IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JA12/08

In the matter between:

THE FOSCHINI GROUP **Appellant**

and

MAIDI MABEL & 4 OTHERS **First to Fifth Respondents**

ERIC LOUW **Sixth Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Seventh Respondent**

JUDGMENT

<u>REVELAS AJA</u>

[1] This is an appeal and a cross-appeal against a judgment of the Labour Court in review proceedings. The first to fifth respondents ('the respondents') were suspended by the appellant on 21 September 1999 and charged with 'failure to secure assets of the company' after substantial stock losses were detected at the clothing store where they had been employed. They did not attend the disciplinary enquiry to be held into the charges which were set down for 15 and 16 October 1999, and it proceeded in their absence. On 20 October 1999 each of the respondents was notified in writing that they were found guilty and dismissed for the following: 'Gross negligence in that you failed to take proper care of company property under your

control resulting in a financial loss of R 207 000 as well as an irretrievable breakdown in the trust relationship. The fact that you allowed stock losses to reach a level in excess of 28% also indicated a total lack of commitment towards the company. No notice pay due to extent of loss to the company'

[2] The following day the respondents referred a dispute about the alleged unfairness of their dismissals on procedural and substantive grounds to the second respondent, the Commission for Conciliation Mediation and Arbitration ('the CCMA'). This immediate recourse to the remedies under the Labour Relations Act 66 of 1995 ('the LRA') pre-empted the internal appeal offered to the respondents by the appellant during the unsuccessful attempt by the parties to conciliate their dispute on 19 November 1999 at the CCMA. When the matter was first set down for arbitration, the appellant had not received the notice of set down for the arbitration, which was proceeded with in its absence and decided in favour of the respondents. The appellant then successfully applied for the award to be rescinded.

[3] The matter was set down for arbitration a second time on 15 December 2000, when it proceeded before Commissioner Roopa, who issued an award to the effect that the dismissals were fair. The respondents then applied to the Labour Court to review the award of Commissioner Roopa. The review succeeded on the sole ground that the CCMA was unable to furnish a full record of the arbitration proceedings.

[4] The matter was then set down for arbitration a third time. It was postponed once to allow the appellant to obtain legal representation. It then proceeded on 17 June 2003 and 8 August 2003 before the sixth respondent ('the arbitrator') and on 8 September 2003 the arbitrator issued an award to the effect that the dismissals were both procedurally and substantively fair.

[5] The respondents applied to the court *a quo* to review the arbitrator's decision. They also sought at a later stage, to review the arbitrator's ruling granting the postponement and allowing legal representation. The court *a quo* declined to entertain the latter review, but ordered on 30 August 2006 that the arbitrator's award be set aside insofar as it related both to the substantive fairness of the dismissal of each of the respondents as well as to the procedural fairness of the dismissal of the first respondent.

[6] The appeal, with leave having been granted on petition to this court, is against the judgment of the court *a* quo granted in the review application in respect of the third arbitration award, dated 8 September 2003. The learned judge in the court *a quo,* having set aside the award, declined to substitute it with an order for compensation or reinstatement and remitted the matter back to the CCMA, to be arbitrated afresh (for a fourth time) before a different arbitrator. The latter order gave rise to the respondents' cross-appeal on the basis that, instead of remitting

the matter to the CCMA for another hearing, the award of the arbitrator should have been substituted with an award for the reinstatement of the respondents.

[7] The delay of more than a decade between the date of dismissal and the hearing of this appeal is a serious indictment against the system of expedited adjudication aspired for in the LRA and by those involved in labour dispute resolution. The causes for the delay are not limited to the fact that there were three arbitration hearings. For instance, the heads of argument for both parties in respect of this appeal were filed more than a year ago. There also seems to have been inordinate delays in finalising the review applications. Regrettably, this is not an isolated incident. Even the Constitutional Court expressed concern in this regard in *Equity Aviation Services (pty) Ltd v CCMA and Others*[1] where Nkabinde J had cause to observe that the system 'operates far from expeditiously'.

[8] The facts and events which gave rise to the dismissal of the respondents commenced after the appellant carried out one of its biannual financial stock-takes. This particular official financial stock-takes was conducted on 11 August 1999. An investigation followed which, according to the appellant, exposed severe shrinkage, in excess of 28%, of the stock in the store.

[9] The staff compliment of this store comprised of the five respondents only, and relying on the principle of *'collective misconduct'*, each of the respondents were charged as mentioned above in the first paragraph, and notified them that their

[1] (2008) 29 ILJ 2507 (CC) at 2529 D-E

attendance was required at a disciplinary hearing to be held on 15 October 1999. It is common cause that the respondents and their union representative appeared on the day scheduled for the enquiry, but left before its commencement and the respondents were consequently dismissed in their absence. The reason for their absence at the enquiry was not common cause and will be dealt with further on in this judgment as it is convenient to deal with the substantive review first.

SUBSTANTIVE FAIRNESS

[10] Mr Wilson, who acted as the initiator at the disciplinary enquiry, was also the appellant's only witness with regard to the stock-losses incurred at the Mabopane store where the respondents were employed. As the appellant's national operations administrative manager, he was instructed by his immediate supervisor, the operations director, to visit the store in Mabopane to investigate the shrinkage of 1553 items in the six months preceding 11 August 1999.

[11] Mr Wilson testified that he arrived at the Mabopane store on 7 September 1999, almost a month after the biannual stock take. On arrival, he explained the purpose of his visit to the first respondent. He told her that he had come to investigate the massive stock losses at the store under her charge. He interviewed each staff member (i.e. all five the respondents), seeking an explanation of how the loss could have occurred.

[12] The explanation given by the staff was that the store was broken into the previous night. Although a few clothing hangers were discovered in the stores ceiling, there was no sign of forced entry and this was verified by the alarm records provided by the security company responsible for the store. According to the security company's access control sheets, access could have been gained through the store roof. Since Mr Wilson's investigation of this possibility revealed that the suspension of the ceiling was too weak to sustain the weight of a person, that possibility was discounted. The first respondent also never reported the break-in to the appellant's head office.

[13] The issue of the break-in and the later burglary on 18 September 1999 was entirely irrelevant because they occurred almost a month after the stock-take when the shrinkage was first detected. Mr Wilson initially believed the discrepancy to be attributable to an administrative error and was also told by the staff that they were concerned about the store's computer systems that had gone down regularly and as a result the stock database or the "FINSAS" could have been corrupted and could therefore be inaccurate.

[14] According to Mr Wilson's explanation, the shrinkage percentage in question was calculated as follows: The official records reflected that a total of 2801 items had been counted in the store on 11 August 1999 (the biannual stock-take date). The appellant's computer system which is operated to assist it in stock control and records the "theoretical stock holding" for each store (FINSAS), showed that on

that day, that theoretically there should have been 4354 items in the store. The discrepancy of 1553 items therefore represented a 28,58% loss of stock, which it was valued at R 207 000, 00.

[15] Mr Wilson explained that the appellant's business shrinkage percentage of 2% is considered undesirable but nonetheless acceptable, probably because its occurrence is a reality. A shrinkage rate however of over 3% Mr Wilson said, "*set off alarm bells*". The stock loss at the rate of more than 28% therefore necessitated a visit to the Mabopane store by Mr Wilson.

[16] At the arbitration hearing, Mr Wilson explained at length the procedure he followed in his investigations, with reference to documents, in determining the shrinkage. He also explained how the FINSAS system worked. Through its FINSAS system, the appellant was able to control approximately three billion Rands worth of stock *per annum* He also explained the concept of shrinkage and its impact on the appellant's business and the measures adopted by the appellant to combat this scourge. He said that one of these measures was to conduct stock-takes. Official financial stock-takes were conducted twice a year. Each month two full stock counts are also conducted by the staff members in the stores. In the Mabopane store, the first respondent and the other staff members (the remaining respondents) were responsible for stock and they all received ongoing training in this regard.

[17] The following evidence of Mr Wilson is important for purposes of understanding how the appellant's stock control operated. All new stock arrivals are recorded on the FINSAS system together with subsequent sales, customer returns or other stock transactions which cause stock to diminish. The computer at the head office regularly dials into the computer kept in the store, to receive this information. In other words, the movement of the stock or clothing items is recorded in the head office computer system. This dialing in of the information is termed "*polling*" and means the delivery of information about stock and sales from the store to head office. The information is then fed into the various office control systems.

[18] If the store's information is not retrieved in this way on a particular day, it is stored at branch level and "*goes down"* at the next opportunity. Therefore, at all times, there was a constant record of what the store's 'theoretical stock on hand' should be. At the end of a physical stock take, the area manager is able to compare the physical count with the theoretical stockholding on FINSAS to obtain an unofficial result of what the store has lost. Once a stock-take had been conducted the area manager would reconcile the count, seal the bin cards in an envelope and then courier it to the stock department, situated in Parow. Mr Wilson pointed out that tampering with the bin cards was not possible. These stock take figures would then be verified by the appellant's head office and once the results were audited and issued, they were communicated to him.

[19] During his investigations, Mr Wilson reviewed the stock loss control sheets completed over the period prior to the official stock take which revealed a trend of stock losses in the store. Two previous security reports confirmed that there was an actual stock loss problem at this store. Shrinkage trends in other stores in the same shopping centre were also canvassed by him and they did not reveal similar stock losses. A scrutiny of the store's transaction report aroused his suspicions because of the abnormally high amount of transactions involving a high fraud risk was reflected. He also called the appellant's IT department and enquired whether all computer systems were in good working order during the relevant period. He was assured that since February 1999 no "*out of line*" situations had occurred.

[20] Even the sales audit department, tasked with identifying discrepancies in systems, was unable to identify a problem there. No discrepancies were found in respect of the banking daily takings. This Mr Wilson confirmed with the treasury and bank matching department. The stock department confirmed that all stock dispatched to the store was accurately captured on the system. Two other area managers were sent to the store to verify the figures, but neither were able to detect any administrative error.

[21] Apart form his oral testimony Mr Wilson also produced certain supporting documents in evidence. The first was a summary of cyclical recorded stock loss results (every six months) of the stores in various areas. For the period 1998 – 2000 the stock loss result reflected a loss for Mabopane which prompted Mr

Wilson's visit. This document also revealed that since the dismissal in question, shrinkage decreased drastically.

[22] The second document was a summary of losses per department for the Mabopane store in the relevant stock take period, reflecting the physical stock take and the bin cards and the theoretical stock in the different departments as kept on the FINSAS data base. A schedule of comparative stock take results for the area which demonstrated that the Mabopane store was different was also considered.

[23] A summary of the daily polled transactions for the store over the stock take period was also produced. This was the document that proved that the final stock figure, as at 11 August 1999, was 4 354 units, which tallies with the departmental loss figure.

[24] Shrinkage across all the store departments was also investigated showing that the problem did not lie there either. The investigations and checks carried out by Mr Wilson led him to conclude that there was no feasible explanation such as a possible administrative error or a burglary existed. In his opinion, the stock loss problem originated in the store itself, and that the store staff who had all been tasked with the responsibility to secure the appellant's assets or stock, had to provide an adequate explanation.

[25] At the conclusion of his investigations Mr Wilson prepared a report setting out his findings excluding administrative fraud or error and advised that the respondents were directly responsible for the stock losses.

[26] The first respondent maintained that the shrinkage at the store was never more than 3% percent. She also disputed that the sole purpose of Mr Wilson's visit to the store was to investigate the so-called burglary the night before. Since she did not inform the head office of the alleged burglary, it is difficult to comprehend why the appellant would have sent Mr Wilson, its operations administration manager, all the way from Parow to investigate a burglary, if the area manager could have done this. Mr Wilson's testimony in any event was that be was not told of the burglary until he arrived in Mabopane to make enquiries.

[27] The arbitrator accepted Mr Wilson's testimony that the stock-loss rate was just more than 28%, and the reason for his recommendation to that all the staff in the store (i.e. the five respondents) were to be held accountable for the stock losses. The arbitrator also observed that the document reflecting the stock-losses, as generated by the appellant's FINSAS system was not disputed by the respondents. Neither was Mr Wilson's evidence that 'the documentary evidence was checked and re-checked' challenged in cross-examination. The arbitrator further accepted 'the extensive comprehensive documentary evidence' given by Mr Wilson of the 'massive stock loss' and rejected the respondents' challenge that the loss was less than 3%. He emphasized in his award that Mr Wilson's intimate knowledge of the

system as the appellant's erstwhile operations manager, placed him in a better position than any of the parties or himself (the arbitrator) to understand and explain the system. Having accepted that there was a stock-loss in excess of 28% in the store, the arbitrator dealt with the question of accountability and why the respondents should collectively be held accountable.

[28] Insofar as substantive fairness is concerned, the court *a quo* in effect upheld the respondents' assertion that the stock losses were not above 3%, by finding that the appellant was unable to prove the existence of massive stock losses, since Mr Wilson's evidence was 'unconvincing' and the report he had prepared and presented at the arbitration hearing was hearsay. The learned judge *a quo* found that the arbitrators award 'had no rational link' to the reasons given for it and that there was insufficient evidence before the arbitrator to arrive at the conclusion he came to. The court *a quo* therefore applied the test for the reviewability of an arbitrator's award as formulated in *Carephone (Pty) Ltd v Marcus NO.*[2] That test has since been substituted by the more stringent test of reasonableness in the decision of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*[3], where Navsa AJ held[4] 'that the better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star. Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

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[2] 1999(3) SA 304 (LAC) being whether there must be a rational objective basis justifying the connection made by the decision-maker between the material properly available to him and the conclusion he eventually arrived at.
[3] (2007) ILJ 2405 (CC)
[4] At paragraph [110]

[29] In *Fidelity Cash Management Services (Pty) Ltd v CCMA*[5] Zondo JP described the difference between the two tests as follows:

'The difference seems to me to be twofold. Firstly, *Carephone* sought to construe s 145 so as to bring it in line with a constitutional imperative at the time which was to the effect that an administrative action had to be justifiable in relation to the reasons given for it, whereas *Sidumo* seeks to construe s 145 so as to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. It seems to me that, even if there may have been a debate under *Carephone* and prior to *Sidumo* on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision.'

[30] In my view, the court *a quo* erred in its reasoning with regard to both the former, as well as the current test for review. There was simply no reasonable or even rational basis upon which the court *a quo* could have rejected Mr Wilson's testimony on the basis of his report being 'unconvincing' and because it constituted hearsay. If one has regard to Mr Wilson's entire testimony, and not only his report, the arbitrator came to a conclusion which is manifestly a decision any reasonable decision-maker could make.

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[5] (2008) 28 ILJ 2405 (LAC) para [102]

[31] The very brief summary of Mr Wilson's testimony in the arbitrator's award and the summary above, demonstrate that Mr Wilson conducted a thorough investigation himself, which preceded and founded his report. The only challenge presented by the respondents to the entire body of Mr Wilson's evidence, was to dispute the actual shrinkage rate, by asserting that it was never above 3 %. No proper evidence to support that assertion was proffered by any of the respondents. In finding that the appellant did not prove its case, the court *a quo* in effect required the criminal law standard of proof to be applied in arbitration hearings and consequently misconceived the nature of such proceedings.

[32] Section 138 of the LRA prescribes the general code of conduct in arbitration proceedings. Subsection (1) thereof, which is the relevant part, reads as follows:

> '(1) the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the matter with **the minimum of legal formalities'** (emphasis added).

[33] In *Pep Stores Pty Ltd v Laka NO and others*[6] the following was said with regard to this section: 'Section 138 of the LRA advocates an arbitration process that is simple, less formalistic and less legalistic with curtailed legal representation'

[6] (1998) 19 ILJ 1534 LC, See also East Rand Gold and Uranium Co Ltd v CCMA and Others (1999) 20 ILJ 2348 (LC).

[34] In *Naraindath v CCMA and Others*[7] Wallis AJ held that in certain appropriate circumstances, an excessive concern for court procedures may constitute reviewable error, and dealt as with the appellant's complaint in that matter, that the arbitrator relied on hearsay evidence and did not apply the criminal standard of proof, as follows:

> "Instead the commissioner appears to have approached the matter in a sensible and practical fashion, which expedited proceedings and brought them to finality sooner than would have been the case if he had been emulating a conventional trial"[8]

[35] In *OK Bazaars (A Division of Shoprite Checkers) and Others*[9], the Labour Court held that an irregularity resulted when criminal law standards were employed in arbitration proceedings in order to decide on the admissibility of confessions and the onus of proof. The rule against the admission of hearsay is no longer an absolute one in our law, by virtue of the provisions of Section 3 of the Law of Evidence Amendment Act 1998.

[36] The implication of the court *a quo's* finding with regard to hearsay in effect required the arbitrator to have heard the evidence of all the persons interviewed by Mr Wilson, as well as all the people who had part in the "polling" process, the capturing and collating of data in the FINSAS system, or the drafting of spread sheets. In this regard it erred. Counsel for the appellant, Mr *Janisch*, gave the apt

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[7] (2000) 21 ILJ 1151 (LC)
[8] At 1164, A-C [42]
[9] (2000) 21 ILJ 1188 (LC) at 1191 [12]

example of matters involving financial irregularities, where the decision makers such as arbitrators of the CCMA, generally rely upon the evidence of a forensic auditor, who was not personally involved in making any of the inputs, but who could analyse, understand and draw conclusions from the data generated by the employer's systems. In *La Consortium and Vending CC t/a LA Enterprises and Others v MTN Service Provider (Pty) Ltd and Others*[10] this approach was also adopted by the Court (Full Bench) required to adjudicate upon the admissibility of electronic data as hearsay. The Court in that matter also pointed out that the margin of error in effecting electronic entries is minimal and will generally be made by employees acting within the scope of their employment, and concluded that 'the fact that more than one person contributed to their existence does not constitute a valid objection to the admission of data messages into evidence and the court affording them 'due weight' "[11]

[37] This practice is clearly acceptable because evidence of this nature is most conveniently and accurately presented by a person who understands the systems and has personal knowledge of how they integrate with the practical operation of the employer's business. The arbitrator concluded that Mr Wilson was such a person. Since he was the appellant's national operations manager, with eight years retail experience, the conclusion reached was reasonable. that the margin of error in effecting electronic entries is minimal and will generally be made by employees acting within the scope of their employment. The Court concluded that

[10] Case No A5014/08, dated 19 August 2009 (SCHC)
[11] At para [19]

‘the fact that more than one person contributed to their existence does not constitute a valid objection to the admission of data messages into evidence and the court affording them ‘due weight’ ’[12]

[38] As Mr Wilson was not personally present during the stock-taking and did not personally generate the stock loss documents which resulted in his investigations, these documents were strictly speaking hearsay, but it was permissible for the arbitrator to have relied on them in conjunction with Mr Wilson’s testimony, provided he was satisfied that the evidence was reliable, which it was. Moreover, his view that the evidence was reliable was imminently reasonable.

[39] There was no suggestion that Mr Wilson fabricated the documents or that he and other employees of the appellant colluded in some conspiracy to rid the appellant of all its the staff in the Mabopane Store. On the other hand, the first respondent’s credibility was viewed questionable by the arbitrator. Her evidence that Mr Wilson’s visit to the store was because of the burglary and that he never mentioned the 28% stock loss, vacillated. She also contradicted herself in respect of police case numbers in relation to the alleged burglary. The arbitrator’s rejection of her evidence was therefore not unreasonable.

[40] The court *a quo* correctly found that the question of whether a burglary had occurred on 6 September 1999 was irrelevant because the stock-take occurred long before that. However, the learned judge lamented that the arbitrator did not

[12] At para [19]

appreciate that he was not called upon to decide on the question of the burglary and "did not understand how to separate those two issues." The comment in my view is not only unwarranted but also factually incorrect. The arbitrator specifically found in his award that the burglaries were irrelevant and seemed to have perfectly understood the reason therefore. Any reasonable commissioner, seeking to determine the matter fairly, expeditiously, and affordably, could have relied upon the evidentiary material which was before him to arrive at the same conclusion. Consequently, the arbitrators' finding that massive stock losses or shrinkage indeed occurred, did not warrant the criticism of the court *a quo.*

[41] Once the arbitrator's finding as to the existence of massive stock losses in the store is found to have satisfied the test of reasonableness, the next question is whether the finding of 'team misconduct' on the part of the respondents and the subsequent sanction of dismissal in respect of each respondent, was a reasonable one.

[42] In determining the collective accountability of the five respondents, the arbitrator considered arbitration awards delivered in similar matters. In particular he relied upon the matter of *Federal Council Retail and Allied Workers v Snip Trading*[13] where Professor Grogan, as arbitrator, was required to determine the substantive fairness of a policy adopted by a general retailer (also an employer with several stores as in the present case), in terms of which all employees at a particular store could be held accountable for stock losses.

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[13] (2007) 7 BLAR 669 (T)

[43] In his award, Professor Grogan accepted that the notion of "collective guilt" was repugnant to the principles of natural justice, and noted that the term "collective misconduct" referred to situations where a number of employees participate for a common purpose, but are then held liable individually. In the context of employees in a small store, who are unable to point to some cause for the stock loss, he held[14]:

> "In my view, the species of misconduct upon which the company relies when it calls members of an entire staff to book for stock loss, although collective in nature, would be better described as **'team misconduct,'**….In the case of **'team misconduct'** the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to prove individual culpability, 'derivative misconduct' (see Chauke's case, supra)[15] or common purpose - the three grounds upon which dismissal for collective misconduct can otherwise be justified. In **'team misconduct'** the employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer".

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[11] At 678 paragraph [32]

[12] Chauke and Others v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC). Here the Labour Appeal Court held that an employer, who suffered continuously under industrial sabotage perpetrated by unidentified employees, was entitled to dismiss all the employees on the shop floor where the damages occurred, on the basis that the employees must have known who the perpetrators were and failed to come forward and identify them.

If employees in a small store are unable to give an explanation for stock losses in that store to the effect that it was beyond their control, the only possible inference is that they are guilty. Consequently he held that the policy was not unfair.[16]

[44] In his award, the arbitrator also referred to the arbitration award in SA *Commercial Catering and Allied Workers Union v Pep Stores,*[17] where the entire staff compliment in a particular store of the respondent in Lady Frere were dismissed after an enquiry into stock losses of 81%. The arbitrator in that matter found that the stock loss figure was so glaring that it could not possibly have escaped the attention and knowledge of every member of the Lady Frere staff. It was further held that it was the responsibility of every staff member to protect the interests of their employer. In the present matter the arbitrator pointed out that the first respondent and the staff (the other respondents) were similarly responsible for stock losses. With reference to the aforesaid cases, the arbitrator concluded that the dismissals were fair on substantive grounds.

[45] The question whether employees, other than managers, such as the second to fifth respondents, should be held accountable (i.e. disciplined and dismissed) for a general stock loss at a store, was pertinently raised by this Court. These respondents did not testify at any stage.

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[13] Snip Trading at 676 paras [26]
[17] (1998) 19 ILJ 939 (CCMA)

[46] According to Professor Grogan in *Snip Trading* the justification for the dismissal of each employee lies in his or her individual culpability for the failure of the group to attain the performance standard set by the employer.[18] This justification is permissible if one accepts that an employer is entitled to introduce strict rules in order to protect its assets. It is often extremely difficult to prove that stock losses are caused by a particular employee. Consequently, it is acceptable for employers to introduce rules into the workplace and employment contracts which, if breached carry the sanction of dismissal, even for a first offence, and even if it is not a criminal offence. 'Unauthorized possession' and 'failure to follow security procedures' were examples given by Professor Grogan of such offences. These rules are reasonable, he reasoned because 'rules are assessed not only in terms of fairness, but also in terms of operational requirements.'[19]

[47] In *Chauke's* case (*supra*)***[20]*** the Labour Appeal Court accepted that this type of matter presents a difficult problem for fair employment practices, and illustrated the problem by posing the following question: "Where misconduct necessitating the disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which inconstably included them? Cameron JA then postulated two lines of justification for a fair dismissal in such circumstances. The first is where an employee, who is part of the group of perpetrators, is under a duty to assist the

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[18] See: Snip Trading at 680 paras [37] - [41]
[19] See: Metro Cash n Carry Ld v Tshehla [1997] 1 BLLR 35 (LAC) at 41 G and Snip Trading at 680, par [40]
[20] At 1447 pars [31] and [33]

employer in bringing the guilty to book. The second is where an employee 'has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is in its essentials is one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment (*Council for Scientific and Industrial Research v Fijen*[21]). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal' The learned judge of appeal further[22] held that this derived justification is wide enough 'to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'

[48] The arbitrator, in concluding that all five employees were fairly dismissed, came to a decision which falls within a range of reasonable outcomes by following legal principles that have been authoritatively dealt with in the matters referred to above.

[49] Mr *Khoza*, for the respondents, did not take issue with these legal principles. He reiterated the argument that the appellant did not prove the existence of a stock loss of 28%. The argument has been canvassed above. In addition, Mr *Khoza* argued that dismissal was too harsh a sanction given the service records of the respondents which ranged from eighteen to three years service. It appears that the respondents colluded to keep from their employer the fact that almost a third of the stock in the Mabopane store disappeared and gave unacceptable explanations

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[21] (1996) 17 ILJ 18 (A) at D-E
[22] At 1447 [33]

for the disappearances. The relationship of trust between them and the appellant clearly has broken down irretrievably. In these circumstances dismissal is the only appropriate sanction. Consequently, the arbitrator's findings as to the substantive fairness of the dismissal ought to have been upheld by the court *a quo*. I proceed now to deal with the question of the procedural review.

THE DISCIPLINARY ENQUIRY AND PROCEDURAL FAIRNESS

[50] The appellant's version as to why the disciplinary hearing took place in the absence of the respondents was as follows: Mr Jan Masemola, the union official who was to represent the respondents at their enquiry on the 15th October 1999 (a Friday) sought a postponement of the enquiry the previous day, in respect of the first respondent, so that she could be heard separately. An agreement was then reached with Mr Masemola, that the enquiry in respect of the first respondent would take place on Saturday 16 October, and that the hearing in respect of the remaining respondents would proceed as scheduled, on Friday 15 October. On this day Mr Masemola and the respondents (including the first respondent), arrived at the enquiry and Mr Masemola requested a postponement of the enquiry, which Mr Le Roux, the chairperson of the enquiry refused, as he was not amenable to a postponement because Mr Wilson had to return to Cape Town the following Monday.

[51] Mr Masemola then demanded that Mr Wilson relinquish his role as initiator at the enquiry and indicated that if Mr Wilson were to remain as the initiator, the respondents would not participate in the hearing. Although Mr Masemola was assured of an opportunity to cross-examine Mr Wilson, the appellant stood firm on its decision for Mr Wilson to remain in the proceedings as the initiator. Mr Masemola persisted in the stance he had adopted. When he learnt that Mr Wilson would continue as initiator, he and the five respondents left the enquiry. The enquiry proceeded in their absence and Mr Wilson led all the evidence before Mr Le Roux.

[52] That same evening, at about 18h00, Mr Le Roux telephonically enquired from Mr Masemola whether the first respondent would attend her hearing scheduled for the following day, as arranged by agreement. Mr Masemola reiterated his objection to Mr Wilson's role as initiator. The following day, when Mr Le Roux attended the appointed venue, neither Mr Masemola nor the first respondent appeared. All five respondents were found guilty as charged and each one of them notified that they were dismissed.

[53] The respondents' version as to these events was presented by the first respondent. The other respondents did not testify. According to the first respondent, Mr Masemola successfully applied for a postponement of the enquiry to 19 October 1999. The postponement was obtained from Mr Le Roux on the grounds that Mr Jabu Motau, the official appointed to represent the respondents, was only

available on19 October and not before that. However, when Mr Motau and the respondents arrived at the appointed venue for the enquiry on 19 October 1999no one was in attendance and they left after an hour. Each one of the respondents was later notified of their dismissal.

[54] The arbitrator made favourable credibility findings in respect of both Mr Le Roux and Mr Wilson because their versions corroborated each other. Their version on this aspect was also fortified by the evidence of Ms Lizette Bester, a former human resources official of the appellant. Her evidence was presented as part of the record of the first arbitration hearing in this matter before Commissioner Roopa, which was held on 15 December 2000. The transcript of her evidence was contained in the appellant's bundle of documents presented as evidence in the third arbitration hearing (the one under consideration in this appeal). She could not testify personally at that hearing because she had since left the country to live in Dubai. For that reason her testimony was allowed as hearsay.

[55] The arbitrator drew an adverse inference against the respondents for not calling either Mr Masemola or Mr Motau, who would have been in the best position to testify on behalf of the respondents, concerning the events surrounding the disciplinary hearing which was held *in absentia*.

[56] Faced with the two conflicting versions regarding the postponement of the enquiry, the learned judge *a quo* seemed to have accepted the evidence of the first

respondent. Although he made no credibility findings with regard to the witnesses either way, and further did not analyse or weigh up the two different versions presented to the arbitrator regarding the postponement, he nevertheless found that 'Clearly, no enquiry was held in respect of the first applicant [respondent]. In the absence of any enquiry by the commissioner, I find that it probably skipped his mind to investigate this carefully, as he failed to do so'.

[57] This criticism of the arbitrator's finding of procedural unfairness is unjustified, and most probably attributable to the learned judge's erroneous understanding that only the second to fifth respondents arrived at the enquiry venue on 15 October 1999. It was common cause between the parties before the arbitrator that all five respondents arrived at the hearing venue on that day. This fact and its significance did not escape the arbitrator. The first respondent, being there on the day in question, associated herself with the approach adopted by Mr Masemola and left the hearing, thereby displaying her attitude toward her own hearing set down for the following day.

[58] On the evidence accepted by the arbitrator, the respondents' refusal to attend the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed their objections on record. It is a trite principle in our law that a party, who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the

outcome of the hearing.[23] In any event, the fact that Mr Wilson was the initiator would not have prevented cross-examination by the respondents' representative and on the evidence accepted by the arbitrator, Mr Masemola was given that assurance.

[59] The arbitrator's finding that the dismissals were also procedurally fair, given all the facts placed before the arbitrator, as in the case of his finding on substantive fairness, is one that a reasonable decision maker could have made, and ought not to have been upset on review. Consequently, the appeal should succeed and there should be no order as to costs.

[60] The order of the court *a quo*, dated 30 August 2006, is altered to read "the application for review is dismissed"

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[23] See Reckitt and Colman SA (pty) Ltd v Chemical Workers Industrial Union and Others (1991) 12 ILJ 806 (LAC) at 813 C-D and Old Mutual Life Assurance Co SA Ltd v Gumbi [2007] 8 BLLR 699 (SCA)

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E REVELAS
ACTING JUDGE OF THE LABOUR APPEAL COURT

DM DAVIS JA: I agree.

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DM DAVIS JA
JUDGE OF THE LABOUR APPEAL COURT

AN JAPPIE JA: I agree.

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AN JAPPIE JA
JUDGE OF THE LABOUR APPEAL COURT

For the appellant: Adv M W Janisch
Instructed by: Perrot Van Niekerk Woodhouse and Matyolo Inc
For the respondent: Mr MW Khoza
Instructed by: Retail and Allied Workers Union

Date of Judgment: 25 March 2010