



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2986/2010B

In the matter between:

DEVEL SWITCHBOARDS (PTY) LTD

Applicant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

COMMISSIONER T NSIBANYONI N.O.

Second Respondent

ERIC CHISANE

Third Respondent

Heard: 1 July 2015

Delivered: 7 August 2015

Summary: Review application – arbitration award – s 145 of the LRA – misconduct – theft – gross dishonesty – dismissal – applicable legal principles restated

JUDGMENT

MALAN AJ,

Introduction

- [1] This is an opposed application in terms of which the applicant (*the company*) seeks to have the arbitration award dated 23 September 2010 (case number MEGA27241) (*the award*) handed down by the second respondent (*the Commissioner*) on 7 October 2010 under the auspices of the first respondent (*the Bargaining Council*) reviewed and set aside (*the review application*).
- [2] Although not expressly stated by the company in the review application, having regard to the papers filed of record as a whole as well as the company's heads of argument and submissions by its counsel at the hearing of this matter, I am satisfied that it is evident that the review application has been brought in terms of s 145 of the Labour Relations Act, 66 of 1995 (*the LRA*).
- [3] In essence, the third respondent, Mr Eric Chisane (*Mr Chisane*), is an erstwhile employee of the company. Following his suspension, a disciplinary enquiry was convened during which Mr Chisane was charged with and found guilty of (1) theft and/or attempted theft; (2) misappropriation of company property; (3) gross dishonesty; (4) causing the company financial loss; and (5) a breakdown of the trust relationship. Consequently, he was summarily dismissed from the company's employment on 30 October 2009.
- [4] Aggrieved by these findings, Mr Chisane referred a dispute to the Bargaining Council, contending that his dismissal was unfair. Conciliation failed and the matter proceeded to arbitration. During the arbitration proceedings the procedural fairness of Mr Chisane's the dismissal was not disputed.¹ Only

¹ Record p96, lines 21-245 (transcript).

the substantive fairness of his dismissal was challenged and accordingly required determination by the Commissioner.

- [5] In the award, the Commissioner determined that Mr Chisane's dismissal was substantively unfair and accordingly ordered the company to reinstate him. In addition to the aforesaid, the Commissioner ordered the company to pay Mr Chisane compensation equivalent to 12 (twelve) months' back pay since his dismissal. It is these determinations by the Commissioner that forms the subject matter of the review application.
- [6] At the commencement of the argument, counsel for the company, Mr Venter, indicated that the company did not persist with its point *in limine* relating to the late filing by Mr Chisane of his answering affidavit.

Synopsis of material evidence before the Commissioner

- [7] The company is a manufacturer of switchboards in which copper is an essential and frequently used material. During the time in question Mr Chisane was employed by the company as a general worker. In his capacity aforesaid, he is the person responsible for, amongst other things, receiving copper delivered to the factory and cutting the copper to the required sizes for purposes of manufacturing switchboards.
- [8] Prior to August 2009, the company had noticed for some time that copper delivered to its factory had gone missing. On 24 August 2009, several bars of copper were delivered to the factory. On 21 September 2009, the company's director, Mr Steve Tselchous, noticed that a copper bar had gone missing. Following his aforesaid discovery, Mr Tselchous called a staff meeting and requested those members of staff involved in the missing copper to redeem themselves. He also advised them that he was going to require of each one of them to contribute to pay for the missing copper.
- [9] On or about the 28th of September 2010, Mr Tselchous noticed one of its employees namely Ms Rebecca Khoza ('Ms Khoza'), leaving the premises

with a plastic bag. Ms Khoza was employed by the company as a cleaner. After he followed her, she noticed him and dropped the plastic bag. When opening the plastic bag, Mr Tselchous discovered pieces of copper inside the plastic bag. The police were contacted and Ms Khoza was subsequently arrested.

- [10] Ms Khoza admitted that she was party to the theft and subsequently resigned. However, she also informed Mr Tselchous that she was not the only employee involved in the theft of copper from the company but was in the past assisted by Mr Chisane. He would cut pieces of copper and assist her in smuggling the pieces of copper out of the factory.
- [11] Following the aforesaid incident, Mr Tselchous was also approached by one of the employees, who informed him that Mr Chisane had previously assisted Ms Khoza in removing copper from the factory by placing pieces of copper in a bucket filled with water designated for the washing of motor vehicles.
- [12] In essence, Mr Chisane denied that he assisted Ms Khoza with removing the said copper from the factory or that he stole any copper from the company.
- [13] As mentioned earlier, following the above, Mr Chisane was suspended and subsequently dismissed following a disciplinary hearing.

Grounds of review

- [14] I understand the company's grounds of review, albeit wide, to be that the findings by the Commissioner in the award is not that of a reasonable decision-maker in that the Commissioner failed to apply her mind and/or misconstrued material evidence before her in that:

14.1. The misconduct with which Mr Chisane was charged related to theft committed over a period of time and was not limited to the incident on 28 September 2009.

14.2. During the arbitration proceedings Mr Chisane only challenged Ms Khoza's evidence relating to the incident on 28 September 2009 and not the balance of the allegations against him. Put simply, Mr Chisane did not challenge the evidence by Ms Khoza that he assisted her over a period of time in unlawfully removing pieces of copper from the company's premises.

Applicable legal principles

The review test

[15] The two recent and most important judgments, at least in my view, delivered on the review test are *Herholdt v Nedbank Ltd*² and *Gold Fields Mining SA (Pty) Ltd v CCMA*.³

[16] It is apposite to first have regard to the judgment by the Supreme Court of Appeal ('SCA') in *Herholdt v Nedbank Ltd*.⁴ ('the *Herholdt* case') The SCA in the *Herholdt* case sought to reconfirm the principles enunciated by the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*.⁵ ('the *Sidumo* case'). In a nutshell, the test is whether a reasonable decision-maker could reasonably arrive at the same conclusion that the decision-maker whose decision is under review, has arrived at.⁶

[17] The SCA at par 12 in the *Herholdt* case provided a useful explanation of how the *Sidumo* test operates:

"[T]hat test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. ... The reasons are still considered in order to see how the arbitration reached the result. That assists the court to determining

² (2013) 34 ILJ 2795 (SCA) at par [25].

³ [2014] 1 BLLR 20 (LAC).

⁴ (2013) 34 ILJ 2795 (SCA) at par [25].

⁵ 2008 (2) SA 24 (CC); also reported at (2007) 28 ILJ 2405 (CC) and also at [2007] 12 BLLR 1097 (CC).

⁶ *Ehrke v Standard Bank of SA & Another* (2010) 31 ILJ 1397 (LC) at p 1404, par [19] B/C-D; See also *Fidelity Cash Management Service & Others v CCMA & Others* (2008) 29 ILJ 964 (LAC); also reported at [2008] 3 BLLR 197 (LAC).

whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence."

[18] In examining the effect of the *Sidumo* case the SCA went on to state that:

"... a gross irregularity in the conduct of the proceedings ... was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable ..."

[19] In summary, the SCA at par 25 in the *Herholdt* case stated:

"A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds of s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrive at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[20] What the court was saying, simply put, is that if the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.⁷

[21] In the *Goldfields* case the Labour Appeal Court ('LAC') at par 14 held as follows:

"Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act ... continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds

⁷ National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others (2015) 36 ILJ 232 (LC) at [14].

are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable..."

- [22] The LAC, in considering process-based reviews, stated at paragraph 15 the following:

"... The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to set aside on the grounds of process-related review.

In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.

The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground to interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

... the review court must necessarily consider the totality of the evidence ..."

- [23] And further at paragraph 20:

"... The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

- [24] However, the LAC at paragraph 21 accepted that:

“Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome.”

- [25] In the case of *CUSA v Tao Ying Metal Industries & others*⁸ (“the Tao Ying case”) Ngcobo J stated as follows:

“It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.”

- [26] In summation, although differing to a limited extent in their approach, both the aforesaid judgments make it clear that:

- 26.1. in order to succeed with a review attacking the merits of an award (or ruling in this case), the applicant must ultimately establish that the award fails the *Sidumo* test;⁹
- 26.2. this test would be satisfied if the commissioner misconceived the true nature of the issue he or she was called upon to determine;
- 26.3. where the commissioner did appreciate the true nature of the enquiry, the award or ruling may still be reviewable on the grounds set out in *Sidumo*. Errors of fact and other misdirections appearing from the award or ruling do not, in and of themselves, give rise to a review, but the award will be reviewable if they caused the result thereof to be unreasonable (as occurred in both *Herholdt (supra)* and *Gold Fields (supra)*;¹⁰ and
- 26.4. allied to this, although a commissioner’s reasons obviously remain relevant, both the reasons and the result (on all the material available) must be assailed in order to succeed on review.

- [27] Therefore, the first step in a review enquiry is to consider and determine if a

⁸ [2009] 1 BLLR 1 (CC).

⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). (“*Sidumo*”) at para 110: “*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*”

¹⁰ See also *Myers v National Commissioner of the SAPS* (2013) 34 ILJ 1729 (SCA).

material irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.¹¹

- [28] Should the review court, however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination whether, if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? The review court, in essence, at the second stage of the review test, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision maker, even if it is for different reasons. The end result always has to be an unreasonable outcome flowing from an irregularity, for a review to succeed.¹²

Acts of dishonesty

- [29] Section 23(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 (*the Constitution*) provides that everyone has a right to fair labour practices. The right to fair labour practices extends to employees and

¹¹ National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others (2015) 36 ILJ 232 (LC) at [16].

¹² National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others (2015) 36 ILJ 232 (LC) at [17].

employers alike. One of the primary purposes of the LRA is to give effect to the fundamental rights conferred by Section 23 of the Constitution. This is encapsulated in s 3 of the LRA that provides that any person applying the provisions of the LRA must interpret its provisions to give effect to its primary objects in compliance with the Constitution.

- [30] In *NEHAWU v University of Cape Town and others*¹³ the court remarked as follows:

"The focus of Section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both, in giving content to that rights, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so far as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."

- [31] The LAC in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*¹⁴ quoted with approval the earlier dictum of the Labour Court in *Standard Bank of SA Ltd v CCMA and Others*¹⁵ to the effect that:

"It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee ... a breach of this trust in the form of conduct involving dishonest is one that goes to the heart of the employment relationship and is destructive of it"

- [32] A further reference in the judgment and one frequently quoted in this court and the LAC is the dictum in *De Beers Consolidated Mines Ltd v CCMA and Others*¹⁶ namely:

"A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be a sensible operational response to risk management in the particular enterprise.....; it has everything to do with the operational requirements of the employer's enterprise."

¹³ 2003 (2) BCLR 154 (CC) at [40].

¹⁴ (2008) 29 ILJ 2581 (LAC).

¹⁵ (1998) 19 ILJ 903 (LC).

¹⁶ (2000) 21 ILJ 1051 (LAC).

- [33] In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*¹⁷ the court comments that:

“Turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scale to an extent that even the strongest mitigating factors, like long service and a clear record of a discipline are likely to have minimal impact on the sanction to be imposed. In other words, whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.”

- [34] The learned author on labour law, Professor John Grogan in the December 2008 issue of his publication *Employment Law*, dealing with “*Sidumo*” and the “*Reasonable Commissioner Test*”, comments, with reference to, *inter alia*, *Hulett supra* that:

“... the Labour Court found that the ‘Sidumo test’ did not preclude a reviewing Court from setting aside awards in which employees dismissed for dishonesty were reinstated. Before setting aside the award in Hulett Aluminium, the Court cited a string of pre-Sidumo judgments which support the proposition that ‘conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.’”

- [35] It is clear from the above authority that our courts place a high premium on honesty in the workplace and there are many cases dealing with matters of outright dishonesty, where it was found that the sanction of dismissal was justified.¹⁸ Ultimately, the task of the court is to pass a moral or value judgment in order to determine fairness.¹⁹

- [36] The abovementioned cases outline the approach that commissioners should adopt in arbitrating disputes involving dishonest conduct on the part of

¹⁷ (2008) 29 ILJ 1180 (LC).

¹⁸ *Shoprite Checkers (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2581 (LAC); *Consani Engineering (Pty) Ltd v CCMA & others* (2004) 25 ILJ 1707 (LC); *De Beers Consolidated Mines Limited v CCMA & others* (2000) 21 ILJ 1051 (LAC); *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC); *Standard Bank of South Africa Ltd v CCMA & others* (1998) 19 ILJ 903 (LC); *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC); *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & another* (1991) 12 ILJ 340 (LAC) at 344. Also see *Rainbow Farms (Pty) Ltd v CCMA & Others* [2011] 5 BLLR 451 (LAC).

¹⁹ *Media Workers Association of South Africa & others v Press Corporation of South Africa Ltd (“Perskor”)* 1992 (4) SA 791 (A) at 798I and 802A; See also *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ (A) at 459H; *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC).

employees. The authorities referred to lay down sound and commercially intelligible principles that should not be departed from. It is submitted that a shift away from these principles will further fuel the perception that our labour laws are too inflexible.

- [37] It is against this background that the applicant's background that the applicant's grounds of review and arguments presented by the respective parties in this regard are considered.

Analysis of evidence and grounds of review

- [38] Central to the company's grounds of review and argument presented at the hearing of this matter is its contention that the Commissioner disregarded and/or failed to apply her mind to the evidence that the charges levelled against Mr Chisane was not limited only to the incident of the 28th of September 2009. In the circumstances, I understand the company's case to be that the charges against Mr Chisane related to his ongoing involvement in the theft of copper from the factory and colluding with and assisting Ms Khoza to remove copper from the factory, selling it to a nearby scrap yard and sharing the spoils. On this basis the company contends that the Commissioner's findings is not that which a reasonable decision-maker could reach.

- [39] Having regard to the content of Mr Chisane's notice of suspension, his charge sheet and the evidence presented during the arbitration proceedings, I am satisfied that that the charges against Mr Chisane were not limited to the specific incident on the 28th of September 2009 but related to his alleged ongoing involvement in the theft of copper from the company. This conclusions is supported further by what is set out hereunder.

- [40] The evidence by Mr Tselchous was that: (1) he previously caught Mr Chisane in the past stealing copper;²⁰ and (2) Ms Khoza, advised him that

²⁰ Record p101, lines 1-3.

Mr Chisane assisted her in stealing copper from the factory.²¹ (Ms Khoza testified to this effect during the arbitration). This evidence was not seriously challenged by Mr Chisane during cross-examination. However, it appears, for the first time, from Mr Chisane's evidence in chief that he disputed stealing or ever being caught stealing copper from the company.²²

[41] In *Smal v Smith*²³ his Lordship Mr Justice Claasen said at 438:

"it is, in my opinion, elementary and standard practice for party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved."

[42] The judgment in *President of the Republic of South Africa and others v South African Rugby Football Union and others*²⁴ is similarly relevant in this regard:

*"[61] The institution of cross examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witnesses attention to the fact by question put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lord in *Browne v Dunn* (1893) (6) R 67 (HL) and has been adopted and consistently followed by our courts.*

*[62] The rule in *Browne v Dunn* is not merely one of professional practice but is essential to fair play and fair dealings of witnesses. It is still current in England and has been adopted and followed in substantially the same form in the commonwealth jurisdictions.*

²¹ Record p104, lines 13-17; p108, lines 1-14.

²² Record p107, lines 13-25; p108, lines 21-23; p109, lines 1-24.

²³ 1954 (3) SA 434 (SWA).

²⁴ 2000 (1) SA 1 (CC) at [61] – [63].

[63] *The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particular where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."*

[43] In the premises, I find that very little weight can and should be attached to this belated and bald denial by Mr Chisane regarding the theft of copper on occasions other than the incident on the 28th of September 2009.

[44] Although Ms Khoza, during her evidence, dealt with the incident that occurred on the 28th of September 2009, she testified that Mr Chisane did not give her copper on the 28th of September 2009.²⁵

[45] I understand, Ms Khoza's evidence further to be that Mr Chisane, amongst other employees, assisted her on occasions other than that of the 28th of September 2009 in stealing copper from the company by assisting her to remove copper from the factory in order to enable her to sell it to the nearby scrap yard and sharing the money received.²⁶ This evidence was not disputed by Mr Chisane.²⁷

[46] The fact that the charges against Mr Chisane could not have been limited to the incident on the 28th of September 2009 is supported by the fact that Mr Chisane's involvement in the theft of the copper, the sale thereof to the nearby scrap yard and sharing of the proceeds with Ms Khoza could not have related to the incident of the 28th of September 2009. This is so simply because both Mr Tselchous and Ms Khoza testified that the copper that was removed by Ms Khoza on the 28th of September 2009 in a plastic bag was recovered by Mr Tselchous. It follows that Ms Khoza's evidence relating to

²⁵ Record p108, lines 21-23; p109, lines 1-4.

²⁶ Record p107, lines 13-25; p108, lines 21-23; p109, lines 1-24.

²⁷ Record p120, lines 1-23; p121, lines 21-23; p109, lines 1-24.

the sale of the stolen copper and sharing of the proceeds must have related to occasions other than that of the 28th of September 2009 with which Mr Chisane assisted.

[47] Mr Chisane did not challenge Ms Khoza's evidence that: (1) he assisted her in stealing copper from the company on occasions other than the 28th of September 2009; (2) such copper was sold to the nearby scrap yard; and (3) he shared in the proceeds of the said copper.

[48] The Commissioner clearly either disregarded the aforesaid undisputed evidence or failed to apply her mind to such evidence. This undoubtedly caused her to arrive at a conclusion that is not reconcilable with that of a reasonable decision-maker and renders the award reviewable. Had the Commissioner applied her mind to this material evidence that remained unchallenged, as she was duty bound to do, the inescapable conclusion would have been that Mr Chisane was guilty of the charges levelled against him and consequently that there existed a valid reason for his dismissal.

[49] The court in *Kalik v Truworths (Gateway) & Others*²⁸ (dealing with theft as a form of dishonesty), held as follows:

"[27] *An employment relationship broken down as a result of an act of dishonesty can never be restored by whatever amount of mitigation. The underlying reason for this approach is that an employer cannot be expected to keep dishonest workers in his/her employ. The other reason for this is to send an unequivocal message to other employees that dishonesty will not be tolerated ... The rationale for this approach are also informed by the consideration that a worker with an unblemished record cannot after an incident relating to an act of dishonesty, continue to be trusted. It is the operational risk to the business of an employer that arises from the dishonest conduct, which cancels off whatever good record the worker may have had before the commission of the offence. In other words there would be no purpose in conducting an inquiry into mitigating circumstances where a worker is guilty of misconduct relating to dishonesty. However, this approach would not apply in cases involving other forms of misconduct.*"

[50] The above sentiments echo a long line of decisions stretching back many

²⁸ [2008] 1 BLLR 45 (LC) at [27].

years and in previous cases this court as well as the LAC have emphasized the fact that the main consideration is not one of vengeance or moral outrage, but a sensible operational response to risk management.²⁹

- [51] Employees should be encouraged to avoid dishonest conduct. In our society the levels of workplace dishonesty are increasingly high. Naturally, this state of affairs affects their competitiveness and in some cases seriously challenge the viability of many enterprises, resulting in job losses. This state of affairs cannot and should not be allowed to continue.
- [52] If an arbitrator affords relief to an employee who has stolen, his conduct is in effect, thereby condoned. Theft should under no circumstances be tolerated in the workplace. All employees should know in no certain terms that there are no grey areas or exceptions.
- [53] Employers are entitled to implement rules and enforce discipline to protect their proprietary interests. Rules are an essential part of risk management. In order to properly regulate real risks, the rules must be consistently applied.

Order

- [54] In the premises, I make the following order:
1. The arbitration award issued by the second respondent under case number MEGA27241 on 23 September 2010 is hereby reviewed and set aside.
 2. The award is substituted by the following:

'The third respondent's dismissal was substantively fair'.
 3. There is no order as to costs.

²⁹ De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 ILJ 1051 (LAC).

L M Malan, AJ
Acting Judge of the
Labour Court of South Africa

APPEARANCES:

For the applicant:

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Instructed by Gascoigne Randon & Associates

For the third respondent:

Mr L Makhuni

Instructed by B M Kolisi Attorneys