reasons for attending at Fernandes' office. Mrs Gouws attempted to place emphasis upon the fact that the drawing instructions formed part of the activities related to the dry goods section, when that was clearly not the issue. The issue was that she claimed in the e-mail to have attended at the dry goods section *to see if there was anybody still there and to see if they required anything for the balance of the shift and the following day*. That was inconsistent with her testimony given in chief that she attended at Fernandes' office in order to look for a drawing instruction.

The arbitration award

[27] At the conclusion of the arbitration proceedings the second respondent delivered an award in the following terms:

> "1. The dismissal of the applicant, Sonia Gouws, by the respondent, Distell (Pty) Limited, was unfair.
> 2. The respondent is ordered to reinstate the applicant on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated 22 November 2011. The reinstatement is to offer it retrospectively with effect from 10 January 2012.
> 3. The respondent is ordered to pay the applicant her lost income due to the unfair dismissal in the amount of R62 181.09 by 10

April 2012.

4. The applicant is to report for duty on 10 April 2012.
5. The respondent is ordered to take the necessary administrative steps to restore the applicant's medical aid/pension fund/provident fund, with no penalty to be incurred by the applicant."

[28] In arriving at the aforesaid conclusion, the second respondent stated that the "specific issues" were whether the applicant could prove on a balance of probabilities that Mrs Gouws had committed the acts of misconduct and if so, whether that warranted her dismissal. He noted that "the sole procedural attack" was whether Mrs Gouws had been afforded sufficient information to prepare properly for the disciplinary enquiry.

[29] The second respondent concluded ultimately that the dismissal of Mrs Gouws was both procedurally and substantively unfair.

[30] Insofar as the procedural aspect was concerned, the second respondent noted that:

> "I agree … that [Mrs Gouws] had been given sufficient information in order to answer to the charges. These were not difficult charges and she clearly understood them. A domestic hearing is an informal matter and the insistence by certain trade unions to emulate court proceedings is out of touch with the current thinking of the nature of these proceedings, causes delays and is contrary to the spirit of the LRA."

[31] Notwithstanding the aforesaid, the second respondent concluded that the dismissal of Mrs Gouws was procedurally unfair. In doing so, he reasoned as follows:

31.1 Although he was not called upon to determine the grievance, what was clear was that Mrs Gouws was not

treated fairly during the grievance hearing. She could not be expected to defend herself against allegations without being provided with the access to the full statements and the names of all grievants. This was linked to the findings in respect of procedural fairness in the disciplinary enquiry.

31.2 As long as an employer had complied with the requirements of Schedule 8, the procedures would be fair. However, where the employer has set a higher standard for itself, compliance with such higher standard was necessary.

31.3 The applicant had in fact set a higher standard for itself.

31.4 The "only" deviations (presumably from the standards set for itself by the applicant), related to the delay in charging Mrs Gouws and the "general insistence" in compelling her to undergo a polygraph examination.

31.5 In these senses, the dismissal was effected in a procedurally unfair manner.

[32] With regard to the substantive fairness of the dismissal, the second respondent found that the applicant had "failed to prove that [Mrs Gouws] was guilty of the charge that she had stolen the documents or that she had gained access to the documents in an unauthorised way" (Charge 1). With regard to Charge 3, he found that there was no evidence presented by any of the applicants' witnesses "from which I can infer that [Mrs Gouws] probably did something to interfere in that process or tried to hamper the conclusion or actual process of that grievance hearing". She was therefore, said the second respondent, not guilty of the allegations set out in the third

charge.

[33] Insofar as Charge 1 was concerned, the second respondent reasoned that:

33.1 Of the eight witnesses called by the applicant, two actually saw Mrs Gouws in Mr Fernandes' office. The other witnesses presented circumstantial evidence and matters relating to their employment relationship.

33.2 Neither of the two witnesses actually saw Mrs Gouws scratching through things in Mr Fernandes' office or in his desk.

33.3 Mr Schippers who had gone to the door to get a better view, was not able to say that he saw Mrs Gouws scratching through Mr Fernandes' drawers. In any event, he gave two versions of what he had seen. On the first version, he saw her near the drawers and on the other, he was unable to say where she was save that she was near the desk.

33.4 If Mr Schippers had observed Mrs Gouws in the manner described by him, he would also have seen her removing the documents.

33.5 The only person who could confirm that the documents had been removed, was Mr Fernandes, but "all" that his evidence established was that the documents were gone.

33.6 It was clear that Mr Fernandes did not like Mrs Gouws. He had initiated and driven the group grievance. His

evidence had therefore to be considered with caution. He was the only person who bore knowledge of whether he had in fact placed the documents in his drawer. The applicant's reliance upon a polygraph test to bolster the veracity of Mr Fernandes' evidence was [it appears] misplaced because "I am not sure why anyone who speaks the truth is in need of a polygraph result to prove that he is speaking the truth".

33.7 There was no reliable evidence to indicate that Mrs Gouws was aware that there were extra copies in Mr Fernandes' office.

33.8 The office was open and anybody could enter it.

33.9 On the other hand, Mrs Gouws had not made a good impression as a witness under cross-examination; she had "severe memory lapses" under cross-examination despite having a "phenomenal recollection of times, events, what was said, etc." during examination in chief. Moreover, Mrs Gouws had given at least four explanations as to why she had entered Fernandes' office.

33.10 It therefore appeared that Mrs Gouws was lying about her reasons for entering the office. She was, on her own version, on her way home.

33.11 It was furthermore highly probable, given the personality of Mrs Gouws that she was determined to find out who had written the two statements used during the grievance hearing and she may well have gone to the office to locate the documents. On the other hand it was

possible that her behaviour was due to her obsessive compulsive disorder.

33.12 There was, in any event, no evidence to show that Mrs Gouws had opened the drawer and Mr Schippers would have seen her opening the drawer if she had.

33.13 Neither Mr Schippers nor Mr Daniels were requested to undergo polygraph testing and both of them had a motive to falsely implicate Mrs Gouws and the opportunity to enter the office.

[34] The second respondent concluded:

> "In the end then at best for the [applicant] there is a suspicion that [Mrs Gouws] was guilty of theft (or of the alternative). Proof on a balance of probabilities means that the evidence points more probably to the conclusion that the employee committed the alleged misconduct, than to his or her innocence. However, a mere suspicion of guilt does not satisfy the test of proof on a balance of probabilities. There is no such thing as a "reasonable suspicion" in the labour law context."

Grounds of review

[35] The applicant challenges the award on various grounds.

[36] First, it contends that the second respondent made a number of incorrect factual findings, based on the evidence led. An example of this, says the applicant, is the second respondent's finding that because Mr Schippers had gone to the office door to get a better view of what Mrs Gouws was doing he would have seen her remove anything from Mr Fernandez's desk door. The applicant contends that this finding was not supported by the evidence which demonstrated why Mr Schippers was unable to see Mrs Gouws

remove anything.

[37] Secondly, the applicant contends that the second respondent's evaluation of the evidence presented was fatally flawed:

37.1 In his assessment of Mr Gouws' evidence, the second respondent accepted that she lied about her reasons for being in Mr Fernandez's office, but accorded no weight to this finding in assessing the overall probabilities.

37.2 The second respondent failed to understand the notion of the balance of probabilities appearing, instead, to apply the higher standard of proof beyond reasonable doubt.

37.3 The second respondent adopted speculative considerations when assessing whether any other person may have removed the documents.

[38] Thirdly, the applicant contended that the second respondent's assessment of Mr Fernandes' evidence was flawed. In this regard, the applicant argued that:

38.1 The decision to treat the evidence of Mr Fernandes "with caution" simply because he "did not like" Gouws was entirely unjustified and irrational in circumstances where significant aspects of the evidence of Mr Fernandes was corroborated and there was no apparent credibility challenge to the evidence of Mr Fernandes referred to in the Award.

38.2 If it were appropriate to treat the evidence of a witness "with caution" in litigious proceedings simply because

such witness did not like one of the parties, the evidence of almost all witnesses would have to be treated with caution.

38.3 In any event, it was not apparent that the second respondent rejected the evidence of Mr Fernandes. The applicant argues that a clear and specific finding in this regard was critical to the overall assessment of the evidence and the second respondent's failure to make a clear finding in this regard rendered the "findings" reviewable.

[39] Fourthly, the applicant contends that the second respondent did not accord sufficient weight to the outcome of the polygraph test performed on Mr Fernandes.

[40] Fifthly, the second respondent *mero motu* embarked upon an assessment and consideration of Mrs Gouws' medical condition.

[41] Sixthly, the second respondent failed to consider procedural fairness correctly. In this regard the applicant contends that the second respondent found that there was only one procedural challenge raised by the third respondent, a challenge which he decided in favour of the applicant, but then proceeded to find that the dismissal was procedurally unfair on a different ground.

[42] Seventh, the second respondent's finding that requiring Mrs Gouws to undergo a polygraph test is a form of procedural unfairness was wrong.

[43] Finally, the applicant contends that reinstatement was not a rational award given the second respondent's findings regarding the mendacity of Mrs Gouws.

Consideration of the award

[44] I have a number of difficulties with the reasoning of the second respondent as set out in his award. What I have ultimately to consider, however, is whether such difficulties give rise to reviewable irregularities.

[45] Insofar as procedure was concerned, the second respondent noted that there was only one issue for consideration under this rubric, viz. whether sufficient information had been provided to Mrs Gouws. In this respect he was relying upon what Mr Pio (who appeared on behalf of Mrs Gouws both in the arbitration proceedings and before this Court) had stated in his opening address. On this issue the second respondent found that sufficient information had been provided to enable Mrs Gouws to answer to the charges (a finding with which I agree).

[46] In argument before me Mr Pio contended that notwithstanding his opening address, the issue was broadened during testimony. He pointed out that questions were posed to a number of witnesses relating to the polygraph testing and the alleged insistence by the applicant on subjecting Mrs Gouws to a polygraph test, all of which demonstrated that the intention was to broaden the challenge in respect of the procedural fairness of Mrs Gouws' dismissal. I cannot agree.

[47] If, having limited the case in the opening address, a representative seeks to broaden the enquiry, at the very least he or she ought to have made this clear so that the opposing representative could take measures to deal with it. If a party elects to limit the ambit of his or

her case, the election is generally binding.[1]

[48] Moreover, having considered the record it appears to my mind that the questions posed by Mr Pio in respect of the polygraph testing were concerned with substantive, as opposed to procedural, fairness.

[49] In any event, a document styled 'Corrective Action Procedure' was handed in. In terms of paragraph 3.2.5 thereof, it provided that:

> "Corrective action will be initiated and action taken within three working days of it becoming known to Management that an alleged offence has been committed. These time periods serve as guidelines, which should be adhered to as being the norm and should only be changed for good reasons. Time periods may be extended after mutual consultation."

[50] Quite apart from the fact that the prescribed time periods are stated to be guidelines only ("subject to change for good reasons") it is clearly stated that corrective action will be "initiated" and that "action" will be taken within three working days of management acquiring knowledge of an alleged offence.

[51] The code does not prescribe *what* action ought to be taken or what is meant by initiation. The evidence showed that by 4 July 2011, Mrs Gouws had already been confronted with the allegations and investigations were under way. As part of those investigations, the applicant decided that it would be prudent to subject both Fernandes and Mrs Gouws to polygraph tests. Fernandes underwent a polygraph test on 18 July 2011, but the applicant declined to do so. In these circumstances, I cannot see that there was any deviation from the disciplinary code.

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[1] *A J Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk* 1985 (1) SA 399 (A), at 415B – D

[52] By 17 August 2011, charges had been prepared and were served on Mrs Gouws. The enquiry proceeded shortly thereafter.

[53] With respect to the second respondent, I fail to see how a "general insistence" to force Mrs Gouws to undergo a polygraph test, could be considered to be procedurally unfair unless, perhaps, it resulted in the extraction of evidence which was ultimately utilised against her. But that was not the case in the present matter. Mrs Gouws maintained that she was not prepared to undergo a polygraph test and no test was ultimately performed.

[54] What the second respondent may have had in mind is that by "insisting" upon Mrs Gouws undergoing a polygraph test, the applicant thereby delayed the matter and thereby undermined the provisions of the disciplinary code. Quite apart from the fact that the evidence does not suggest that there was any insistence by the applicant, I do not think that this gives rise to any procedural unfairness.

[55] I am unable to understand the second respondent's reliance upon procedural unfairness in the grievance hearing as a basis for finding procedural unfairness in the disciplinary enquiry. He himself appears to have considered the two processes to be distinct.

[56] At any rate, as previously noted, the second respondent himself understood Mrs Gouws' challenge to procedural fairness to relate to one aspect and one aspect only. That being the case, I fail to see how the second respondent came to a conclusion which was inconsistent with his own understanding of what he was required to decide.

[57] Thus, the award stands to be set aside in so far as the second respondent found that the dismissal was procedurally unfair.

[58] I turn now to consider the question of substantive fairness.

[59] The second respondent identified a number of valid concerns with regard to the evidence presented. It is true that no witness actually saw Mrs Gouws remove the documents. It is also true from the evidence that other people had access to the office and could accordingly have removed the two statements. While it is not clear to me that the evidence supports a finding that Messrs Fernandes, Daniels and Schippers were biased against the applicant, I am prepared to accept for present purposes that the second respondent was entitled to come to such conclusion.

[60] The difficulty I have with the second respondent's reasoning is that he seems to afford no weight to circumstantial evidence in determining whether a dismissal had been proved on a balance of probabilities.

[61] The use of circumstantial evidence is a powerful tool in proving the existence of an issue in dispute. Hoffmann & Zeffertt[2] note the distinction between direct evidence and circumstantial evidence. Direct evidence is provided by a witness who testifies directly on the issue in dispute. So, for instance, in a murder trial, a witness who testifies that he saw the accused stab the deceased with a knife, provides direct evidence as to the stabbing. On the other hand, a witness who testifies that he saw the accused emerge from a room in which the deceased was subsequently discovered, bearing a knife dripping with blood, provides only indirect or circumstantial evidence to support the fact that the accused had stabbed the deceased.

[62] Circumstantial evidence is thus evidence of a fact from which an

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[2] LH Hoffmann & DT Zeffertt, *The South African Law of Evidence*, 4th ed. (1988), pp. 588 – 9; DT Zeffertt & AP Paizes, *The South African Law of Evidence*, 2nd ed. (2009), p. 99

inference can be drawn as to the existence of a fact in dispute.[3]

[63] Zeffertt & Paizes in an update to the celebrated work by Hoffmann & Zeffertt, note that it is popularly supposed by laypeople that direct evidence is more compelling than circumstantial evidence, but in reality circumstantial evidence may be more persuasive than direct evidence. They provide the example of identification provided by means of a fingerprint and identification provided by means of an eyewitness.[4]

[64] The danger with direct evidence is that the witness may either be mistaken or may be lying about what he or she alleges was observed.

[65] The danger with circumstantial evidence, on the other hand, is that, in addition to the possibility that a witness may be lying or mistaken, the evidence may be capable of more than one logical explanation without it being clear what other possible explanations exist or the Judge, in analysing the evidence may embark upon a *non sequitur*. Thus circumstantial evidence may, at first blush, appear to be much more compelling than it really is, largely because the trier of fact does not have a sufficient knowledge or understanding of the particular field to be able to question the evidence and its potency or because the trier of fact does not understand how to make sense of it.

[66] On the example given above, the mere fact that a witness (W) saw the accused emerging with a blood-drenched knife from a room in which the deceased was subsequently found, may appear to give rise to a fairly strong inference that the accused killed the deceased.

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[3] CWH Scmidt & H Rademeyer, *Law of Evidence* (LexisNexis), §3 – 25
[4] Zeffertt & Paizes, *op cit*, p. 100

If, however, DNA tests were conducted of the blood on the knife and it was established that the blood did not match that of the deceased, the testimony of W would be negated. On the other hand, if the knife was disposed of making DNA testing impossible and the accused was unable to explain the circumstances of the disposal, he may find it difficult to exonerate himself.

[67] One must be careful to distinguish between an inference and an assumption or speculation. An inference is drawn from an existing fact; speculation has no factual foundation to it.[5]

[68] Turning to the facts of the present case, it is apparent that the second respondent failed to appreciate the potency of the circumstantial evidence which the applicant had presented. Such evidence included the following:

68.1 Two witnesses (Messrs Schippers and Daniels) had seen Mrs Gouws in the office of Mr Fernandes.

68.2 Mrs Gouws had an interest in obtaining the written statements. Grievances had been lodged against Mrs Gouws but the applicant would not disclose the identity of the grievant or provide her with copies of the statements made by them. As the second respondent himself recognised, Mrs Gouws' personality was such that she was "determined to find out who had written the two statements used during the grievance hearing".

68.3 Mr Fernandes' had testified that the documents which had been in his drawer were removed.

68.4 Mrs Gouws lied about her reasons for being in Mr

[5] *S v. Naik* 1969 (2) SA 231 (N), at 234

Fernandes' office. Even assuming that the lie provided no corroboration of the applicant's case,[6] at the very least, her version that she had worked late in order to complete certain activities had to be rejected. This meant that Mrs Gouws had provided no (honest) explanation for not knocking off at 15h30 (when she should have) and being in Mr Fernandes' office at almost 18h00 on a Friday.

68.5 Mrs Gouws had been seen leaving the office in a hurry with her hands clasped in front of her chest. She denied that she had clasped her hands in front of her chest, but admitted that she had a file with her at the time. Her explanation was that it was a personal file. This is wholly unconvincing. First, why would she clasp it against her chest? (Although she appeared to dispute that she had clasped it against her chest, this was not directly challenged during the cross-examination of Mr Schippers.) Second, it only emerged during cross-examination that Mrs Gouws had already logged off and was on her way home when she passed by Mr Fernandes' office.

[69] Assuming that Messrs Fernandes, Daniels and Schippers were biased as suggested by the second respondent, the fact remains that Mrs Gouws had on her own version being in Mr Fernandes' office at a time when she should not have been and then lied about her reasons for being there. Her conduct was therefore suspicious. None of the aforesaid witnesses had fabricated that evidence

[6] I am mindful that a lie *in and of itself* does not establish the guilt of a person (*S v. Mtsweni* 1985 (1) SA 590 (A), at 593 – 594)

against her. At best for Mrs Gouws, there is a possibility that the witnesses had ceased upon her suspicious conduct, and sought to make it appear more damning than it actually was, but the likelihood of that had to be assessed against all the other evidence. Thus, their apparent bias had to be viewed against those facts which were either common cause or which the second respondent himself had (correctly) found to exist.

[70] In any event, I fail to understand on what basis the second respondent, on the one hand, refused to rely upon the polygraph test in so far as Mr Fernandes was concerned, but then criticised the applicant for not subjecting Messrs Daniels and Schippers to a polygraph test as well. It is clear from the attitude which he adopted towards the evidence of the polygraph tests conducted on Mr Fernandes that he would have adopted the same approach had Mr Daniels and Schippers also undergone a polygraph test and produced the results. Quite apart from the aforesaid, Mr Daniels and Schippers had not refused to undergo a polygraph test (assuming that an inference could be drawn from such refusal); they had simply not been subjected to one.

[71] Moreover, whilst other people may have had access to Mr Fernandes' office and there was a possibility that somebody else may have taken the documents, that was but one possibility (for which there was no evidence other than the fact that the office was not locked). Such evidence had to be weighed up against the fact that Mrs Gouws not only had a reason to remove the documents, but was in fact seen with her hands clasped against her chest and had been unable to provide an (honest) explanation about her reasons for going to Mr Fernandes' office and working late.

[72] Furthermore, the evidence does not support the second

respondent's finding that Mr Schippers would have seen Mrs Gouws fiddling in the drawer if she had done so. On his version, he was unable to tell whether she had scratched in the drawer and it was for that very reason that he moved closer to get a better view; by the time he was better placed, Mrs Gouws was on her way out of the office.

[73] Thus, having regard to the aforesaid, there was ample circumstantial evidence to suggest that Mrs Gouws had removed the files. She had both the opportunity and the motive to do so.

[74] The second respondent's finding that "a mere suspicion" of guilt does not satisfy the requirement of proof on a balance of probability, demonstrates a complete misunderstanding of the evidence which had been placed before him.

[75] The question which I now have to decide is whether the manner in which the second respondent dealt with the matter gives rise to a reviewable irregularity. That is a more complex question.

Legal principles applicable to the present review

[76] Section 145(2)(a)(ii) of the Labour Relations Act, 66 of 1995 (the LRA) entitles a reviewing court to set aside an arbitration award if the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings.

[77] In *Ellis v Morgan; Ellis v Dessai*[7] Mason J commenting upon a gross irregularity as a ground of review stated:

> 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the method of the trial, such as, for example, some high-handed or mistaken action which

[7] 1909 TS 576

has prevented the aggrieved party from having his case fully and fairly determined.'[8]

[78] Expanding upon this in *Goldfields Investment Ltd & another v City Council of Johannesburg & another*[9] Schreiner JA held:

> 'It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Of course, even the first class are only material inasmuch as they prevent, or are deemed to prevent, the magistrate's mind from being properly prepared for the giving of a correct decision. But unlike the second they admit of objective treatment, according to the nature of the conduct. Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. The law, as stated in *Ellis v Morgan* (*supra*) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the

[8] At 581
[9] 1938 TPD 551

> magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.'[10]

[79] What must be borne in mind is that it is for the commissioner to determine the dispute and to determine what weight to attach to the relevant considerations. In a recent judgment the Supreme Court of Appeal held that

> '[18] … It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.
>
> [22] … The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as [long as] he acts in good faith (and reasonably and rationally) a court of law cannot interfere.'[11]

[80] It follows that when reviewing arbitration awards under the LRA little purpose is served by referring to copious passages from the transcript to highlight why the version advanced on behalf of one party was improbable and should have been rejected. The correct approach is that which was recently stated by the Supreme Court of Appeal:

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[10] At 560 – 561

[11] *MEC for Environmental Affairs and Development Planning v. Clairison's CC* 2013 (6) SA 235 (SCA), at 240H – 241A. See also *Pepcor Retirement Fund & Another v Financial Services Board & Another* 2003 (6) SA 38 (SCA); *Dumani v Nair and Another* 2013 (2) SA 274 (SCA), at 285D – E

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[12]

[81] Nor may a mistake, in and of itself, warrant the setting aside of an award. As noted by Harms JA (as he then was):

> 'An arbitrator "has the right to be wrong" on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry.'[13]

[82] Of course, where the commissioner has misstated a fact a court is not bound to accept the incorrect fact, provided that the correct fact is 'established in the sense that it is uncontentious and objectively verifiable'.[14]

[83] It follows from the aforesaid that where a commissioner has to determine where the truth lies between two versions, the mere fact that he or she accepts one version in preference to another cannot on its own be a ground upon which the decision can be reviewed and set aside.

[84] The question in the present case is whether the approach adopted by the second respondent can be said to have prevented a fair

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[12] *Herholdt v. Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA), at 2806B – C
[13] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), at 302A
[14] *Dumani v Nair and Another* 2013 (2) SA 274 (SCA), at 285D – E

hearing of the matter, i.e. whether from the reasons provided by him it appears that 'his mind was not in a state to enable him to try the case fairly' or that he misconceived the whole nature of the enquiry. After much anxious consideration I have come to the conclusion that it can.

[85] I have outlined the evidence which was before the second respondent. I have also analysed the evidence and demonstrated why the second respondent should have come to a different conclusion. I must not be understood to suggest that the second respondent could only come to the conclusion which I have set out above or that he was duty bound to analyse the evidence in the manner set out above.

[86] What concerns me, however, about the second respondent's conclusion is that he himself was satisfied that Mrs Gouws had lied about her reasons for being in Mr Fernandes' office and, further, that she had probably gone to his office to hunt for the files which Mr Fernandes had used at the grievance hearing. Once he made those findings (which were amply supported by the evidence before him), it was a very short step towards finding that she had in fact removed the file. What prevented him from doing so?

[87] I have already mentioned that the second respondent's view that Mr Schippers would have seen Mrs Gouws remove the file if she had, was, objectively not supported by the evidence. In any event, not only had the second respondent declined a proposal to conduct an inspection *in loco*, it was never suggested during cross-examination of Mr Schippers that he would have seen Mrs Gouws remove the documents from the drawer if she had done so.

[88] It follows that the only fact which appears to have prevented the

second respondent from taking that further step towards a finding that Mrs Gouws had in fact removed the file was his view that no witness had actually seen Mrs Gouws do so. In short, the second respondent appeared to be of the view that before a positive finding could be made there had to be direct as opposed to circumstantial evidence. In other words, on his understanding, no amount of circumstantial evidence would have persuaded him that Mrs Gouws was guilty. If such an approach was adopted generally, very few cases would ever succeed.

[89] The second respondent's attitude towards circumstantial evidence effectively robbed him of the opportunity to try the case fairly; the applicant's case was stillborn before it had even commenced. The second respondent's approach to the case falls within what Schreiner JA in *Goldfields Investments*, *supra*, described as a 'latent irregularity'.

[90] In the circumstances, I am satisfied that his award should be set aside.

[91] The next question is what relief should be granted in these proceedings? A court should generally refrain from correcting and substituting the decision of a functionary with that of the court save in exceptional circumstances, for instance, where the end result is a foregone conclusion; where further delay would cause unjustifiable prejudice; where the original decision-maker has exhibited bias or incompetence; or where the court is as well qualified as the original authority to make the decision.[15]

[92] While I do not think it can be said that the result in the present matter was a foregone conclusion, it comes very close to it. Although one

[15] C. Hoexter, *Administrative Law in South Africa*, 2nd ed. (Juta, 2012), pp. 552 – 7

cannot overstate the importance of observing the witnesses testify,[16] fairly substantial evidence was led and the record is complete. Moreover, a total of nine witnesses were ultimately called to testify and if the matter were referred back, it is likely that they will have to testify again. A further delay in this matter is unwarranted.

[93] In all the circumstances, I am of the view that it is in the interests of justice that a final decision should be taken by this Court.

[94] As set out above, I am satisfied that there was sufficient evidence to show, on a balance of probabilities, that Mrs Gouws had removed the file from Mr Fernandes' office. She knew that the applicant had no intention of providing the witness statements to her and she wished to acquire them without the applicant's or Mr Fernandes' permission and for her own benefit. In these circumstances it must be accepted that Mrs Gouws was guilty of theft of the documents and was therefore guilty of the first charge.

[95] While the witness statements probably had little intrinsic value, it was what they contained which was important to both the applicant and Mrs Gouws. Certainly, the grievants had provided the written statements on the express understanding that they would not be made available to Mrs Gouws. Mrs Gouws understood this. She was justifiably upset that the applicant was prepared to consider the grievance without providing her with the documents to consider who her accusers were and precisely what their complaints were. It is not clear how far the company was prepared to or could proceed without making the documents available to her. Ultimately it may have been compelled to provide the statements to her or abandon the

[16] *R v Dhlumayo* 1948 (2) SA at p. 705. The fact that the trial Court has had the advantage of seeing and hearing the witnesses should never be A overlooked; see R v Dhlumayo, supra at p. 705

grievance. But that point had not been reached and Mrs Gouws had no right to steal the documents.

[96] What I find particularly aggravating in the present case is the fact that Mrs Gouws not only lied during the arbitration hearing, but the level of the deception involved. I have set out her evidence in paragraphs 17 to 20 above. Her lies consisted of a fairly intricate web of deception designed to adapt information which was true (such as the request from Mr Jan du Toit and her telephone call to Mr Van der Linde) to support her explanation for working late on the evening of 1 July 2011. How is the applicant to continue working with a person who is prepared to go to the extent of lying under oath, challenging evidence presented against her and cross-examining the company's witnesses?

[97] The fact that she had many years of service with the applicant cannot counterbalance the aforesaid factors.

[98] In my view the applicant was rightly dismissed.

The order

[99] In the circumstances I make an order in the following terms:

99.1 The award is hereby reviewed and set aside and replaced with the following:

"(a) The dismissal of the applicant, Mrs Gouws, was substantively and procedurally fair; the application is accordingly dismissed

(b) There is no order as to costs.

99.2 The third respondent is ordered to pay the costs of this application.

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Hulley, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr E. Ellis

Instructed by: Edward Nathan Sonnenberg's Attorneys

For the Third Respondent: Mr Pio (union representative)