

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no J 1351/97

In the matter between:

East Rand Gold and Uranium Co Ltd

Applicant

AND

The Commission for Conciliation Mediation

and Arbitration

1st Respondent

J.N Lebea

2nd Respondent

A.A Shabalala

3rd Respondent

SS Msibi

4th Respondent

MJ Cashibe

5th Respondent

LJ Dube

6th Respondent

I Tshabalala

7th Respondent

National Union of Mineworkers

8th Respondent

JUDGMENT

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MLAMBO J.

1. On 6 November 1997 the second respondent (“Lebea”), a commissioner under the auspices of the Commission for Conciliation Mediation and

Arbitration (“the Commission”), issued an award in which he purported to inter alia, reinstate the Third to the Seventh respondents (“individual respondents”) in the employ of the Applicant. Lebea, had been appointed in terms of **section 136** of the Labour Relations Act no, 66 of 1995 (“the Act”) to arbitrate a dispute between the Applicant and the individual respondents who were represented (during the arbitration proceedings) by the Eighth respondent, their union.

2. The individual respondents had been dismissed by the applicant as a result of alleged misconduct involving the theft of gold bearing material belonging to the Applicant. The Applicant approaches this court for an order to review and set aside the award issued by Lebea.

The factual background

3. The events and facts giving rise to the arbitration proceedings conducted by Lebea, and the background thereof, may for the sake of convenience be summarised as follows:

3.1 The Third respondent (“Shabalala”) was charged with theft of gold bearing material from the Daggafontein plant, a division of the Applicant. He appeared at an internal disciplinary hearing presided

over by Mr R Peacey (“Peacey”).

3.2 The Fourth respondent (“Msibi”) and the Seventh respondent (“Tshabalala”) were charged with gross negligence based on their alleged assistance in the removal of gold bearing material from the Applicant’s Daggafontein plant. Msibi’s internal disciplinary hearing was chaired by Peacey whilst Tshabalala’s hearing was chaired by Boshoff. The allegation against them was that they neglected to search vehicles driven by Cashibe and Dube which allegedly were used to remove gold bearing material from the Applicant’s Daggafontein plant.

3.3 The Fifth respondent (“Cashibe”) and the Sixth respondent (“Dube”) were charged with being accomplices to theft in that it was alleged that they, in their capacities as drivers, assisted in the removal of gold bearing material out of the Applicant’s Daggafontein plant. They also appeared at an internal disciplinary hearing chaired by Peacey.

3.4 All the individual respondents were found guilty and were dismissed. They all lodged appeals in terms of the Applicant’s disciplinary code and

procedure, which appeals were all unsuccessful.

4. The individual respondents then declared a dispute and referred it to the Commission in terms of the provisions of the Act. Conciliation failed to resolve the dispute and it was consequently referred to arbitration. The arbitration proceedings before Lebea took place on the 11th through to the 14th of July 1997 and thereafter on the 11th to the 14th of August 1997.

5. In the arbitration proceedings the individual respondents denied involvement and or participation in theft or dishonest conduct as well as negligence. On the 6th of November 1997 and in terms of **section 138(7)** Lebea handed down his award. The award is as follows:

“AWARD

Based on the above, I make the following award:

1. The dismissal of Shabalala, Cashibe, Msibi, Dube and Tshabalala was unfair.
2. The company is ordered to reinstate Shabalala, Cashibe, Dube, Msibi and Tshabalala to terms and conditions of employment not less favourable than those that would have applied to them had they not been dismissed.
3. The company is ordered to pay Shabalala, Cashibe, Msibi, Dube and Tshabalala an amount equivalent to 7(seven) months' remuneration in respect of the period of their unfair dismissal being their arrear earnings. This amount shall be calculated at the rate that would have applied to them as at the date of this award had they not been unfairly dismissed. The payment as aforesaid will be effected within 10 (ten) days of the date of this award.

4. The reinstatement of the individual Applicants as set out in paragraph 1 hereof shall take place within 10 (ten) days of the date of this award.

5. I make no order as to costs.”

6. The Applicant seeks to upset Lebea’s award in this review application on the following broad grounds:

6.1 “that the arbitrator , in coming to a conclusion without *inter alia* having regard to credibility of witnesses, committed a gross irregularity in terms of the provisions of section 145(2)(a)(ii) of the Act;

6.2 the provisions of section 33 of the Constitution of the Republic of South Africa (1996) (“the Constitution”), read with item 23(2) of schedule 6 to the Constitution;

6.3 the common law grounds of review.”

The Applicant’s submissions

7. Mr Pauw, counsel for the Applicant, advanced comprehensive submissions in support of the Applicant’s case. He submitted primarily that the award should be reviewed and set aside because

Lebea did not consider the credibility of the witnesses in assessing the evidence before him. This submission is supported by reference to certain portions of the award which, according to Mr Pauw, provided a conclusive demonstration that Lebea's disregard of the credibility of witnesses amounted to a gross irregularity within the contemplation of section 145. Mr Pauw submitted that credibility was crucial in view of the individual respondents' defence of alleged jealousy and racism by their accusers, Enslin and Pretorius, as well as the fact that Lebea had before him two dramatically opposed versions. The following examples were cited which, according to Mr Pauw, demonstrate that credibility was crucial and should not have been overlooked by Lebea: the version presented by Shabalala that Enslin was a racist was not credible simply because Shabalala had never lodged a grievance regarding such racism; despite such racism allegations Shabalala stated that he still wanted to assist Enslin progress at work; Enslin denied hating black people and considered himself to be Shabalala's friend; Enslin and Pretorius were never attacked as lying; Shabalala could not account for his whereabouts during a substantial portion of his shift

on 8 October 1996; Cashibe remembered almost nothing regarding the events of 8 and 9 October 1996; Msibi used to see Dube almost daily except for 8 and 9 October 1996; Tshabalala consistently failed to answer direct questions and contradicted himself, for example that he could not see the bakkie but saw a spare wheel at the back of the bakkie; Shabalala denied the versions of Enslin, Pretorius and Ngomane about where sample bags were kept; that Pienaar and Enslin gave evidence of confessions of guilt made to them by Shabalala.

Standard of review

7. In **Carephone (Pty) Ltd v Marcus N.O & Others (1998) 11 BLLR 1093(LAC)** the Labour Appeal Court settled the question of the ambit of the review jurisdiction of this court over arbitration awards of the commission. There the court reaffirmed the fact that the administrative justice section of the Bill of Rights in the Constitution (108 of 1996) has broadened the scope of judicial review of administrative actions. At paragraph 31 and 32 the court

said:

“The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it(*section 33 and item 23(b) of schedule 6 of the Constitution*). This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety.

But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal. According to *The New Oxford Dictionary* ‘justifiable’ means ‘able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible’. It does not mean ‘just’, ‘justified’ or ‘correct’. On its plain meaning the use of the word ‘justifiable’ does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals.”

9. Further at paragraph 35 and 36 the court said:

“When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or

her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”

10. The notion of review of the awards of the Commission by this court as restated and settled by the Labour appeal Court in the **Carephone** judgment means that this court cannot and should not attempt to determine the correctness of an award. Rather the court should be pre-occupied with the task of determining whether the award is rationally justifiable in relation to the reasons given for it.

11. It is trite that a decision maker such as a commissioner must consider the evidence placed at his disposal and must base his award thereon. In **Standard Bank of Bophuthatswana Ltd v Reynolds NO 1995 (3) SA 74(B)** at 89F-G Friedman JP said:

“Our courts have held that where a decision-maker takes a decision unsupported by any evidence, or by some evidence which is insufficient reasonably to justify the decision arrived at, or where the decision-maker ignores uncontroverted evidence which he was obliged to reflect on, the decision arrived at will be null and void.”

A commissioner considering the evidence placed at his disposal is,

under normal circumstances, expected to properly evaluate and assess the evidence in order to make his award.

Credibility of witnesses

12. Lebea made it clear in the award that he would not deal at all with the credibility of any of the witnesses but would look at the evidence as a whole with due regard to the balance of probabilities. The Applicant is critical of this approach on the basis that probabilities cannot be properly assessed without making any credibility findings.

13. The demeanor of witnesses is the primary basis upon which credibility is assessed. Hoffman & Zeffert: South African Law of Evidence 4th edition at page 610 the learned authors say the following:

“Demeanour should be allowed only to reinforce a conclusion reached by an objective assessment of the probabilities, or possibly to turn the scale when the probabilities are evenly balanced.”

14. In **S v Kelly 1980 (3) SA 301** at 308B - C Diemont JA said:

“There can be little profit in comparing the demeanour only of one witness with that of another in seeking the truth. In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride.”

And at E -F:

“Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does, “reflect on and enhance the credibility of oral testimony”. The experienced trial officer is well aware of this fact; it is a matter of common sense. He observes the witness closely -- evasions, hesitations and reactions to awkward questions. He will note, if he is alert, “all the incidental elements so difficult to describe which make up the atmosphere of an actual trial”.

15. As Diemont JA said **S v Kelly** above the demeanour of witnesses and their credibility is not a substitute for evidence. Reliance on the demeanour and credibility of witnesses is a subjective issue. It is “tricky horse to ride” which can sometimes mislead. Where the demeanour and credibility of witnesses is relied on full reasons for doing so must be set out. A decision not to rely on the demeanor and credibility of witnesses is under normal circumstances not open to criticism. After all it is up to the decision maker who has the benefit of listening to the witnesses and observing their behaviour to decide which witnesses to believe and why.

16. It must be accepted that when the Commission's arbitral function was conceived the object was to introduce a process that is free from legal formalities free from legal technicalities and free from legal representatives (to a large extent). The process is meant to be simple so as to enable employers and employees, on their own, to easily ventilate their differences. Though the process is essentially judicial in nature it does not transform the Commission into a court of law.

"The constitutional answer to this submission is that although the Commission or other organs of state may perform functions of a judicial nature they are not courts of law and thus have no ***judicial authority under the Constitution (sections 165, 166 and 239 of the Constitution)***. Their judicial functions do not transform them into part of the judicial arm of the state, nor does it make them part of the judicial process (cf *Bernstein and Others v Bester and Others* NNO 1996 (2) SA (CC); 1996 (4) BCLR 449 (CC) paragraph 95 o 97)."

Carephone (Pty) Ltd v Marcus NO & Others Supra at paragraph 18.

17. It is correct that public institutions such as the Commission are subject to the same values of accountability, responsiveness and openness which apply and have always applied to courts of law. This however does not mean that the formalities, practices and rules applicable to courts of law are also applicable to public

institutions such as the Commission. Confirmation of this is found in section 138 of the LRA which provides for an arbitration process with minimum legal formalities. This means that under normal circumstances if a court of law should, in assessing evidence, consider the credibility of witnesses, the same cannot be said to be also applicable to public institutions such as the Commission. This obviously does not mean that a lesser or lower standard of accountability and responsiveness applies to public institutions. It simply means that the actions and conduct of public institutions are measured differently in terms of their nature. The cornerstone of the Commission's arbitral function is equity and fairness whilst courts of law dispense with law and justice. This should not be interpreted to mean that the credibility of witnesses, as a way of assessing evidence has no place in the arbitration process of the Commission. In appropriate cases commissioners will be expected to make reference to and place reliance on the credibility and demeanour of witnesses in their awards. They should however be vigilant to the dangers inherent in this approach.

18. One should be careful not to burden commissioners with the added responsibility of also basing their awards on the demeanour and credibility of witnesses. Section 138 of the LRA advocates an arbitration process that is simple, less formalistic and less legalistic with curtailed legal representation. With this setting in mind it would be improper to expect demeanour and

credibility, issues rightly at home in proper judicial processes to feature prominently in the Commission's arbitration function. In the final analysis what the court has to determine in a review of an award of the Commission is whether it was arrived at arbitrarily, capriciously or malafide, or that the commissioner took into account irrelevant considerations or ignored relevant ones or that the award is so grossly unreasonable so as to warrant an inference that he had failed to apply his mind to the matter. Once this is shown it will have been demonstrated that no fair hearing took place meaning that the award cannot be justified in relation to the reasons given for it. See **Pep Stores (Pty) Ltd v Laka NO & Others (1998) 9 BLLR 952 (LC)** at page 960A -C. Unless a commissioner is enjoined by the Act or any relevant statute itself to take certain matters into account or to exclude them from consideration, it is primarily his task to decide what is relevant and what is not and also to determine the weight to be attached to each relevant factor.

The award

19. Regarding the matter in casu the court proceeds to consider whether Lebea's award is reviewable due to his decision to overlook the credibility of the witnesses who testified before him. It is therefore a worthwhile exercise to consider Lebea's analysis of the evidence before him.

20. The Applicant through, Pretorius, led evidence that Shablala was seen

in an area called the bunded area, at a time when he was not supposed to be there and without having obtained the key to that area from him. Lebea views the evidence as follows:

“I must also add that the evidence of the company about the above incident at times seemed to me to be inconsistent and unclear in the following respects:

. Pretorius saw Tshabalala (*Shabalala*) in the place in which he was not supposed to be and asked him what he was doing there. Tshabalala gave unintelligible answer and said “hello”. Pretorius chose to ignore Tshabalala and proceeded to have a shower.

. When he came back to the office he told Enslin about what had happened.

They then decided to phone Smith at his house. Nobody bothered himself to alert the corporal officer on duty during the theft about the incident. In fact Mohulatsi was kept in the dark through out.

. Nobody from the company knew who was at the gate when Cashibe left the plant on 8 October 19996. The version of the company became somewhat self-contradictory in that both Enslin and Raubenheimer suggested theirs suffered (sic) in that evidence that Cashibe left the plant between 6h55 and 7h05. In fact, Enslin testified that he actually saw him at the gate and was there for about two minutes. The documentary evidence produced by the company, however suffered (sic) that Cashibe only left the premises at least at 7h30 on 8 October 1996. Mr Olivier during cross examination and during argument seemed to put a version that the sample bags were disposed of during the unaccounted period reflected by the blank space in the logsheet.

21. Pretorius on behalf of the Applicant further testified that Shabalala removed sample bags from the bunded area and placed them at the pavement in front of the laboratory. Lebea commented, in this regard, as follows:

“ Did Shabalala act in this manner or did he act with such an intention? My answer is in the negative for the reason that even if I were to assume that he removed the samples from the bunded area (which) I still have to determine) and put them in the pavement in front of the laboratory, that would not in my view per se be an act of appropriation. The pavement in front of the laboratory is a very conspicuous place, it is within the view of people from many directions, including people driving or walking towards the main gate. The alleged removal of samples took place in broad day light, viz at about 5h00 in summer! From this action I cannot infer furtive intention (*animus furandi*). Furthermore, no casual connection was drawn between the action of Shabalala and Cashibe it may well have happened that Cashibe’s action was a completely independent action (***novus actus interveniens***) **not connected to Shabalala previous action knows (acts intervenes)**. **I, therefore, arrive at the conclusion that the evidence has not established theft on the part of Shabalala.”**

22. In the award Lebea states that he was urged to guard against piecemeal reasoning and consider the evidence as a whole. He says:

“ I fully agree with this proposition. The logical result of this process of evaluation of evidence in relation to this matter is that I should not consider evidence relating to Shabalala in isolation from the evidence in respect of Cashibe. There was no evidence to the effect that when Cashibe left the premises the vehicle was either negligently or intentionally not searched by the security guard who was manning the gate. Instead Enslin stated that the kombi stopped at a gate for about two minutes (which was a normal time). The only inference I can draw from this is that the kombi was properly searched and if there was anything unlawful in the (sic) the security guard could have detected it and taken appropriate action. This conclusion is strengthened by the fact (sic) if the samples had left the premises without having been searched, the company could have investigated about the security guard who was at the gate (just as it did in respect of Msibi) and taken appropriate action against such security official. I’ therefore, find that

Cashibe did not remove the sample bags or did not in any manner facilitate the theft of the sample bags.”

23. As regards the events of 9 October 1996 Lebea comments that some aspects of the Applicant’s case left him perplexed and these are:

“Shabalala on this day, i.e. 09 October 1996, was said to be fully prepared for his activities in that he was now having a 25 litre bucket, house (sic) pie and empty sample bags. He remained in the bunded area from about 1h00 to 5h00 and at about 6h45 he was loading samples onto Dube’s bakkie. Did Shabalala ever work during this shift?

Mohulatsi who was in charge of the security department during the entire shift was again kept in the dark about the developments. Pretorius spoke to Mohulatsi but chose to keep quite about Shabalala’s activities. Would a reasonable person in Pretorius, Enslin or Raubenheimer’s position had behaved in the manner they did?

Pretorius saw Dube removing company goods out of the premises of the company. He did nothing to get Mohulatsi or anybody to pursue Dube and recover company goods. What else did he want to prove?

The company witnesses had sought to place Tshabalala out of the scene at the gate, Mr Olivier even suggested to Tshabalala that he did not see Dube when the latter was at the gate because he was sitting down at the gate house because his leg was aching. This was the versions of the company. At the same time Tshabalala was dismissed for gross negligence in not searching the vehicle or allowing the vehicle to leave with

company property. This raised a question whether was Tshabalala dismissed for gross negligence or for testifying in favour of Msibi which testimony had an effect of absolving Dube, Msibi and Shabalala.”

Lebea further says elsewhere in the award:

“Let us now consider the case of Tshabalala. As already pointed out above that the company’s stance in relation to Tshabalala was rather ambivalent. The company’s version was essentially that he was not present or did not witness the incident. Why then punish him? It is either that Tshabalala was present when the search was conducted or was telling lies. If it was the latter the company should have simply dismissed his evidence as lies and upheld the truth.”

24. Lebea also rejected Enslin’s version that there were sample bags at the back of the bakkie and that it is likely that Enslin saw a spare wheel and mistook it for ample bags. In this regard he says:

“Only Enslin saw the samples at the back of the bakkie. He was observing the samples from the vantage point in the 6th floor of the elution building. The evidence of Dube, Tshabalala and Msibi was that there was only a spare wheel at the back of the bakkie. The question which then arises is could Enslin have been able to identify and distinguish between darkish samples and the sparewheel? It is, therefore, more probable to me what Enslin saw at the back of the bakkie was, in fact a black sparewheel.”

25. As to the confessions alluded to by Pienaar and Enslin Lebea

stated that he was confronted with uncorroborated versions from both sides. He says:

“The circumstances under which the said confessions were made do not make me to believe that they were indeed made. I start with the discussion of 11 July 1997. The alleged confession only came to light when the union made allegations about racism or racial conspiracy. If a confession had indeed been made Enslin would immediately have apprised Mr Olivier of it. This is to me improbable especially having regard to the adversarial nature of the relationship of the parties during the proceedings. Regarding the discussion of 18 October 1996, I am quite prepared to accept that incentives to make a confession were put to Shabalala. But I cannot say on a balance of probabilities that as the result of such inducement by Pienaar, Shabalala did make oral confession, judging from Pienaar, did make oral confession. Judging from Pienaar’s methodology he at least would have drafted some statement albeit not signed by Shabalala.”

26. Lebea then made the following findings:

26.1 The evidence of Enslin and Pretorius about seeing Shabalala in the bunded area was suspect.

26.2 Shabalala did not have a spare key to enter the bunded area and open the valves. The key was, at all material times in the possession of Enslin and/or Pretorius at the time Shabalala was allegedly seen in the bunded area.

26.3 Shabalala was never in the bunded area. Shabalala gave a detailed account of what he did during the time he was alleged to be in the bunded area.

26.4 Shabalala did not remove any sample bags from the bunded area as alleged.

26.5 There were no sample bags at the back of the bakkie driven by Dube when it exited the Applicant's premises.

26.6 Msibi conducted a proper search of the bakkie driven by Dube when he was at the gate.

26.7 There was no case whatsoever against Tshabalala as the company's case was that he did not see the bakkie and its driver (Dube).

27. It should be apparent from the portions of the award cited that not only did Lebea consider the evidence placed before him, but

also that he evaluated the evidence and on a balance of probabilities chose the version of the individual respondents. Considering Lebea's findings it cannot be argued that he ignored uncontroverted evidence or that his findings cannot be supported by the evidence before him. A careful reading of the award reveals that not only did he consider the evidence before him, it also demonstrates that in assessing the evidence he applied his mind to all of it.

28. Mr Pauw also submitted that Lebea's assessment of the evidence on a balance of probabilities was also incorrect. Lebea found , as regards to Shabalala, that even if he had removed samples from the bunded area and put them on the pavement in front of the laboratory that this would not amount to an act of appropriation. I need not consider this line of thinking in any great detail simply because Lebea found in any way that Shabalala was never in the bunded area (to remove the samples). This reasoning would have been very relevant had Lebea found that Shabalala was in the bunded area and had removed sample bags.

29. Lebea's finding that Shabalala was never in the bunded area is also attacked on a different basis. Mr Pauw criticizes this finding on the basis that Lebea failed to consider the evidence of Enslin and Pretorius, who corroborated each other. Mr Pauw stated that Shabalala's version was uncorroborated and this meant that on a balance of probabilities Lebea had to accept the Applicant's version in the absence of a credibility finding. It is notable that Lebea is not criticised on the basis that he ignored the evidence of Enslin and Pretorius. Indeed he cannot be criticised of this because he did not ignore their evidence, but considered all the evidence before him. What influenced Lebea not to accept the evidence of Enslin and Pretorius about the presence of Shabalala in the bunded area is the fact that it was common cause that there was only one key to the bunded area and at the time of the alleged incident that key was in the possession of Pretorius. In fact Lebea found that the Applicant's version that Shabalala gained access into the bunded area because he had a key was sheer speculation. He stated that he would not make a decision based on conjecture. Furthermore

there can be no question of corroboration between Enslin and Pretorius because only one of them says he saw Shabalala in the banded area.

30. Lebea is also criticized for his finding that on 9 October 1996 Pretorius did not see if samples were at the back of the bakkie driven by Dube. To resolve the issue the court referred to annexure **X.3** the a record of the proceedings before Lebea. It is correct that under cross examination Pretorius was asked the question: “**Did you see samples inside the bakkie?**” His answer was a simple “**No.**”. It is also correct however that he testified that he saw Shabalala load samples in the bakkie before was driven it to the security gate where it stopped for 30 - 60 seconds and left. Dube denied that he transported samples out of Applicant’s premises on 9 October 1996. It appears that Lebea was influenced by the answer Pretorius gave under cross- examination for his finding that Pretorius did not see if sample bags were at the back of the bakkie. To say Lebea was incorrect is not entirely correct. If Pretorius was certain that there were sample bags at the back of the bakkie he

could easily have said so.

31. Lebea was also criticised for his finding that Enslin must have seen a spare wheel at the back of the bakkie and not 12 sample bags. Also challenged is Lebea's finding that Msibi searched the bakkie and that the factual dispute as to where the sample bags were normally placed was not material to the determination whether theft was committed or not. It is not clear why Lebea found that Enslin must have seen a spare wheel rather than 12 sample bags. He says it was more probable that Enslin saw a spare wheel. What is clear is that Lebea applied his mind directly to the issue regarding the spare wheel and sample bags and found on a balance of probabilities that Enslin must have seen a spare wheel. If one considers that Enslin never saw sample bags being loaded on the bakkie and that it was Pretorius who told him of this it is safe to conclude that when he saw something at the back of the bakkie he simply assumed it to be sample bags.

32. As to the security search Lebea's reasoning was that Enslin

did not remain at his observation point the whole period the bakkie was travelling to the gate or was at the gate. It is correct that Enslin left the area to look for Pretorius and it is possible that it is at that time the search was conducted. The court cannot find scope to criticise Lebea for finding that the dispute as to where sample bags were normally placed was not material to the determination whether theft was committed. The court could also find no merit in the Applicant's criticism of Lebea on the basis that he did not rely on certain evidence by Enslin, Pretorius and Ngomane which was relevant to the probabilities. What is clear from Lebea's award is that he considered all the evidence before him and made his findings based thereon.

33. Lebea's comments about Shabalala being seen in the cynade area are irrelevant as far as the issues in this matter are concerned. It is correct that these observations are not borne out by the evidence and as such are meaningless. On their own however they are not sufficient to have the award set aside.

34. Another aspect which has attracted criticism from the Applicant is Lebea's finding that Peacy's involvement in the pre-hearing investigation involving Shabalala, Cashibe, Msibi and Dube had resulted in him not entering the internal disciplinary proceedings with an open mind. It is common cause that on hearing of the incidents allegedly involving the individual respondents, Peacy requested some samples to be taken and after receiving the results he formed the view that gold was probably stolen. This was before the individual responsible were charged. Describing his involvement in such pre-hearing investigations, Lebea stated:

"His involvement is more than what one would call an institutional bias but goes to the root of the principle that nobody should be a judge in his own case."

35. Mr Pauw made the submission that Lebea had no basis for this finding in that though Peacey had to an extent, participated in the pre-hearing investigations and had independently deduced that gold was probably stolen there was no evidence suggesting that Peacey came to his conclusion (as chairperson of the hearings) other than by way of reference to the evidence adduced at the respective internal hearings and on a balance of probabilities. It was further submitted that the mere fact that Peacey had established that theft had been committed at some stage was not

indicative of his having established prior to the hearings who exactly committed such offences and on what particular date. This contention is integral to the charge against the individual respondents in that in any investigation of a charge of theft against the individual respondents it would be required of the Applicant to establish that gold bearing material had indeed been stolen.

36. The involvement of Peacey in the investigations that led to that conclusion, which investigations were conducted outside of and beyond the ambit of the disciplinary hearings, meant that at least that aspect of the charges against the individual respondents had been pre-judged by Peacey by the time the hearings against them commenced before him. Notwithstanding the fact that Peacey may not have reached the conclusion as to who had stolen the material, the issue of whether or not the material had in fact been stolen was at issue in the disciplinary hearings and the fact that Peacey had reached a view thereon precluded him from presiding over the hearings in an unbiased and objective manner.

38. The Applicant's other challenge to Lebea's finding regarding Peacey is that he did not apply his mind to the provisions of Item 4 of schedule 8 to the Act. Item 4(1) provides that:

“(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”

38. It is clear that Item 4 provides for a process where the employee is confronted with the allegations against him and he is given an opportunity to respond thereto or even defend himself. What is clear is that the process through which the Applicant subjected the individual respondents is much more than what schedule 8 provides for. The process followed by the applicant is what is provided for in the disciplinary code and procedure applicable to the parties. There is no doubt in the court's mind that the Applicant had in mind the provisions of the disciplinary code when it initiated hearings against the individual respondents.

39. The fact that item provides for a certain type of standard in the investigation of alleged misconduct does not mean that what the parties themselves have agreed as to the standard in such investigations does not apply. The Act promotes and encourages parties to regulate their relationships through privately agreed procedures and processes. Where parties have an agreed disciplinary code and procedure that is the process through which they have agreed to resolve disciplinary issues. The provisions of Item 4 would therefore apply where parties do not have an agreed disciplinary process. In the court's view once parties have agreed to a disciplinary process that encourages a liberal standard one of them cannot be heard to argue that a conservative standard contained elsewhere should have been applied.

40. With this in mind it is clear that Lebea though aware and mindful of the provisions of Item 4 applied the standard implicit in the parties' agreed disciplinary code and procedure. Lebea's conclusion regarding Peacey's state of mind should therefore be understood in this light. In Lebea's mind Peacey's involvement in the pre-hearing investigations regarding Shabalala, Cashibe,

Dube and Msibi disqualified him to sit as chairperson in disciplinary enquiries involving these persons. In a situation where no agreed disciplinary code and procedure was in place Lebea's conclusions could be adjudged to be out of place. In the court's view there is no merit in the criticism levelled at Lebea in this regard.

41. A reading of the award reveals that in relation to each of the conclusions reached by Lebea in the award he has pointed to specific deficiencies in the evidence of the Applicant's witnesses. These deficiencies are not fanciful. Whether the weight afforded to each of these deficiencies is that which the Applicant, this court or another arbitrator would have attributed is not the issue. That exercise lies in the discretion of the arbitrator, and the fact that he has done so in a manner that differs from that which the Applicant would have liked to see does not render his decision reviewable. It must, at all times, be borne in mind that what this court is engaged with is a process of review, not appeal.

42. In **Carephone (Pty) Ltd NO and others (supra)** the Labour Appeal Court per Froneman DJP stated that an award should be justified in relation to the reasons given for it. The reasons given by Lebea on their own can be defended. The test here is not whether another person or arbitrator would have arrived at a different finding. The court is not persuaded that Lebea committed any irregularity warranting interference by this court. As argued by Mr Jammy, counsel for the individual respondents, the Applicant's case against the individual respondents was based on circumstantial

evidence. On this basis the aspects of the evidence on which the applicant relied must be beyond reproach. It is in this regard that Lebea found deficiencies in the Applicant's case against each individual respondent. On that basis therefore the reasons he gives against the Applicant are above reproach. It appears justified therefore that the application for review should fail.

43. The order of this court is therefore:

1. The application for review is dismissed.
2. The Applicant is ordered to pay the legal costs of the third to seventh respondents.

Mlambo J

Date of Judgment: 7 May 1999

For the Applicant: Mr P. Pauw instructed by Brink
Cohen Le Roux & Roodt Inc.

For the 3rd to 7th respondent: Mr P Jammy instructed by
Nomali Tshabalala Attorneys.

Reportable and interest to other judges