THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 483 / 13

In the matter between:

METRORAIL (PRASA) **Applicant**

and

SATAWU obo J TSHABALALA **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

DAVID DIBAKWANE *N.O* **Third Respondent**

Heard: **30 June 2015**

Delivered: **05 October 2015**

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of commissioners – test for review – s 145 of LRA 1995 – determination of gross irregularities and reasonable outcome.

Misconduct – establishment of the existence of a rule – rules need not only be established in writing – tacit rule established – arbitrator's position requiring a written rule a misdirection – breach of such rule by employee established

Misconduct – gross negligence – what constitutes – employee's misconduct in this instance constitutes gross negligence.

Evidence – evaluation thereof by arbitrator – arbitrator failing to make any credibility findings of witness testimony – constituting irregularity – issue of credibility considered.

Evidence – evaluation and determination thereof – arbitrator adopting approach of reasonable doubt – no proper assessment of probabilities – approach of arbitrator irregular – proper probabilities considered.

Dismissal – determination of fairness of dismissal – dismissal fair in the circumstances.

Review of award – conclusion of arbitrator irregular and unreasonable – arbitration award reviewed and set aside – substituted with award that dismissal fair.

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the third respondent in his capacity as a commissioner of the CCMA (the second respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] This matter has as its origin the dismissal of the individual first respondent by the applicant, following disciplinary proceedings against the individual first respondent on three changes of misconduct. The first respondent then pursued the dismissal of the individual first respondent as an unfair dismissal dispute, to the CCMA, and the dispute came before the third respondent for arbitration. As it was common cause that the individual first respondent had

[1] Act 66 of 1995.

been dismissed by the applicant on 28 June 2012, the third respondent was called upon to decide whether such dismissal was substantively fair. Procedural fairness was ultimately not in dispute in the arbitration. In an award dated 2 February 2013, the third respondent decided that the individual first respondent's dismissal by the applicant was substantively unfair, and determined that the individual first respondent be reinstated by the applicant with effect from the date of his dismissal, with 7 months' back pay. It is this award of the third respondent that forms the subject matter of the review application brought by the applicant.

The relevant background

[3] The individual first respondent, whom I will refer to in this judgment, for purposes of convenience, as "Tshabalala', was employed by the applicant as a ticket sales agent. Tshabalala commenced employment in February 1996, and was stationed and rendering his duties at the Pretoria station.

[4] The applicant has ticket sales offices at the various train stations across the country. At these offices, tickets are sold to members of the public by ticket sales agents. Tshabalala, at the time of the events giving rise to this matter, had been a ticket sales agent at Pretoria Station for some four years.

[5] All cash ticket sales transactions are done on what is called an ECD machine. The ECD machine is fitted with an ECD cash box. When the ECD box is full it must be removed from the ECD machine and replaced with an empty ECD box. When the full ECD box is removed, it must be entered by the employee removing it on what is termed the 'security control container list', which I shall refer to in this judgment as the 'control list'. Each such box has a unique serial number that is recorded on the control list, together with the amount contained in the ECD box.

[6] Once removed from the ECD machine, the responsibility is then on the senior ticket agent at the station to ensure that the ECD box is kept safe until it is collected by the applicant's external Cash-In-Transit ('CIT') contractor, SBV. This is done by placing the ECD box in a locked strong room at the station.

[7] SBV normally arrives at between 08h30 and 10h00 to collect the cash takings at the station, being a contractually agreed collection time. SBV arrives with replacement empty ECD boxes. The SBV personnel open the full ECD boxes with their key, in the presence of the applicant's staff doing the handover who also have their key, and remove the money bags. The money bags are then confirmed against the control list and against the ECD box number on the control list. These bags are then all scanned, and a receipt issued, which is signed by both parties. The SBV personnel then leave with the full boxes, which is then taken to be banked. At the bank, the same verification is then again conducted when the cash is deposited.

[8] The events giving rise to the matter *in casu* took place on 14 February 2012. Tshabalala was on duty on that day as the senior ticket agent in charge at the Pretoria station. Chelsie Rangwaga was the office administrator on duty, and she was acting as station manager. Tshabalala was instructed by Rangwaga to remove ECD box number 03849 from the ECD machine, as it was full. The box contained R111 540.00. It was common cause that Tshabalala indeed removed this ECD box from the ECD machine, at about 14h00 on 14 February 2012.

[9] What Tshabalala was then supposed to have done, having removed the ECD box, was to record the ECD box and its content on the control list. It was common cause he never did this. It was also common cause that ECD box number 03849 was not in any other way recorded, despite having been removed from the ECD machine.

[10] In addition, and having removed the ECD box from the ECD machine, Tshabalala was supposed to have taken steps to safeguard the box until it could be collected by SBV. This, as said, is done by placing the ECD box in the strong room. Tshabalala said that he did place the box in the strong room. It is added that Tshabalala was the one with the key to the strong room, which he kept in the office he shared with Rangwaga.

[11] SBV then arrived on 15 February 2012 to collect cash takings. The guards of SBV removed, and signed for 17 bags, which was verified against the control list. But this did not include box number 03849, which was not listed nor recorded. It was then undisputed that this box could not in any way be

accounted for, and was ultimately lost, causing a direct loss to the applicant of R111 540.00.

[12] There was also some evidence about suspicious movements of Tshabalala on the afternoon of 14 February 2012, suggesting that he may have seized on an opportunity to remove the ECD box and misappropriating it. But Tshabalala was never charged with misappropriating the ECD box and its contents. None of this evidence therefore has any value or relevance, as I will specifically address hereunder.

[13] In the end, and pursuant to all of the above, the applicant first suspended and then proffered three charges against Tshabalala. The first charge was gross misconduct for failing to record ECD box 03849 on the container control list when he removed it from the ECD machine. The second charge was that of gross negligence in that Tshabalala failed to discharge his responsibility as acting senior ticker sales agent to safeguard the ECD box, having removed it from the ECD machine. The third charge was dereliction of duty in failing to ensure that this ECD box was indeed collected by SBV.

[14] Following disciplinary proceedings, Tshabalala was then dismissed on 28 June 2012. As stated above, this dismissal was pursued to the CCMA as an unfair dismissal in terms of the LRA.

[15] The third respondent, as arbitrator, found that the dismissal of Tshabalala on 28 June 2015 was substantively unfair, because, in short, the third respondent reasoned that Tshabalala did not know of any rule ne needed to follow with regard to ECD box 03849, as this rule did not exist. The third respondent thus concluded that the misconduct in question had not been proven by the applicant. Tshabalala was consequently reinstated by the third respondent, prompting the current review application.

<u>The test for review</u>

[16] I will commence the determination of this matter with a few short comments about the test for review. The premise of the review test is found in *Sidumo*

and Another v Rustenburg Platinum Mines Ltd and Others,[2] where Navsa AJ held that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, that 'the reasonableness standard should now suffuse s 145 of the LRA', and that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[3]

[17] The aforesaid envisages a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator and the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable. In *Herholdt v Nedbank Ltd and Another*[4] the Court said:

> '…. 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[18] Therefore, the first step in a review enquiry is to consider or determine if an irregularity exists in the arbitration award or the arbitration proceedings, and this is done by considering the evidence before the arbitrator as a whole, as gathered from the review record, and comparing this to the reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law which may be applicable in the particular case. But this is only the first part of the review enquiry. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[5] the Court said:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator

[2] (2007) 28 ILJ 2405 (CC).
[3] Ibid at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[4] [2013] 11 BLLR 1074 (SCA) at para 25.
[5] [2014] 1 BLLR 20 (LAC) at para 14.

> misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

[19] This means that the review enquiry has a second part, which entails a determination, based on all the evidence before the arbitrator, whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable, even if it may be for different reasons or on different grounds.[6] In *Head of the Department of Education v Mofokeng and Others*[7] the Court said:

> '…. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.'

[20] In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity concerned is the only basis to substantiate the outcome the arbitrator arrived at, that the review application can succeed. The simple reason why this would be the case is that the irregularity directly affected the outcome, and thus prevented a fair trial of the issues.

[21] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the award of the third respondent.

Analysis

[22] I will now commence determining this matter by first identifying the applicant's grounds of review. These grounds of review must established in the founding

[6] See *Fidelity Cash Management* (*supra*) at para 102.
[7] [2015] 1 BLLR 50 (LAC) at para 31.

affidavit, and the supplementary affidavit in terms of Rule 7A(8). In summary, these pleadings rely on the following grounds of review:

22.1 The third respondent misdirected himself in finding that no rule existed, because the third respondent assumed that only a written rule could constitute a rule, without considering what was undeniable common practice even if there was no written rule;

22.2 The third respondent unreasonably accepted that Tshabalala was not properly trained in the execution of his duties, considering Tshabalala had five years' experience as ticket sales agent;

22.3 The third respondent misconstrued the real issue he was called on to determine, when he sought to equate the charges to that relating to the misappropriation of the lost ECD box by Tshabalala, in circumstances where Tshababala was never charged with misappropriation but in essence with gross negligence with regard to the manner in which he handled the ECD box;

22.4 The third respondent ignored pertinent evidence, such as the suspicious conduct of Tshabalala on the day, the evidence about how the ECD boxes are handled, and how Tshabalala thus failed when it came to the ECD box in question. According to the applicant, a proper consideration of the evidence as a whole can only have as a reasonable outcome that Tshabalala indeed committed the misconduct concerned.

I will decide this review application based only on these grounds of review.

[23] Something must however be said, from the outset, as to the manner in which the third respondent dealt with and determined the testimony of the witnesses that testified before him. What is conspicuously absent from the award of the third respondent is any credibility assessment and finding. As will be more fully dealt with hereunder, and especially on the issue as to whether a rule indeed existed which is based solely on testimony, a proper credibility

assessment was essential[8]. As was said in *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others*[9]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. ….'

The third respondent *in casu* did have some regard to probabilities, but made no attempt to assess and decide credibility. This is a gross irregularity where it comes to the proper determination of the evidence.

[24] Having regard to the issue of credibility, the applicant led the testimony Chelsie Rangwaga and Sandiwe Mosandiwa, I have considered both of these witnesses' testimony as a whole, and as reflected in the transcript, and in general consider them to have been credible witnesses. They remained consistent in their evidence, did not contradict themselves, and made concessions where necessary, such as conceding that the cash handling procedure documents did not refer to ECD boxes and that anyone can do the cash handover to the SBV personnel on collection. Their evidence should have been accepted by the third respondent as credible, and reliable.

[25] The applicant also led the testimony of the area manager, Phillemon Soko. I must point out that from page 140 to 173 of the transcript, what is reflected as examination in chief of Soko by the applicant's representative (Masilela) in the arbitration, is actually cross examination by Tshabalala's representative,

[8] In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5, the Court said: 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

[9] (2011) 32 ILJ 723 (LC) at para 7.

Mlambo. Overall, I was impressed with Soko's testimony. He held up under vigorous cross examination, which on several occasions became bogged down in completely irrelevant considerations. This kind of irrelevant cross examination assists no one in arriving at the truth of a matter. In the end, Soko properly answered all relevant questions put to him. He remained adamant in denying any flaws in the ECD system. But he was willing to make concessions, examples of which were that anyone could do the handover to SBV, the signature of the visitors register was only by only one guard, and that there was no written ECD policy. His evidence should also have been accepted as credible and reliable.

[26] The applicant also called Hazel Matenchi, the guard from SBV that did the collection on 15 February 2012, as a witness. His testimony was uncontroversial, and largely unchallenged. The only person inexplicably confused by his testimony was the third respondent. There was no reason not to have accepted his evidence. Similarly, the testimony of the next witness for the applicant, Johanna Mabena, simply confirmed the SBV handover procedure and time, which was not really contested.

[27] Turning then to the testimony of Tshabalala, I consider it, in general terms, to be evasive, self-serving and contradictory. A pertinent example of the contradictory nature of his evidence is where he twice says he disagrees with the term of him being a senior ticket sales agent, but in the same breath says he was working as a senior ticket sales agent on 14 February 2012. Despite conceding what he was working as, he maintains he was not acting as a senior sales agent because there were no documents to say this. This kind of approach permeates his evidence. He says that he needed to be specifically instructed by Rangwaga to record the ECD box on the control list, and when confronted under cross examination that he had done this on several occasions before without instruction, evaded answering the question. Further, and despite it being undisputed, Tshabalala does not even agree that the amount in the missing ECD box, is missing. He also says he placed the ECD box in the strong room, but then, and in my view clearly to water down the implications of this to his case, adds that he placed the box 'where similar boxes are placed' and left it there. He even later on testifies there is no safe place where ECD boxes are kept. But perhaps the best example of the

unacceptable nature of Tshabalala's evidence can be found where Masilela (the applicant's arbitration representative) asks him 'Is it true that the ECD box had money inside it' and he answers 'I cannot say it contained money inside because I have not seen the money'. But then he concedes there is money in the ECD box. The testimony of Tshabalala also contains a material contradiction, which related to why he was instructed to remove the ECD box. In giving evidence in chief, he says he was told to remove it because it was full. Under cross examination, he says he was told to remove it because it was dysfunctional, which I may add was never put to Rangwaga under cross examination. Tshabalala's evidence should not be accepted as credible and reliable, and should be rejected where it is in conflict with the evidence of the applicant's witnesses.

[28] Therefore, and considering what I have said above, had the third respondent done a proper credibility assessment, and dealt with the testimony of witnesses on the basis as discussed above, the outcome in this matter may well have been different. As the Court said in *Sasol Mining*:[10]

> '…. That failure, and the fact that the award clearly may have been different had the commissioner properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the commissioner in the conduct of the arbitration proceedings.'

[29] I dealt with a comparable situation in *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others*[11] and said the following in finding the award of the arbitrator to be reviewable:

> '…. The second respondent, had he discharged his duties properly, was compelled to determine this conflicting evidence and thus decide what evidence to accept, and what to reject. The second respondent had to assess credibility and probabilities and come to a proper and reasoned finding as to what evidence to accept. The second respondent did none of this ….'

[30] I will now move on to answering the question whether or not a rule existed to the effect that where a ticket sales agent removes a box from the ECD

[10] (*supra*) at para 13.
[11] [2015] JOL 33126 (LC) at para 37.

machine, that box removed must be recorded on the control list. In this instance, it was undisputed evidence that Tshabalala indeed removed ECD box 03849 from the ECD machine and never recorded it on the control list. Tshabalala's case was he was not obliged to do this, and the third respondent agreed with him, which, considering that the evidence of Rangwaga, Mosandiwa and Soko is to be preferred, is already an irregularity.

[31] The third respondent's decision that the rule did not exist and thus that there was no obligation on Tshabalala to have recorded the ECD box on the control list is based on the third respondent's version of a probability assessment. These probabilities referred to by the third respondent were: (1) the applicant could not produce a written document reflecting such a rule; (2) the applicant could not prove that Tshabalala was trained in the execution of his duties; and (3) the applicant had no policy about how ECD boxes should be handled. It is clear that the testimony of Rangwaga, Mosandiwa and Soko as to the existence of a rule and what that rule prescribed was never considered by the third respondent.

[32] But at least the third respondent appreciated that central to deciding whether Tshabalala committed misconduct, was whether he was obliged to record the ECD box on the control list when removing it from the ECD machine. This is certainly a critical consideration, for the simple reason that if Tshabalala was so obliged, he failed in the proper execution of his duties in not doing so and would need to provide a proper and justified explanation for such failure. In this matter, and because Tshabalala disputed the obligation *per se*, there was no explanation for failure. Therefore, and in my view, should it be accepted that if there was indeed such an obligation on Tshabalala, he would be grossly negligent in not discharging it.

[33] Tied to the issue as to whether the rule existed, the third respondent, as a further consideration, adopted the view that in effect, anything could have happened to ECD box 03849, even if it was recorded by Tshabalala on the control list. The third respondent gave a number of reasons for this view. The first reason was that Tshabalala was not the only person who handled the ECD boxes on 14 February 2012. The second reason was that because both SBV guards did not sign the visitors register, and there was an issue with the

time recorded on the scanner, it was unclear how many other persons may have entered the strong room where the ECD box was kept. The third reason was that no one specifically is entrusted with the handover of the money to SBV. The final reason was that a PRASA investigation report about the incident recorded that there were no working cameras in the ticket sales office, the ECD boxes were not kept in a 'strong safe' once removed from the ECD machine, and the recording of the ECD box on the control list does not prevent it being removed. In effect, the third respondent reasoned that there was an insufficient nexus between the loss of the ECD box and any failure by Tshabalala. I do agree that the third respondent's approach in considering whether there was a sufficient nexus between any failure by Tshabalala and the loss of the ECD box, is a correct approach, for the simple reason that if there is such a sufficient nexus, it would go a long way towards establishing the existence of misconduct by Tshabalala, in respect of both the first and second charges against him. The question now is whether the third respondent's reasoning, as set out above, is sustainable, which I will now turn to.

[34] The point of departure has to be a consideration whether the third respondent's conclusion that Tshabalala was not obliged to record ECD box 03849 on the control list when removing it from the ECD machine, for the he reasons gave, constitutes a gross irregularity. I unfortunately believe that it does. I agree with the applicant that the third respondent became improperly fixated on the issue of the existence of a written document prescribing the rule, and thus lost sight of what was actually placed before him in evidence. What the third respondent did was to turn a blind eye to the simple and logical operational process in the applicant where it came to ECD boxes, which had been in existence and which applied for some time, as confirmed by proper testimony. There was no need to defer to or require a written document.

[35] It is my view that the existence of the rule was established, in evidence, based on a number of considerations. Firstly, it was undisputed evidence, and even conceded by Tshabalala in testimony, that ECD boxes removed from the ECD machine must be recorded on the control list. Considering then that it was undisputed that Tshabalala was the one who actually removed the ECD box, this begs two questions to be answered. The first is who was supposed to

record the box on the control list, seeing it has to be done, if not Tshabalala? Must the removed box just stand around until someone at some point in lime realises it must be listed? Surely not. It is a matter of common sense and logic that the person who removes the box lists it. This being the case, Tshabalala needed to indicate who was supposed to list the box, if not him, which he never did. The second question is that considering he did it before, why did Tshabalala not record the box this time? This question was never answered.

[36] In the end, it was not necessary for a written policy containing a rule to exist. As Rangwaga said under cross examination – 'it is something we do every day ….', and affirmed under re-examination with specific reference to Tshabalala – 'that is what he does very day ….'. Rangwaga also testified that Tshabalala was fully aware of all the procedures in this regard. And finally, Soko, the area manager, testified that 'I am saying …. We do not need a policy for the ECD, we need to issue instructions', and said on several occasions that the ECD process was an 'instruction'.

[37] The third respondent's fixation on the issue of a written policy governing ECD boxes tainted his entire reasoning. He even went so far as to call on Soko to go and find, and then produce, such a written policy. When none was forthcoming when Soko returned, this was, as far as the third respondent was concerned, the end of the matter for the applicant. This approach effectively negates and excludes all the evidence and probabilities as discussed above. The third respondent, in short, had blinkers on, these blinkers being the existence or a written policy on the ECD boxes.

[38] Is the third respondent however as a matter of law correct in saying such kind of rules must be in writing, no matter what the evidence shows? In my view, this cannot be the case. I am satisfied that such kind of rules can tacitly be established, by way of conduct or practice. In this regard, the same principles applicable to tacit terms in any kind of contract can equally apply to establish whether rules or policies have tacitly come about by way of conduct or practice. In *Wilkins v Voges*[12] the Court said:

[12] 1994 (3) SA 130 (A) at 136H–137C.

> 'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. …. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.'

[39] In specifically considering the test to be applied to establish the existence of a tacit term, the Court in *De Lange v ABSA Makelaars (Edms) Bpk*[13] said:

> 'The test for establishing the existence of a tacit term, which this court has recognized and applied in many cases, is the so-called 'bystander' or 'officious bystander' test. In *City of Cape Town (CMC Administration) v Bourbon-Leftley & another NNO*, Brand JA set out the legal principles governing tacit terms as follows:
>
> '[19] ... [A] tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. …. [20] In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term ….''

[13] (2010) 31 ILJ 885 (SCA) at para 21.

The Court concluded[14] with specific reference the often quoted dictum of Scrutton LJ in *Reigate v Union Manufacturing Co*[15] where that learned Judge said that it can certainly be said that a tacit term:

> '…. is necessary in the business sense to give efficacy to the contract; that is ... it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?' they would have both replied: "Of course so-and-so. We did not trouble to say that; it is too clear."

[40] Of course, the tacit term must be a necessary one.[16] Also, the tacit term must be susceptible to being clearly formulated, although the formulation need not be concise.[17] As was said in *Commissioner for the South African Revenue Service v Bosch and Another*[18]:

> '… If a party contends for a tacit term it is incumbent on them to formulate that term so as to give effect to what they say should be imputed to the contracting parties ….'

[41] The application of the above principles by the Labour Court, in accepting that tacit rules, policies or even employment terms exist, is not unprecedented. In *Oranjevis (Pty) Ltd v CCMA and Others*[19] the issue concerned an obligation on an employee to work night shift. The Court considered testimony by the employer's personnel manager that during the course of the interviews with the employee, that employee had been informed that he would have to work night shifts in accordance with standard practice in the fishing industry, and that most of the employees at the factory were required to work night shifts. Even though the Court was satisfied that there actually existed an express term to work night shift, the Court went further and said:[20]

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[14] Id at para 29. See also *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* [2011] 3 All SA 535 (SCA) at paras 13, 14 and 17.
[15] [1918] 1 KB 592 (CA).
[16] See *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] 3 All SA 561 (GJ) at para 30.
[17] *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* [2014] 4 All SA 12 (SCA) at para 27.
[18] [2015] 1 All SA 1 (SCA) at para 26.
[19] [2005] 1 BLLR 62 (LC).
[20] Id at para 22.

> '…. I am also of the view that the second respondent misdirected himself by failing to consider whether or not an obligation to work night shifts had become a tacit term arising from the third respondent's conduct subsequent to his commencing employment. ….'

Having accepted the existence of a misdirection by the arbitrator, the Court further said:[21]

> '…. on the evidence presented, it is apparent that the third respondent at the very least tacitly accepted the obligation to work night shifts by his conduct. It was only at a later stage when he was unable to resolve the issue regarding compensation that he began to profess that he had no obligation to work night shifts in terms of his written contract of employment. ….'

The Court concluded:[22]

> 'In the final analysis, the second respondent's conclusion that in the absence of an express term to work night shifts, the third respondent's "inability for health reasons to work night shift after 2 August 2001 is therefore not the issue" is a failure on his part to properly determine the true nature of the duties owed by the third respondent to the applicant, and as such amounted to a misdirection. Besides concluding mistakenly that there was no express term, the second respondent neglected to consider whether any duty had arisen in terms of a tacit or implied term ….'

[42] The judgment in *Samson v CCMA and Others*[23] dealt with a situation where the issue was the existence of a practice in terms of which decisions made by chairpersons of disciplinary enquiries in that employer, would be reviewed by the employer's corporate affairs department. The employer presented evidence of such a practice, its application, and that it was a common occurrence. It was said the policy was "well-known'. The Court held:[24]

[21] Id at para 23.
[22] Id at para 25.
[23] [2009] 11 BLLR 1119 (LC).
[24] Id at para 11.

> '…. The commissioner found that it was practice for the executive vice-president: corporate affairs to review the disciplinary decisions of chairpersons of disciplinary enquiries and that it was not prohibited by the respondent's disciplinary procedure. Given the evidence before him, and in particular the applicant's failure to dispute Killian's evidence in this regard (the debate in the arbitration proceedings was more narrowly based on whether this practice was actually written into the company's policies), the commissioner's conclusion that the evidence established the existence of a practice to the effect claimed by the company cannot be impugned. ….'

[43] A final reference in this regard is to *Harmony Gold Mining Co Ltd (Target Mine) v National Union of Mineworkers and Others*[25] where the Court considered similar factors such as undisputed evidence, and what was common practice on a day to basis specifically applied, in accepting the existence of a tacit term of employment.

[44] Considering the above principles, the question that the third respondent needed to ask was whether there existed a practice, which had become a rule, that the person removing the ECD box had to record it on the control list, even if this rule was not written down. In my view, there can be little doubt, on the evidence, that there was a rule constituted by practice that the person removing the ECD box from the ECD machine has to record it on the control lost. This is an inference clearly established from the evidence of the applicant's witnesses, and what is surely common and business sense. It is a rule capable of simple formulation, being that if you remove the ECD box, record it on the list and make sure it is locked in the strong room. I am quite sure that if Tshabalala or any one of the applicant's ticket sales agents were asked, if not for these proceedings, what they had to do when they removed the ECD box from the ECD machine, they would answer that it must be recorded on the control list and locked in the strong room. It is an answer, in terms of the above authorities, that calls for saying: 'We did not trouble to say that; it is too clear ….'.

[45] There was quite some evidence led in the arbitration about the applicant's cash handling policies, which in reality had nothing to do with the ECD boxes.

[25] (2012) 33 ILJ 2609 (LC) at para 28.

This happened because the third respondent made it clear in the arbitration that a written policy was an imperative to him. The applicant, and in particular Soko in his testimony, valiantly tried to panel beat its discovered written policies on cash handling, into fitting as applying to dealing with ECD boxes as well, in my view with little success. The simple truth is that it was clear that these policies have nothing to do with handling ECD boxes. All of this evidence, in the end, has little value, and was never necessary, save for one provision that requires that money bag numbers must also be written on the control list. In my view, it was undeniable that there was no written policy or rule dealing with the handling of the ECD box *per se*. But that did not matter to the proper question to be answered.

[46] In summary, the third respondent's conclusion that in the absence of a written rule or policy, there rested no obligation on Tshabalala in terms of a rule to record the ECD box on the control list is not only a gross irregularity, but an entirely unreasonable outcome. The only reasonable outcome has to be that such a rule existed, and Tshabalala had that obligation.

[47] The third respondent also adopted the inexplicable approach that Tshabalala needed training in order to properly fulfil his duties relating to the ECD boxes. This is entirely at odds with the real situation. Tshabalala was working as ticket sales agent for some four years, and had in fact formally acted as senior ticket sales agent, on his own version, for several months and ending as late as 23 January 2012. In fact, and when the events in this matter arose, Tshabalala was actually still fulfilling the functions of senior ticket sales agent. What kind of training he thus may have needed is unclear. In any event, I find it puzzling to suggest that a person directly dealing with ECD boxes on a day to day basis for four years, needs to be trained to record the ECD box when removing it from a machine on the control list, and then safely storing it. Finally, Rangwaga testified that everyone who worked with ECD, including ticket sales agents, where trained. This evidence was confirmed by Mosandiwa. Therefore, the reasoning of the third respondent in this respect is entirely irregular, without foundation, and unsustainable.

[48] Accordingly, it is my conclusion that the finding of the third respondent that there was no rule in existence that the ECD box had to be listed on the control

list once removed from the ECD machine, by the person removing it, is unsustainable and constitutes a gross irregularity. Further, and considering the discussion above, the only reasonable outcome in this instance has to be that Tshabalala, having been instructed to remove the ECD box from the ECD machine and having done so, knew he had to, and should have, recorded the ECD box on the control list. His failure to do so, on the evidence, and in the absence of any explanation for not doing so, constitutes gross negligence.

[49] The next question then is whether there is a nexus between ECD box 03849 not being recorded on the control list, and it ultimately being lost. The third respondent answered the question in the negative, finding that anything could have happened to the ECD box, for the reasons I have already referred to above.

[50] Before specifically dealing with this reasoning of the third respondent, some probabilities require amplification. On his own version, Tshabalala placed the ECD box in the strong room, along with all the other ECD boxes. The fact that Tshabalala put the ECD box in the strong room was confirmed in evidence by Rangwaga. The simple question then must surely be why would the only box that is missing from the strong room be the one not listed? This in itself indicates a nexus between the fact that the ECD box was not listed and that it disappeared. Rangwaga testified that there was only one key for the strong room and this was kept by Tshabalala, and when the key was stored, it was put away in the office she had with Tshalabala. Simply put, there was no evidence of anyone else having this key. And finally, the only person who, on the evidence, could be shown as having had actual contact with the missing ECD box was Tshabalala. All these factors being considered, there would be a duty on Tshabalala to provide an explanation as to what could possibly have happened to the ECD box, but he simply pleaded ignorance. This counts heavily against him.

[51] In *SA Municipal Workers Union on behalf of Damens v Breede Valley Municipality and Others*[26] the Court held that it was not unreasonable for the arbitrator to expect an explanation from an employee in the case of a

[26] (2014) 35 ILJ 2018 (LC) at para 13.

dishonesty charge as to how the same constellation of initials appeared on two separate documents completed on different occasions. But specifically in point is the judgment in *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[27], which concerned a case of the disappearance of a pallet from the truck the employee was an assistant on. The employer sought to hold the employee responsible for this disappearance, contending the conduct of the employee in failing to explain the missing pallet was dishonest. Of comparison to the matter now before me, the Court in *Aluminium City* dealt as follows with the findings of the arbitrator:[28]

> 'It is clear that the commissioner did not appreciate this shifting of onus and gave Khumalo the benefit of the doubt as a result of what he termed the 'necessary link' not being established. ….
>
> The fourth respondent did not give a version as to what happened to the eighteenth pallet. His defence was a bare denial of any involvement in the theft. He could not deny that 18 pallets were on the truck. His version was only that he saw 17 pallets being off loaded. In a case where the employer has established on clear evidence that 18 pallets left the premises on a truck in which the fourth respondent was an assistant and one is found to be missing, there is a clear case of wrongdoing. The employer is entitled to the explanation from the employee. The failure to explain or an untruthful explanation will not discharge the burden resting on the employee.'

The Court concluded:[29]

> 'The commissioner failed to appreciate the shifting of onus. Had he applied his mind properly and assessed the evidence as a whole, he would have come to the conclusion that Mr Khumalo had to give an explanation for the disappearance of one pallet. ….'

[52] I followed a similar approach in *National Union of Mineworkers and another v Commission for Conciliation, Mediation and Arbitration and Others*[30] and said:

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[27] (2006) 27 ILJ 2567 (LC).
[28] Id at paras 21 and 23.
[29] Id at para 25.
[30] (2013) 34 ILJ 945 (LC) at para 41.

> '… the third respondent had at least made out a prima facie case. That meant that there was a duty on the second applicant to advance and provide a reasonable alternative explanation. His failure to do so in my view counts heavily against him. … '

[53] Turning then to the actual reasoning of the third respondent, I will firstly deal with the finding of the third respondent that Tshabalala was not the only one that handled the ECD boxes on 14 February 2014. With respect to the third respondent, that is the wrong question. The right question was whether there was any evidence of anyone else handling ECD box 03849. There was no such evidence. The evidence was that it was only Tshabalala who handled such ECD box. Even the third respondent appears doubtful in his own reasoning, starting his finding with 'maybe' Tshabalala was not the only one handling the ECD boxes. The third respondent elevated speculation and conjecture to a conclusion purportedly based on the facts. This is grossly irregular, and there is no substance in this reasoning.

[54] The next part of the reasoning of the third respondent related to the issue of the collection of the money by the SBV guards on 15 February 2012. In simple terms, the view of the third respondent was that because one guard did not sign the visitors register and there was an issue with the time on the scanner, anything could have happened to the ECD box. This reasoning is simply not rational, or founded on the actual evidence. It was never in dispute that what was collected by the SBV guards on 15 February 2012 was exactly what they banked. It was never suggested the SBV guards took the missing ECD box. In fact, these guards recorded all the money bags and boxes they collected in terms of the prescribed process. ECD box 03849 was not there when they did the collection. There was no evidence to gainsay this, as Tshabalala testified that he was not there when the handover was done on 15 February 2012.

[55] It was specifically explained to the third respondent by Matenchi, the SBV guard that testified, that the scanner time was wrong. The third respondent rejects this explanation because of what he calls 'insurance purposes' of SBV, a conclusion he arrived at of his own accord. The rejection of this evidence was however entirely irrational considering direct and uncontradicted

testimony by Matenchi as to the actual collection time, which was contractually agreed to be in the mornings (between 08h30 and 10h00), and not the afternoon. Mabena testified that SBV normally arrives between 09h00 and 09h30. Even Tshabalala himself testified as to a collection time between 09h00 and 10h00. All this could only mean the scanner time is wrong. Rangwaga also testified that she reported the wrong scanner time, referring to an example when the scanner time read 23h33, where the ticket offices actually closes at 21h00. In addition, the purpose of the scanner, as explained, is to record the money bags collected, and issue a receipt. That was indeed done in this case, and properly so. In the end, the scanner clearly had the wrong time. But this issue of the incorrect time on the scanner was simply of no moment, and entirely irrelevant in deciding this matter.

[56] It is true that one of the two SBV guards did not sign the visitors register. But Matenchi did. Logically, and by signing the register, SBV announce their presence to collect the money bags, which was done. In short, the register was indeed completed and signed when the SBV guards did the collection. What can possibly be the issue with both guards not signing it? In any event, the rule relating to the signing of the visitors register by CIT personnel (SBV) just says the register must be signed when they attend, and does not say it must be signed by each and every guard, forming part of the collection team. How the third respondent can then elevate one SBV guard not singing the register (despite his colleague signing) to a conclusion that anyone can thus enter into and out of the strong room, is beyond comprehension. There was no suggestion, in any event, that there was anyone else there, at the time, who could have access to the strong room. There was no evidence of any other visitors. But, and even worse still, the undisputed evidence by Matenchi was that the SBV personnel could only access the premises with a pre-approved password, which is verified by the staff at the premises (who are also given it) before they are allowed to enter. It is simply not so that ‘anyone’ can enter. The third respondent was doing nothing else but speculating, and in doing so, ignored the evidence.

[57] Considered overall, the third respondent’s approach was tantamount to that of proof of misconduct beyond reasonable doubt. That is a flawed approach. What the third respondent had to decide was whether the existence of the

misconduct was the most natural, plausible and logical inference out of a number of possible inferences. As I said in *National Union of Mineworkers*[31] :

> '…. In *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*, it was held that the inference drawn from the evidence just has to be 'the most natural or acceptable inference', and not the only inference. In *Bates & Lloyd Aviation (Pty) Ltd & another v Aviation Insurance Co* it was held as follows:
> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis *which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable*).' (Emphasis added.)
>
> The *locus classicus* on this issue is the judgment in *Govan v Skidmore* where the court held that it was trite law that 'in general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt, so that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.'

In simple terms, what the third respondent had to do was that as enunciated by the Court in *Food and Allied Workers Union and others v Amalgamated Beverage Industries Ltd*[32], as follows:

> 'The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A))…..'

[58] I am thus satisfied that on the probabilities, properly considered on the basis as set out above, the third respondent's reasoning as to why there was no nexus between the loss of the ECD box, and Tshabalala not listing it, is unsustainable. I am equally satisfied that it is justified to hold Tshabalala

[31] (*supra*) at paras 36 – 37.
[32] (1994) 15 ILJ 1057 (LAC) at 1064B-D.

accountable for the lost ECD box. After all, he was the one that removed it, and having removed it, never recorded it. He was also responsible to ensure that it was safely stored until collected, and he failed in this regard. If he placed it in the strong room, as he suggested on his own version, then there certainly was a duty on him to provide a proper explanation as to what may have happened to it, which was never forthcoming. This establishes a sufficient and proper nexus between the failures of Tshabalala, and the loss of the ECD box.

[59] As I have already touched on above, there was a fair bit of evidence about the suspicious conduct of Tshabalala on 14 February 2012. I do not believe there is any value in this evidence. The only purpose this evidence could serve is to establish that Tshabalala was involved in misappropriating the ECD box, but he was never charged, nor dismissed, for that. The third respondent was clearly influenced by this, being critical of the applicant for not providing proper evidence in support of an allegation that Tshabalala 'took' the ECD box. However, the third respondent should not have considered any of this evidence and should have excluded it from any consideration, in deciding whether Tshabalala actually committed the misconduct for he was charged and then dismissed. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[33] the Court said:

> 'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. ….'

Applying the above *ratio* in *Fidelity Cash Management*, the Court in *Rennies Distribution Services (Pty) Ltd v Bierman NO and Others*[34] held:

> '….. I am of the view that the commissioner's conclusion that it is unfair to find an employee guilty of dishonesty when he was never charged with dishonesty, is not unreasonable …. where an employer does not charge an employee with

[33] (2008) 29 *ILJ* 964 (LAC) at para 32. See also *Harding v Petzetakis Africa (Pty) Ltd* [2012] 4 BLLR 361 (LC) para 67; *Surgical Innovations (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 32510 (LC) at para 55.
[34] (2008) 29 ILJ 3021 (LC) at para 15.

> dishonesty it cannot seek to introduce a new charge or a different charge at the arbitration hearing. …. There is also clear authority to the effect that employers cannot justify a dismissal on grounds other than those which formed part of the initial decision to dismiss an employee. ….'

[60] Therefore, and as I informed the parties in Court, I simply do not consider the evidence about the suspicious conduct of Tshabalala on 14 February 2012 to be of any relevance in deciding whether he was grossly negligent in not listing the ECD box on the container control list and not properly safeguarding the ECD box once removed from the ECD machine. The absence of a misappropriation or theft charge against Tshabalala destines this evidence to the scrap heap of irrelevance. I shall therefor pay no further regard to this evidence, in deciding whether the allegations of misconduct against Tshabalala, for which he was dismissed, have substance.

[61] This brings me to the final reason relied on by the third respondent, being the PRASA report. This report relates to an investigation conducted by PRASA as a result of the loss of the money in this case. In terms of this report, criticism is dispensed at the ticket office where Tshabalala was working, in that the cameras inside the ticket office were not working, ECD boxes were not kept safe inside the ticket office as there was no strong safe to place them in, and writing the ECD box on the control list does not prevent a person taking the box. This report was dealt with in the evidence. Soko testified that he distanced himself from this report and it was not correct. Soko in fact said that the person who made the report should come and testify as to his finding. There is other corroboration to the effect that this report is not correct. Firstly, Rangwaga, who would know, testified that there were never any cameras in the ticket office, and these were only installed a month before she testified at the arbitration. Secondly, as Rangwaga confirmed, there was a strong room in which the ECD boxed were locked, even though it was not a safe *per se*. There was in any event never any testimony by anyone who conducted the PRASA investigation as to what the investigation giving rise to the report entailed and how the conclusions therein were arrived at. This report, in my view, has little value, and the third respondent attached undue weight to it, especially considering the actual testimony presented to him in the arbitration.

[62] It is thus my conclusion that the third respondent's determination that Tsahbalala committed no misconduct is not only grossly irregular, but equally not a reasonable outcome. In my view, the only reasonable outcome in this matter was that Tshbalala in fact committed two counts of misconduct in the form of gross negligence, the first being that he did not record the ECD box on the control list when removing it, and the second being that he did not take reasonable steps to safeguard it. This created the opportunity for the ECD box, and with it some R110 000.00, to be misappropriated, which it was.

[63] As to the third charge of dereliction of duty based on Tshabalala not ensuring that there was a handover of cash to the SBV guards, the third respondent made no finding, presumably because he accepted there was no misconduct on the first two charges which would in effect dispose of the third charge as well. Since I hold the view that Tshabalala in fact committed misconduct with regard to the first two charges, it is necessary to shortly deal with the third charge. I do not believe this charge was proven by the applicant, because the applicant's own evidence was that it is not the duty of Tshabalala to do the handover of money to SBV, and when the handover in this instance took place, it was not done by Tshabalala but by another employee, Maria. I will therefore not consider this charge any further, and will confine my further reasoning to the two counts of gross negligence, being the misconduct indeed committed by Tshabalala.

[64] Considering the issue of a reasonable outcome, the enquiry does not end with Tshabalala having been found to have committed the misconduct. Despite the third respondent not having considered this, obviously because he found there was no misconduct, I am now compelled to consider whether dismissal was an appropriate sanction for the misconduct. This entails deciding whether what the applicant did in dismissing Tshabalala was fair. Navsa AJ in Sidumo said:[35] '…. in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.' In

[35] Id at para 79. See also the *dictum* by Ncgobo J at para 178.

specifically considering this *dictum* of Navsa AJ, Davis JA in *Wasteman Group v SA Municipal Workers Union and Others*[36] said:

> 'These dicta appear to be indicative of the following: The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner. ….'

[65] In deciding whether the decision to dismiss by the applicant was fair, the 'totality of circumstances' must be considered.[37] This 'totality of circumstances' include the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether progressive discipline would be appropriate, the effect of dismissal on the employee, the employee's service record, the issue of the nature of the misconduct, any breakdown of the trust relationship, the existence of dishonesty, the existence of genuine remorse, the job function and the employer's disciplinary code and procedure.[38]

[66] The misconduct *in casu* is serious, in that it constitutes gross negligence. Gross negligence means, as said in *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*[39]:

> '…. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness

[36] (2012) 33 ILJ 2054 (LAC) at 2057G-I. See also *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others* (2010) 31 ILJ 2475 (LC) at para 19.
[37] See the dictum of Navsa AJ in Sidumo (*supra*) at para 78. See also *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Fidelity Cash Management Service (supra)* at para 94.
[38] See *Sidumo* (*supra*) at paras 116 – 117; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.
[39] 2003 (2) SA 473 (SCA) at para 7.

> in the wide sense) depending on the circumstances. …. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence …. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross …. It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care ….'

In my view, the conduct of Tshabalala in not listing the ECD box when removing it from the ECD machine, not taking reasonable steps to safeguard the box once he removed it, and not providing any explanation as to what may have happened to the ECD box where he was the last one to handle it, shows a obtuseness of mind and a total failure to take care. It is certainly an extreme departure from the norm.

[67] Gross negligence is misconduct where dismissal would normally be justified. In *Nampak Corrugated Wadeville v Khoza*[40] the employee party was charged and dismissed for gross negligence in that he had failed to take proper care of equipment for which he was responsible. The Industrial Court found that the employee was negligent but could not find gross negligence to exist. The LAC disagreed with the Industrial Court and held:

> '…The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the Industrial Court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.'

[68] I consider the same reasoning to be applicable in the current proceedings, especially in the absence of any proper explanation by Tshabalala for not

[40] (1999) 20 ILJ 578 (LAC) at para 35.

listing the ECD box when removing it from the machine, and as to what could have happened to the missing ECD box.

[69] Having regard to the further considerations referred to above, Tshabalala occupied a position of trust, which he failed in.[41] The following *dictum* in *Miyambo v CCMA and Others*[42] is also particularly apposite, where it was held:

> 'It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust...'

[70] I also consider the following factors in concluding that the dismissal of Tshabalala was justified: (1) there was clear evidence of a break down in the trust relationship; (2) he showed no remorse for his failures; (3) he tried to disingenuously distance himself from a clear obligation that rested on him by denying the existence of a clear rule; and (4) the applicant suffered a significant loss. Whilst it is so that Tshabalala has relatively long service and an unblemished disciplinary record, this cannot detract from the fact that he earned his dismissal. The following *dictum* from the judgment in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[43] remains a valid consideration *in casu*, where the Court said:

> 'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. ….'

[71] In summary, I therefore conclude that the findings of the third respondent that Tshabalala committed no misconduct because there did not exist any rule, and

[41] See *Theewaterskloof (supra)* at para 23*; Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC) at para.7.
[42] (2010) 31 ILJ 2031 (LAC) at para 13.
[43] (2000) 21 *ILJ* 1051 (LAC) at para 25.

that there was not a sufficient nexus between the conduct of Tshabalala and the loss of the ECD box, constitute gross irregularities. Was it not for the existence of these irregularities, the third respondent simply could not have reasonably arrived at the conclusions that he did. I say this because once these irregularities are taken out of the equation, then the only reasonable outcome based on the evidence and relevant legal principle, as a whole, has to be that Tshabalala was indeed guilty of two counts of gross negligence, and that the applicant's decision to dismiss him (based on a consideration of the totality of circumstances) was fair. Any conclusion to the contrary is reviewable.

Conclusion

[72] Therefore, and based on the reasons set out above, I conclude that the third respondent's award cannot be sustained, and falls to be reviewed and set aside.

[73] Having reviewed and set aside the award of the third respondent, I see no reason to remit this matter back to the second respondent again for determination *de novo* before another arbitrator. As stated above, the factual matrix in this matter was fully established by the transcript and documents, and there is simply no need to go through the whole exercise of arbitration again. There is simply no reason why I cannot finally determine this matter, now, once and for all.

[74] I consider that the misconduct and dismissal dates back to 2012. Considering the essential requirement of expedition in employment law[44], it is unpalatable to have all of this start over and be considered again, in 2015, if this matter is indeed remitted back to the second respondent. I, therefore, intend to substitute the arbitration award of the third respondent with an award that the individual first respondent's (Tshabalala) dismissal was substantively fair.

[75] This then only leaves the issue of costs. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue

[44] See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) at para 42; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 *ILJ* 2861 (CC) at para 76.

of costs. Even though the applicant was successful, I do not intend to burden the first respondent with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

Order

[76] In the premises, I make the following order:

1. The applicant's review application is granted.

2. The arbitration award of the third respondent, being arbitrator David Dibakwane, which is dated 2 February 2013 and issued under case number GATW 9074 – 12, is reviewed and set aside.

3. The arbitration award is substituted and replaced with an order that the dismissal of the individual first respondent (J Tshabalala) was substantively fair.

4. There is no order as to costs.

_____

S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Ms D Norton of Mkhabela Huntley Adekeye Inc Attorneys
For the First Respondent:	Advocate E Mphahelele
Instructed by:	Dzanibe Qina Sekhabisa Attorneys