

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JA 110/97

IN THE MATTER BETWEEN:

LEONARD DINGLER (PTY) LTD

APPELLANT

AND

D.D. NGWENYA

RESPONDENT

JUDGMENT

KROON JA:

- [1] The appellant is a company carrying on business at Boksburg as a manufacturer of tobacco products.
- [2] On 9 August 1988 the respondent commenced employment with the appellant in the capacity of scooter driver.
- [3] Pursuant to alleged incidents that occurred at the appellant's premises on 7 June 1996 the respondent appeared at an internal disciplinary inquiry on 12 June 1996. The charges he faced were theft of company property, viz., bale boards, and breaking same in company time.

[4] At that inquiry, presided over by Mr Vermeulen (a director of the appellant), the respondent was found guilty on both counts as charged. The sanction imposed was dismissal.

[5] On the following day, 13 June 1996, the respondent noted an appeal, as provided for in the appellant's disciplinary code, against both the convictions and the sanction imposed.

[6] On what date the appeal hearing, presided over by Mr Hiemstra, was held does not appear from the record. The decision in the matter, dated 30 June 1996, was transmitted by facsimile to the appellant by Hiemstra on 1 July 1996. It was to the following effect:

- (1) The inquiry proceedings presided over by Vermeulen were fatally flawed by procedural unfairness. That unfairness related to the role played by Vermeulen in the proceedings.
- (2) The appeal hearing had nevertheless to decide whether the respondent's dismissal was substantively fair or unfair, to which end a rehearing of the matter was embarked upon.
- (3) The respondent's guilt on the theft charge was established. The issue of whether the respondent had broken bale boards during company time was regarded as being of a trivial nature which would at most attract the sanction of a warning. No further attention was devoted thereto.

(4) The proper sanction in respect of the conviction on the theft charge was dismissal. However, because of the unfairness that tainted the earlier disciplinary inquiry the dismissal of the respondent with effect from 12 June 1996 was replaced with a dismissal with effect from 30 June 1996 and the rider that the respondent was to be paid his emoluments for the period 12 to 29 June 1996.

[7] After an unsuccessful recourse to a conciliation board the respondent launched proceedings in the industrial court in terms of section 46(9) of the Labour Relations Act, No. 28 of 1956. The relief he sought was an order declaring his dismissal to have been an unfair labour practice, that he be reinstated in his former employment on the same terms and conditions that applied previously, that such reinstatement be with effect from the date of his dismissal and that the appellant pay the costs of suit.

[8] The proceedings, which were opposed by the appellant, concerned the validity of the conviction of the respondent on the charge of theft and the propriety of his dismissal pursuant to that conviction.

[9] The matter was resolved by the industrial court (per GROBBELAAR AM) in favour of the respondent with the following order being issued:

- “1. That the dismissal of the applicant, D D NGWENYA, on the 30th June 1996, did constitute an unfair labour practice;
2. The respondent is hereby ordered to reinstate the applicant in his job or comparable job on terms and conditions no less favourable than those upon which he was employed at the time of his dismissal, should he present himself for work within 7 days of the order;
3. The respondent is also hereby ordered to compensate the applicant in the amount of R6 527-20, calculated as follows:

$4 \text{ months} \times R407-95 @ 16 \times R407-95 = R6\,527-20.$

The said amount is to be paid within 21 days of the order.

4. No order as to costs.”

In the reasons for judgment subsequently furnished by her the additional member explained the making of the order in paragraph 3 as follows: the respondent’s wage at the time of his dismissal was R407,95 per week; he was unemployed for a period of four months until he secured other temporary employment; by reason of the unfair labour practice committed by the appellant it was just and fair that it compensate the respondent for his loss of earnings over the said period, which the additional member equated with 16 weeks.

[10] This appeal seeks the setting aside of the order made by GROBBELAAR AM.

[11] The first aspect to be considered is the appellant’s application for condonation of its non-compliance with certain provisions of the Rules of this Court. The application refers to three aspects:

- (1) the failure timeously to file a power of attorney authorising the appellant’s attorneys to prosecute the appeal;
- (2) what was perceived to be a failure timeously to file the record on appeal;
- (3) what was stated to be a failure to file the notice prosecuting the appeal within 30 days of the notice of the appeal in terms of Rule 22(3)(b) of the industrial court Rules, should this Court find such condonation to be necessary.

[12] That the power of attorney was filed late is clear. Whether the record on appeal was

in fact filed late will be considered below. In regard to the third aspect it should be pointed out that Rule 22(3)(b) of the industrial court has, since July 1997, superseded by Rule 5A(1) of this Court. The subject of both is the time within which an appeal from the industrial court to this Court had or is to be noted. (An alleged failure timeously to note the appeal was the subject of a complaint conveyed to the appellant by the respondent's representative on 3 February 1998). Apart from a requirement relating to the filing of the appeal record, there is no provision in this Court's Rules requiring the formal prosecution of an appeal to it. As will appear below, what the appellant ought to have done was to seek condonation of its failure timeously to file a notice of appeal which set out the grounds on which the appeal is founded, as prescribed by Rule 5A(2)(b). It was that failure, however, that was the subject of argument on the application for condonation, and the application must therefore be construed accordingly.

[13] The application for condonation was opposed on behalf of the respondent.

[14] The principles applicable are succinctly set out in the judgment of HOLMES JA in **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 531 (A).

[15] The requisite power of attorney, dated 20 January 1999, was filed only when the application for condonation was filed, i.e., on 27 January 1999. In the light of the various dates referred to later the filing of the power of attorney was considerably out of time. According to the affidavit of Mr Bam, the appellant's attorney, it was only on receipt of the respondent's heads of argument in the appeal (viz., on 27 November

1998), wherein the point was taken that no power of attorney had been filed, that attention was given to this aspect.

[16] The explanation tendered by Mr Bam is that he overlooked the provisions of Rule 6(1) of this Court, which requires the filing of a power of attorney within 10 days of the noting of the appeal. That omission had to be seen in the light thereof that, as Mr Bam contended the position to have been, a power of attorney had not previously been required in respect of an appeal from the industrial court to the former Labour Appeal Court in terms of s 17A of the Labour Relations Act, 1956. Indeed, with reference to the provisions of Rule 5A (read with Rule 5) of this Court (which do not refer to a power of attorney being required in respect of an appeal to this Court from the industrial court), Mr Bam sought to suggest that it is a moot point whether such a power of attorney is in fact required.

[17] The following comments fall to be made:

(1) The interpretation that no power of attorney was required in respect of appeals from the industrial court to the former Labour Appeal Court is incorrect. Rule 4 of the Rules of the latter Court provided that in so far as those Rules did not, in connection with an appeal, make provision for any specific matter, the Rules of the then Supreme Court would apply **mutatis mutandis**. Rule 7 of the latter Rules enjoined the filing of a power of attorney authorising the prosecution of an appeal.

(2) Whatever Rules 5 and 5A of this Court provide and notwithstanding that no reference to a power of attorney is contained therein, it is clear that Rule 6(1) does

prescribe the filing of a power of attorney in respect of any and every appeal to this Court.

(3) The delay in complying with the provisions of Rule 6(1) **in casu** was substantial, exacerbated by the fact that even after the issue of the power of attorney had come to Mr Bam's attention on 27 November 1998 there appears to have been a lack of urgency on his part in rectifying the matter.

(4) While his misinterpretation of the provisions of the Rules formerly applicable may, to an extent, be understandable, though not excusable, Mr Bam's overlooking and ignorance of the provisions of Rule 6(1) presently applicable constrain me to repeat the comments I made in **Eskom v Mokoena** (Case No. JA 17/97, LAC, unreported):

“It is, however, appropriate to sound a warning to practitioners. The Rules of this court were promulgated in Government Gazette No. 17495 of 14 October 1996. Practitioners ought to have acquainted themselves therewith by this time. The Rules published in the Government Gazette of 10 January 1992 were Rules of the former Labour Appeal Court promulgated in terms of Act 28 of 1956, as amended, and were clearly not applicable to the present Labour Appeal Court. Failure to comply with the Rules of this court will in future attract the censure of the court and may, in appropriate cases, result in an appeal being struck off the roll or, as the case may be, a refusal to hear the respondent in the appeal.”

[18] Mr MALULEKE, for the respondent, raised a further aspect relating to the power of attorney filed. He argued, with reference to authority (see, eg, **Transport and General Workers' Union & Others v S.A. Stevedores Ltd** (1993) 14 ILJ 1068 (IC); **S.A. Allied Workers Union v De Klerk NO** 1990 (3) SA 425 (E)) that a lack of authority cannot be rectified by ratification after an objection thereto has been raised.

[19] The cases are not harmonious on this issue - see the discussion in the **S.A. Allied Workers'** case **supra**. I do not consider it necessary to enter into that debate. For the purposes of this appeal I will accept the validity of Mr MALULEKE's contention.

[20] However, on analysis the present is not a case where it was sought, by the filing of the power of attorney, to ratify previously unauthorised acts done by the attorney on the appellant's behalf. The filing of the power of attorney constituted compliance, albeit very belatedly, with the prescription in Rule 6(1) and constituted formal proof of the authority of the attorney to act. As will appear below - see paragraph [34] - the attorney was, as a matter of fact, authorised by Oosthuizen, a director of the appellant, to note the appeal. I am unable to accept Mr MALULEKE's submission that in noting the appeal the attorney acted without the instructions of the appellant. Subsequently the appellant placed its attorneys in funds for the payment of the costs of the appeal record that had been prepared. Finally, the power of attorney was filed. It is clear that as a fact the attorneys were throughout authorised to prosecute the appeal.

[21] The chronology in respect of the other two aspects in respect of which condonation was sought was the following:

(1) The order of the industrial court, without accompanying reasons, was made on 28 November 1997;

(2) On 5 December 1997 the appellant filed a notice of appeal against the whole

of the judgment of the industrial court; that notice contained no grounds of appeal and instead requested that the presiding officer in the court **a quo** furnish the reasons for her judgment; the appellant's recourse to filing that notice is explained below;

(3) By letter dated on 3 February 1998 Mr MALULEKE advised the appellant's attorneys that the period within an appeal had to be noted had elapsed and enquired as to the appellant's outstanding notice of appeal (no doubt it was considered that the document filed on 5 December 1997 did not constitute a valid notice of appeal);

(4) Reading the aforesaid letter as referring to an obligation on the appellant to prosecute the appeal Mr Barn replied on 10 February 1998 to the effect that the notice of appeal would only be finalised once it had been amplified after receipt of the industrial court's reasons for judgment; thereafter the appeal would be prosecuted;

(5) Due to an administrative oversight the forwarding of the request for reasons for judgment to the presiding officer was delayed. It was in fact brought to her attention by the appellant's attorneys on 20 January 1998;

(6) On 24 February 1998 the appellant's attorneys filed a notice with the Registrar in which application was made for a "trial date in the appeal". Presumably this was considered to be the prosecution of the appeal. In the notice it was stated that the record on appeal had not been prepared because the file had not been made available to the appellant by the Registrar of the industrial court;

(7) GROBBELAAR AM furnished her reasons for judgment on 1 March 1998.

Due to a further administrative oversight the appellant's attorneys were not apprised thereof. In fact a copy of the reasons was sent to the appellant's attorneys by Mr MALULEKE on 19 May 1998;

(8) The record on appeal was delivered by the appellant on 17 June 1998;

(9) An amplified notice of appeal setting out the grounds of appeal was filed by the appellant on 3 August 1998.

[22] Rule 5A (1) requires an appeal from the industrial court to be noted within 14 days of the judgment or order in question unless the reasons or the full reasons for the court's judgment or order are given on a later date, in which event the appeal must be noted within 14 days after the reasons are given. On good cause shown this Court may extend any period.

[23] On a strict reading of the Rule the initial notice of appeal filed on 5 December 1997 was in fact premature, in that the reasons for judgment were still outstanding. Mr Bam intimates that the appellant wished a pending appeal to be in place to counter any then demand by the respondent for reinstatement and therefore what he describes as a truncated notice of appeal was filed.

[24] The noting of the appeal, by way of delivery of a notice setting out the grounds of appeal (see Rule 5A (2) (b)), should have occurred within 14 days of 2 March 1998 (1 March 1998, the date on which the reasons for judgment were furnished, having been

a Sunday). The failure by the appellant to do so is readily understandable in that it was only on 19 May 1998 that the appellant's attorneys were made aware that the reasons had been furnished. However, the noting of the appeal by way of delivery of a notice complying with Rule 5A(2)(b) ought then to have been attended to within 14 days of that date.

[25] In explanation for the failure to do so Mr Bam states that because a notice of appeal, albeit an incomplete one, had already been filed, he formed the view that it was unnecessary immediately to file the grounds for the appeal; hence the latter only being done on 4 August 1998.

[26] The explanation is an unsatisfactory one. Clearly Mr Bam was aware that the grounds on which the appeal was founded had to be furnished. It is difficult to understand why he would have thought that the earlier filing of an incomplete notice of appeal justified delaying the filing of a complete, and therefore proper, notice of appeal. The delay was also not insubstantial.

[27] Rule 5(8) of this Court provides that the record on appeal must be delivered within 60 days of the order granting leave to appeal. That is, of course, a reference to an appeal from a decision of the Labour Court. Translated to an appeal from a decision of the industrial court the requirement of the Rule is that the record must be filed within 60 days of the noting of the appeal.

[28] It appears that Mr Bam was of the view that the 60 day period ran from the date on

which the initial incomplete notice was filed. Hence his reference to initial difficulties in obtaining the file in this matter from the Registrar of the industrial court and subsequent difficulty in obtaining funds from the appellant to pay for the completion of the record, in explanation of the failure to comply with that perceived prescription, However, as already stated, that notice of appeal, in addition to being incomplete, was premature. In the present matter the proper noting of the appeal was in fact out of time, viz., on 4 August 1998. By then the record had already been filed. On a strict interpretation of the Rules the appeal should have been noted by 19 March 1998 (being 14 court days after 2 March 1998) and the record delivered within 60 court days thereafter, i.e., by 17 June 1998. It was in fact delivered on that date. Accordingly, no question of condonation arises. **A fortiori** is that the position if the proper noting of the appeal had to take place within 14 days of 19 May 1998 when the appellant was made aware that the reasons for judgment had been furnished.

[29] In the two respects in which the appellant requires condonation it is to be noted, as already intimated, that the delays in question were substantial and that the explanations therefor are unsatisfactory. On the other hand regard must also be had to the following factors:

- no prejudice was occasioned to the respondent;
- the matter is clearly of importance to the appellant;
- as will be demonstrated below, the question whether the appellant has strong prospects of success in the appeal must be answered in favour of the appellant.

[30] Balancing the various factors against each other and applying the test of fairness to

both sides laid down in **Melane**'s case **supra**, I am persuaded that the present is a case where the condonation sought should be granted.

[31] However, notwithstanding that success by the appellant, I consider, in view of all the circumstances, including the reasonableness of the opposition to the application for condonation, that the respondent is entitled to an order for such costs in respect of the application as he is entitled to recover on taxation. The following comment falls to be made, however. As between the appellant and its attorneys, the papers presently before us reflect that no blame attaches to the appellant in the matter of the need to seek condonation; that blame is to be laid at the door of its attorneys.

[32] In addition to contentions raised in support of the conclusion of GROBBELAAR AM that the appellant had committed an unfair labour practice, Mr MALULEKE sought to resist the appeal on a number of technical grounds. These will be considered in the paragraphs that follow.

[33] The first contention was that the appellant had acquiesced in the judgment of the industrial court which had the result that its right to appeal had been perempted. The contention was founded on the fact that when, pursuant to the order of the industrial court, which was made on Friday 28 November 1997, the respondent attended at the appellant's premises on Monday 1 December 1997 and presented himself for work, the appellant initially allowed him to work. However, after some hours the respondent was told to leave and he was paid for the hours that he had worked.

[34] There is some dispute as to precisely what occurred. The respondent claims that

initially he was reinstated without any qualification, in the sense that he was simply permitted to commence work, but that he was subsequently called and advised that the appellant had changed its mind about reinstating him and now wished to appeal against the industrial court's judgment. On behalf of the appellant Mr Oosthuizen, one of its directors, explains what he refers to as the respondent's short lived reinstatement as follows: when the respondent, armed with a copy of the industrial court's order arrived and demanded his reinstatement, he, Oosthuizen, was taken by surprise and, so it is to be implied, allowed the respondent to commence work; he, however, immediately consulted his attorney and pursuant thereto instructions were given for an appeal against the order to be noted; he was advised that pending the appeal the appellant was not obliged to honour the award; he thereupon caused the respondent to leave the premises.

[35] The resolution of the factual dispute is unnecessary. The inference is clear that Oosthuizen was uncertain as to the legal position that obtained; hence, his recourse to seeking the advice of his attorney, which is not disputed. In the circumstances the appellant's action in permitting the respondent to commence work cannot be said to have constituted acquiescence in the industrial court's judgment or to have been an unequivocal act wholly inconsistent with an intention to contest it. It need hardly be added that the party alleging acquiescence bears the onus of proving same and in cases of doubt the onus must be held not discharged. **Dabner v SAR & H** 1920 AD 583 at 594.

[36] Mr MALULEKE's next contention related to the appellant's failure to comply with

the time constraints for the holding of internal appeals prescribed in its own disciplinary code. After a provision that an appeal should be noted within two working days of the disciplinary action in question, failing which the right to appeal will lapse, the code provided as follows:

“Should management fail to hold such appeal within 3 days the employee will be reinstated.”

[37] While the verdict and sanction in the appeal hearing chaired by Hiemstra were dated 28 June 1996 the record is silent as to when the hearing took place. It appears, however, to have been common cause in the court **a quo** that it was after the prescribed three day period had elapsed.

[38] Under the heading of procedural unfairness, GROBBELAAR AM, with reference to the failure to hold the appeal within the prescribed period of three days, stated:

“In my opinion, the disciplinary code should also have been followed by the respondent because rules and regulations are to be followed by both employer and employee. The respondent should have reinstated the applicant when it failed to hold the appeal hearing within 3 days.”

[39] In the context, and by reason of the failure of the additional member to make reference to that part of the order made in the internal appeal hearing, viz., that by reason of the unfairness which tainted the earlier disciplinary inquiry, the respondent was to be “reinstated” and paid his emoluments in respect of the period between the date of the disciplinary hearing and the handing down of the findings in the appeal hearing, GROBBELAAR AM could not have been referring to a temporary reinstatement pending the belated holding of an appeal. What she intended to convey

was that the respondent's reinstatement would have put an end to the whole matter. Put differently, and notwithstanding that the issue was dealt with under the heading of procedural unfairness, it was the view of the additional member that no appeal hearing at all should have taken place and that the reinstatement of the respondent after three days had elapsed would have been tantamount to a final setting aside of the findings made at the disciplinary inquiry.

[40] While seeking to support GROBBELAAR AM's conclusion Mr MALULEKE took a further allied point. He contended that the appeal hearing, and accordingly the dismissal of the respondent, was a nullity in that the presiding officer, Hiemstra, was not a director of the appellant. This was an infraction of the prescription in the appellant's disciplinary code that appeals against dismissals "shall be conducted by a Director of the Company".

[41] The record reveals that Hiemstra is an attorney who had been retained by the appellant to advise it on labour matters. By the time the hearing in the court **a quo** was held he had become a director of the appellant. Oosthuizen was, however, not in a position to confirm that Hiemstra's appointment to the appellant's board had preceded the hearing of the internal appeal. The matter must therefore be approached on the basis that he was at that time not a director of the appellant.

[42] Oosthuizen explained both the delay in the hearing of the appeal and the appointment of Hiemstra to chair same. He stated that none of the other directors was sufficiently experienced to undertake the hearing of the appeal. Moreover, presumably in the

light of the respondent's complaint, registered in his notice of appeal, against the lack of fairness in the disciplinary inquiry, the appellant had wished to ensure a fair and just appeal procedure. The matter was discussed with the respondent's representative, who appeared for the respondent in the appeal, and he agreed that Hiemstra be asked to preside over the appeal.

- [43] On the first aspect I am persuaded that the construction placed by the additional member on the relevant provision in the disciplinary code, and echoed by Mr MALULEKE during argument, is incorrect. The correct meaning of the provision is that the reinstatement of a worker by reason of an appeal hearing not having been held within three days, would be a provisional reinstatement pending the holding of the appeal. Taking the other view to its logical conclusion would mean that a worker, dismissed at a disciplinary hearing by reason of his having murdered the managing director of the company, would be immune from further disciplinary action where, because of an appeal hearing against the dismissal not being heard within three days of his noting an appeal, he is reinstated. Mr MALULEKE was constrained to concede that in such a case, i.e., one of murder, the construction he contended for could not be supported. He sought to argue, however, that where a disciplinary infraction of comparatively minor proportions, which would, so it was contended, include theft, was involved, that construction must be upheld. The illogicality of the argument is readily apparent. However, on the assumption that the provision in question, taken literally, does bear the meaning contended for, then for the reasons that follow the argument on behalf of the respondent can nevertheless not succeed. By a parity of reasoning the allied point of the appeal hearing not having been conducted by a

director of the company, can also not succeed.

[44] Mr MALULEKE referred to authority to the effect that an employer is bound by its disciplinary code. The correct approach is, however, that disciplinary codes are guidelines which can be applied in a flexible manner. See **Le Roux & van Niekerk**, *The Law of Unfair Dismissal in South Africa*, at 100 and 155 and the authorities there cited. See, eg., **Nehawu v Director-General of Agriculture & Another** (1993) 14 ILJ 1488 (IC) at 1500. It was there stated, correctly, that the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strictly legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity.

[45] In my judgment, and having regard to all the circumstances, the time when and the manner in which the appeal hearing was held, while not strictly in accordance with the appellant's disciplinary code, were substantially fair, reasonable and equitable.

[46] The next aspect invoked by Mr MALULEKE was the wording of the certificate of service issued by the appellant to the respondent. It reflected that the respondent's date of leaving employment was 28 June 1996. More importantly, the certificate itself was dated 28 June 1996. With reference to the fact that the findings in the appeal hearing were dated 30 June 1996, Mr MALULEKE sought to argue that the appellant's board had already, on the earlier date, decided that the respondent's

services should be terminated and, if I understood the argument correctly, the appeal findings merely, and improperly, followed suit.

[47] The argument cannot be upheld. Oosthuizen explained, acceptably, that 30 June 1996 was a Sunday; the appeal findings were received by the appellant on Monday 1 July 1996; the certificate was made out on the latter date; by virtue of the appeal findings the respondent's last day of actual service was in fact Friday 28 June 1996 and the certificate reflected that position; the certificate was inadvertently dated 28 June 1996.

[48] I turn now to deal with the merits of the dispute between the parties. By way of introduction the practice of the appellant in regard to the bale boards requires to be set out. The appellant's evidence was to the following effect. Its suppliers packaged the tobacco supplied to it in bales. At the bottom and on the top of the bales wooden boards were placed and the whole was wired fast. The boards were approximately 1 metre by ½ metre in size. They comprised three longitudinal slats and six transverse slats fastened together. The boards were supplied by the suppliers and the appellant's account was debited with the sum of R8,50 in respect of each board. After a bale had been opened the boards were stacked in a room and from time to time would be returned to the suppliers and the appellant's account credited accordingly. Documentary evidence in support of these allegations was produced. Damaged boards, capable of being repaired, were also returned to the suppliers who would repair same and debit the appellant's account with the cost thereof. Boards damaged beyond repair were either burnt by the appellant in its boilers or chopped up and placed in bags for sale to the staff members.

[49] In his statement of case the respondent alleged that each bale board was used by the appellant only once, whereafter it was treated as scrap having no commercial value. The respondent adduced no evidence to this effect, however, and clearly the appellant's evidence of bale boards being returned to the suppliers for the credit of the appellant must be accepted.

[50] The respondent's further evidence was that he knew nought of any practice of irreparable boards being chopped up and sold to staff members in bags. It was his case that this practice was of recent innovation, i.e., it was introduced after his departure from the appellant. While acknowledging that he would not have been entitled to appropriate a bale board that was whole, he claimed that staff members were freely entitled to take broken boards for themselves. He admitted, however, that broken boards were burnt by the appellant in its boilers.

[51] A further dispute concerned the issue whether staff members had received warnings against taking company property without permission on pain of dismissal and, more specifically, whether the respondent had been made aware of these warnings.

[52] For reasons that will appear later it is unnecessary to resolve the question of when the appellant adopted the practice of selling chopped up broken bale boards to staff members or the dispute referred to in the preceding paragraph (as to which, however, see the remarks in paragraph [64] below). In regard to the latter aspect the comment may be made that no express warning was required to render the taking of company

property without permission - which would in fact constitute theft - a disciplinary offence which, in appropriate circumstances, could attract the sanction of dismissal. Of that the respondent must have been aware.

[53] What transpired on 7 June 1996 was also in dispute. The appellant's case in the court **a quo** (as at the appeal hearing chaired by Hiemstra) was that the respondent was involved in three incidents that morning:

(1) Mr Erasmus, employed in the appellant's workshop as a motor mechanic, testified that at approximately 7 a.m. he proceeded from the workshop to the garages to check which vehicles required to be serviced. He heard a knocking noise and observed the respondent in a corner next to a Passat motor vehicle. The first two doors of the garage were closed - other evidence, that of Oosthuizen, was that the Passat was parked behind the first door - and the respondent was not visible from outside the garage. He, Erasmus, enquired of the respondent what he was doing. The latter replied that he was chopping wood. Erasmus was, however, not able to see what wood was being chopped or what the respondent was using to chop the wood.

(2) Mr Mamahloti, also employed in the workshop, testified that the respondent arrived at the workshop with a number of whole bale boards tied together. It was just after the end of tea time, i.e., 9:45 a.m. He, Mamahloti, was asked by the respondent to cut the boards for him. His response was that he does not work the cutting machine. At the respondent's request he took the boards to place them next to the boiler room, the respondent having said that he would cut the boards himself.

Mamahloti had hardly placed the boards at the boiler room when Mr Lerm, an employee in the office, approached him and told him to take the boards back.

Mamahloti was supported by Erasmus who confirmed that the respondent did arrive at the workshop with whole boards in his possession. He stated that this was just before tea time and that after tea (which ended at 9:45) the respondent spoke to Mamahloti and the latter then left the workshop carrying the boards. Erasmus purported to say that the respondent requested Mamahloti to take the boards to the change room, but he acknowledged that the other men spoke in a language that he could not understand, and the only words he made out were “change room”. Therefore, either he heard afterwards that the respondent had asked Mamahloti to remove the boards for him and he inferred that the intended destination was the change room because he had heard mention of the latter, or he inferred that Mamahloti had been asked to remove the boards and that the intended destination was the change room because he heard the words “change room” during their conversation and Mamahloti left with the boards.

Further support for Mamahloti’s evidence to be found in Erasmus’s evidence is that the latter stated that he went to report the matter to Lerm. The inference is that it was that report that moved Lerm to approach Mamahloti and instruct him to return the boards.

It should further be recorded that these boards were produced at the appeal hearing presided over by Hiemstra.

(3) Oosthuizen testified that after he had received a report at approximately

10:00a.m. he, accompanied by Vermeulen and another employee, Mr Giesing, repaired to the garages. The first door of the garages was closed. Inside the garages, behind the Passat, at a place not visible from outside the garages, and where it was relatively dark, they found the respondent breaking bale boards with a jack. The respondent was hiding behind the motor vehicle and appeared to get a fright when he saw them. On their enquiry as to what he was doing the respondent said he was breaking wood for firewood. He had a bag into which he was putting the wood. There were pieces of more than one board and there was a whole board against the wall. Asked where he had obtained the boards he was breaking the respondent said at the change rooms. Because no boards were kept there the respondent was asked to point out the place. **En route** he said he wished to tell the truth : he did not obtain the boards at the change rooms, but in the snuff section of the storeroom. He claimed that he had only taken broken bale boards. He was thereupon served with a notice to attend an internal disciplinary inquiry.

[54] The respondent denied the evidence summarised in the previous paragraph. He stated that he busied himself with other duties as from 7 a.m. These included delivering some mail in Isando. There was no direct evidence to support these claims of the respondent. On the other hand it was conceded by Oosthuizen that the duties in question were amongst those performed by the respondent in his employment and there was no evidence that the respondent did not perform those duties on the morning in question.

The respondent's further evidence was that after his return from Isando at

approximately 9:40 a.m., he decided, because it was cold, not to take his tea (the time of which was flexible because of the nature of his duties), but instead to collect and prepare the wood from some broken bale boards as firewood. He proceeded to the boiler room where, in the presence of a boiler room worker, Mr Mahlangu, he put some smaller pieces of broken boards into a plastic bag and took possession of two further loose transverse slats of a bale board. That he did collect such pieces of wood was confirmed by Mahlangu who was called as one of his witnesses. From the boiler room he proceeded past the workshop, as he put it, in full view of the persons inside, to the garages where he commenced breaking the two transverse slats by bending them over his knee. He had in fact also walked past Oosthuizen and Vermeulen when he went towards the garages. It was after he had completed that task and put the resultant pieces into the bag and had commenced cleaning his scooter inside the garages that Oosthuizen **et al** arrived. He was not hiding behind the Passat inside the garages when he broke the wood, but was in fact outside the garage where he was quite visible. The bag containing the pieces of wood was upended and the contents thrown out. Oosthuizen told him that they had thought there was stolen tobacco in the bag. He was thereupon told that he would be charged with theft of company property, viz., the wood. He queried why he was being singled out because many other members of staff took wood. He alleged that the appellant took such action against him because he had been dismissed in 1995 for refusing to work during a December (which was not identified) after the closing period had commenced, but was reinstated after a disciplinary hearing. Officials of the appellant had advised him at the time that they would “find” him. He denied that he had said to Oosthuizen that he had obtained the pieces of wood from the change rooms or that he thereafter changed that version

to read the snuff section.

[55] Mahlangu and the respondent's other witness, Mr Chiliza, both stated that they knew of no rule prohibiting them from appropriating broken bale boards. It bears mention, however, that each denied ever having done so himself.

[56] After summarising, in broad outline, the evidence adduced before her, GROBBELAAR AM, stated, correctly, that the appellant bore the onus of establishing the misconduct alleged against the respondent.

[57] She then went on to record the following:

(1) The respondent, while not disputing that he was in possession of bale boards, testified that he did not know of the rule that he had to get permission to remove bale boards from the premises of the appellant.

(2) In this regard the witness, Mr Msiza, a shop steward called on behalf of the appellant, said that he was not sure that the respondent was present at meetings when the shop stewards told employees that bale boards were not to be taken.

(3) Of great importance was the fact that Msiza had testified that what the additional member referred to as the permission rule was only introduced in 1994 and the respondent had only been a member of Msiza's trade union until 1993.

(4) In the light of Msiza's evidence as to when the permission rule was introduced the question arose why the appellant introduced into evidence a statement signed by three shop stewards - one of whom was Msiza - to the effect that over the past 10 years management had repeatedly warned employees not to remove company

property such as bale boards.

(5) Oosthuizen testified that it was the shop stewards, not management, who warned the workers, but he had been given the assurance that all employees knew about the rule.

(6) The respondent, while admitting that he had taken broken bale boards, denied any knowledge of the permission rule.

(7) This was a defence he had persisted in throughout all his hearings.

(8) There was also no evidence that the respondent was trying to hide the fact that he was chopping wood.

(9) That could only indicate that the applicant did not know about the [permission] rule.

(10) Even if that conclusion were wrong, the question arose whether the evidence of the appellant's witnesses could be accepted as satisfactory:

(a) On that evidence the respondent was engaged in the breaking of bale boards from 7 a.m. until about 10 a.m. when Oosthuizen found him in the garage with one plastic bag of broken wood.

(b) Erasmus's evidence also deviated from his evidence at the appeal hearing where he testified that he found the respondent breaking boards.

(c) If the court accepted the evidence of Mamahloti, there was no evidence to support the contention that the respondent was breaking unbroken bale boards. It is quite strange that the respondent would hand four unbroken boards to Mamahloti only to break other bale boards ten minutes later in the garage.

(d) Oosthuizen also did not testify that the respondent was found breaking unbroken bale boards, only that one of the boards, still intact, was standing against the

wall.

(e) The only conclusion to be made in the circumstances was that the applicant was breaking broken bale boards.

(11) In **Anglo-Americal Farms t/a Boschendal Restaurant v Komjwayo** (1992)

13 ILJ 573 (LAC) the following was said:

“It seems to me that the relationship between such an employer and such an employee is of such a nature that, for it to be healthy, the employer, must, of necessity, be confident that he can trust the employee not to steal his stock-in-trade. If that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer.”

(12) The impression gained from Oosthuizen’s evidence was that “every single employee caught for stealing is dismissed and there are no mitigating features”.

(13) There was, however, no direct evidence that the relationship between the parties was destroyed.

(14) There was also no evidence that the applicant had a thieving propensity which could cause the appellant reasonably to conclude that the respondent was no longer to be trusted (**Nsimbi v Pick _ Pay Retailers (Pty) Ltd**, 12 April 1989, IC Case no. NHN 11/2/582 - unreported).

(15) Mitigating factors were also present which had to be considered with all the circumstances. The respondent had nine years of service at the time of his dismissal. He had not been convicted of any other offence while working for the appellant.

(16) Even if her finding were wrong, the circumstances of the case did not warrant a dismissal, but a final written warning.

(17) However, in her opinion the appellant did not know that he was not allowed to take broken bale boards.

(18) Accordingly, the dismissal of the appellant was substantively unfair.

[58] As to the nature of an appeal such as the present I stated the following in **Food & General Workers Union & Others v Design Contract Cleaners (Pty) Ltd** (1996) 17 ILJ 1157 (LAC) at 1165A:

“An appeal to the Labour Appeal Court in terms of s 17 (21A)(a) of the Act falls within the narrow category of appeal identified in *Tikly & Others v Johannesburg NO & Others* 1963 (2) SA 588 (T), ie an appeal in the ordinary strict sense, being a rehearing on the merits, but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong. In that determination the Labour Appeal Court is free, and indeed, bound, to embark on a fresh assessment of the merits on the strength of the evidential material before the Industrial Court, and to exercise its own discretion as to what is fair and reasonable in the circumstances, at the same time having proper regard to the findings of the court **a quo** as to the credibility of the witnesses who testified before it. **Anglo-American Farms t/a Boschendal Restaurant v Komjwayo** (1992) 13 ILJ 573 (LAC); **Durban Confectionary Works (Pty) Ltd t/a Beacon Sweets v Majangaza** (1993) 14 ILJ 663 (LAC) at 667A.”

To this may be added the following passage in the judgment of McCALL J in **Foodpiper CC t/a Kentucky Fried Chicken v Shezi** (1993) 14 ILJ 126 (LAC) at 129F-H:

“Although this appeal is a rehearing, I am of the opinion that in so far as the appeal relates to the findings of fact of the court **a quo**, the principles applicable to appeals against findings of fact, as set out in the judgment of Davis AJA in the case of **R v Dhlumayo & another** 1948 (2) SA 677 (A) at 705-6, are applicable. This court, not having had the advantage of seeing and hearing the witnesses in the court **a quo**, will not readily upset the findings of that court and, where there has been no misdirection on fact by the court **a quo**, will only reverse its decision when it is convinced that it was wrong. There may be misdirections on fact by the court **a quo** where the reasons are either on the face of them unsatisfactory, or where the record shows them to be such, or where the court has overlooked other facts or probabilities.”

[59] **In casu** no specific credibility findings based on an observation of the witnesses in the witness box were made by GROBBELAAR AM.

[60] The judgment of the additional member is not a model of clarity. On the contrary, it is vague and confusing and in a number of respects cannot be endorsed.

[61] It is not clear to what type of bale board the additional member was referring to when she recorded what is set out in paragraph [57] (1) to (9) above, i.e., whether she was referring to intact or to broken boards or to both. In the light thereof that she referred to the respondent's admission that he was in possession of bale boards (which admission related to broken boards) it would seem that she intended in the subparagraphs mentioned to refer to broken bale boards. However, the additional member then went on to make the findings recorded in subparagraph (10) of paragraph [57] which were premised on the basis that her earlier conclusion was wrong and concluded with the finding that it was broken bale boards that the respondent was breaking. This exercise would indicate that the subject of her findings in subparagraphs (1) to (9) was bale boards, whether broken or intact.

[62] I will later deal with the respondent's claim that he thought that he did not require permission to remove broken bale boards. If, indeed, the additional member found that the respondent thought that he could take intact bale boards without permission, that would constitute a clear misdirection. Such a finding would fly in the face of not only the clear and uncontradicted evidence of the appellant as to how whole bale boards were dealt with, but also the respondent's own acknowledgement that he was

not allowed to remove whole bale boards.

[63] With reference to subparagraphs (2) to (4) of paragraph [57] it would seem that the additional member misconstrued the evidence. It was not the testimony of Msiza that it was only in 1994 that the appellant introduced the rule that company property was not to be removed without permission. That rule was always in place and, to Msiza's knowledge, had been the subject of warnings from management relayed to the staff by the shop stewards at meetings held regularly over the preceding ten years, i.e., an employee taking company property without written permission faced dismissal. What, according to Msiza, occurred during 1994 was the introduction of a system whereby a receipt issued to an employee in respect of something purchased by him from the appellant served as the written permission.

[64] Even if it had only been broken bale boards that the respondent removed on the day in question, one cannot but have grave difficulty in accepting his evidence that he thought he did not require permission to do so. In addition to the remarks made later concerning the respondent's credibility I would at this stage make the following comments. I perceive no obstacle in the way of accepting Msiza's evidence that warnings against the removal of company property without permission on pain of dismissal were regularly over the years conveyed by the shop stewards to meetings of employees. These warnings related to company property generally and broken bale boards were not excluded therefrom. Even if, as is improbable, the respondent never attended any of these meetings - he was a union member until 1993 - it would be passing strange if he never came to hear of the warnings. Be that as it may, on his

own showing the broken boards were in fact utilised by the appellant as fuel in the boiler room. They were therefore of commercial value and not worthless scrap. One balks at the suggestion that the respondent thought that he could nevertheless remove them at his will.

[65] The respondent's evidence that he had seen many other workers remove broken boards does not assist him in his claim that he thought he did not require permission to do likewise. He did not, and could not, state that those other employees had in fact not obtained permission. He did not, and could not, state that management was aware of the practice, i.e., in the sense of being aware of who was removing the wood, and turned a blind eye thereto. In any event, one queries why the respondent did not take the simple trouble of enquiring whether or not he was entitled at his pleasure to remove broken bale boards.

[66] GROBBELAAR AM's statement that there was no evidence that the respondent was trying to hide the fact that he was chopping wood is a surprising one. It is true that on the evidence of Mamahloti and Erasmus the respondent did not seek to conceal from them his dealings with the whole bale boards that he brought to the workshop. One could speculate that he was confident that they would not say anything or that, if challenged, he might have represented that he had the required permission. Be that as it may, and leaving aside for the moment the issue of the acceptability of Mamahloti's evidence that it was at the behest of the respondent that he removed the whole bale boards to a place next to the boiler room, Erasmus's evidence that the respondent was chopping wood at 7 a.m. in the garages at a place behind a motor vehicle where he

was not visible from outside the garages and Oosthuizen's similar evidence relating to the 10 o'clock incident, clearly embraced the assertion that the respondent was indeed trying to hide the fact that he was chopping wood. That evidence reads persuasively and falls to be accepted.

[67] In the result and notwithstanding the support lent to the respondent's evidence by the testimony of Mahlangu and Chiliza, I am persuaded that the additional member erred in concluding that the respondent was unaware that he was required to have permission to remove bale boards, even broken ones.

[68] On his own version of what he did on the morning in question, therefore, the respondent was guilty of theft.

[69] The matter does not rest there, however. For the reasons that follow I am unable to agree with GROBBELAAR AM's conclusion that the evidence adduced on behalf of the appellant in the court **a quo** should not be acted upon.

[70] The additional member's statement that in terms of the evidence of the appellant's witnesses the respondent was engaged in breaking bale boards over a three hour period - which she apparently considered improbable and unacceptable - appears to be founded on a misinterpretation of the evidence. The evidence canvassed three separate incidents which occurred at separate times during the approximate period in question. Its effect was not that the respondent was engaged in the breaking of bale boards throughout that period. The improbability apparently contended for by the

additional member is accordingly absent.

[71] The difference between Erasmus's testimony in the court **a quo** and his evidence during his appeal hearing is hardly one of which cognizance should be taken.

[72] Contrary to what the additional member found I consider, if Mamahloti's evidence is to be accepted, that the effect thereof is that the respondent was taking steps in the appropriation to himself of unbroken bale boards.

[73] I disagree, too, with the conclusion that it is strange, and therefore presumably improbable, that the respondent would hand unbroken bale boards to Mamahloti and some ten minutes thereafter engage in breaking other boards in the garages. I fail to understand why the additional member should have considered this strange.

[74] Precisely what point GROBBELAAR AM sought to make when recording that Oosthuizen did not testify that he had found the respondent breaking unbroken boards, only that one still intact board was standing against the wall, is not clear. If it is that that evidence, if accepted, does not establish that the respondent was breaking whole boards, I cannot but disagree. In the absence of any explanation by the respondent, the only inference, as a matter of common sense, is that, had he not been disturbed, he would have completed breaking all the boards in his possession including the intact one standing against the wall.

[75] It must be acknowledged that a reading of the evidence given by the witnesses for the

appellant in the court **a quo** reveals that it is not without blemish. Certain of the blemishes were adverted to during argument. I do not consider it necessary to refer thereto in any detail. Suffice it to state that I am unpersuaded that they constitute cognizable derogation from the acceptability of the evidence. On the contrary the evidence generally reads well and persuasively.

[76] There are on the other hand severe criticisms to be levelled at the respondent as a witness. (1) I have already adverted thereto that the respondent's claim that he was not aware that he required permission to remove even broken bale boards must be rejected.

(2) I have also recorded that in his statement of case the respondent made the assertion (not pursued in his testimony in the court **a quo**) that bale boards were only used by the appellant once, and thereafter had no commercial value to the appellant. The assertion must be stamped as a false one which was not capable of being justified by the respondent. Indeed, in the court **a quo** the respondent conceded that the assertion that the boards were not re-used was incorrect. Sight must not be lost of the fact that the assertion, first made by the respondent during proceedings instituted by him in terms of s 43 of the Act, (and to which the respondent added the assertion that the boards merely came with the tobacco bales and the appellant was neither charged therefor nor credited in respect of any returns), was repeated in his statement of case in the court **a quo**, notwithstanding that the appellant had in the earlier proceedings in terms of section 43 made known in detail its case concerning how bale boards were dealt with.

(3) Allied to the preceding point is the fact that the only interpretation of the

language utilised by the appellant in his statement of case is that he was admitting that he took whole bale boards, but was contending that he was entitled to do so. In his evidence he restricted his case to broken bale boards.

(4) In his notice of appeal noted against the initial disciplinary inquiry findings the respondent admitted picking up old pieces of wood for firewood, but denied breaking or stealing the boards. At the appeal hearing he admitted that he had chopped up boards and put them into a bag, although he did add that he had only taken broken boards that he regarded as scrap. His affidavit in the s 43 proceedings was to the same effect, as was his statement of case in the court **a quo**. In his evidence, however, he claimed that he had broken the two long slats over his knee.

(5) In his notice of appeal he stated that 7 June 1996 was the first occasion he had taken bale boards. In his evidence he said he had often done so.

(6) While it was put to Oosthuizen under cross-examination that the respondent would deny that he was hiding behind the Passat motor car in the garages, or “cowering” as Oosthuizen had put it, it was not disputed that it was inside the garages, the one door of which was shut, and behind the Passat, at a spot not visible from outside the garages, that Oosthuizen came across him. It was also not disputed that Oosthuizen confronted him while he was still busy breaking the wood in his possession. In his own evidence he claimed that all the garage doors were open, that he in fact broke the wood in his possession outside in front of the garages where he could be seen by anyone who looked, and that it was after he had placed it in his bag and was cleaning his scooter that Oosthuizen arrived at the scene.

(7) It was under cross-examination that he for the first time came out with the allegation that while **en route** to the garages from the boiler room where he had

allegedly taken pieces of wood he in fact walked past Oosthuizen and Vermeulen with the wood openly in his possession.

(8) While the respondent did deny at his internal appeal hearing that he had told Mamahloti that he wished to have the boards referred to by the latter cut in the workshop, he did not deny that he had given unbroken boards to Mamahloti to take to the boiler room. He explained that he had not wanted to take unbroken boards. He there further explained that some of the boards he had taken from the storeroom were unbroken, but it was only after he had started breaking up broken boards he realised that some of the boards were still in good order. This evidence was diametrically opposed to that given by the respondent in the court **a quo**.

[77] In my judgment therefore the matter requires to be resolved on the basis of an acceptance of the evidence adduced on behalf of the appellant in the court **a quo**. On that basis the misconduct alleged against the respondent, i.e., theft of bale boards, including whole bale boards, was established.

[78] Was dismissal of the respondent an unfair sanction? I am persuaded that this question falls to be answered in the negative. It is true that the respondent had a long record of service (7 years 10 months, not 9 years as found by GROBBELAAR AM) with no previous record of a disciplinary offence. On the other hand Oosthuizen testified that the appellant experiences theft by its employees on a large scale. It follows that a measure of deterrence is called for. The respondent's conduct was not only dishonest, but was premeditated, planned and persistent. The overlapping triad of misconduct, incapacity and operational necessity adverted to in **MAN Truck & Bus (SA) Pty Ltd**

and United African Motor & Allied Workers Union (1991) 12 ILJ 181 (ARB) at 185G-I (referred in the **Anglo-American Farms** case **supra** at 590) was present. Moreover, regard may further be had to the manner in which the respondent conducted his case in the court **a quo**. It embraced a false accusation of perjury against, **inter alia**, a director of the appellant and a charge against him that for ulterior motives he made a false accusation the subject of disciplinary proceedings against the respondent. No viable employer-employee relationship remained.

[79] I conclude accordingly that the respondent's dismissal was both substantively and procedurally fair and that no unfair labour practice was committed.

[80] The following order will accordingly issue:

- (1)
 - (a) The appellant's application for condonation is granted.
 - (b) The respondent is awarded any costs recoverable by him on taxation in respect of the opposition to the application for condonation.
- (2) The appeal is upheld with costs. For the award made by the court **a quo** is substituted the following order:

“The application is dismissed.”

I agree

FRONEMAN DJP

I agree

CONRADIE JA

Appearance for Appellant : Mr BEETON

Instructed by Rooth & Wessels

Appearance for Respondent:Mr MALULEKE

National Entitled Workers Union

Date of Hearing: 3 February 1999

Date of Judgment: 16 February 1999.

This judgment is available on the internet at the following website: <http://www.law.wits.ac.za/labourcrt>.