IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: JR789-07

In the matter between:

TRUWORTHS LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION

AND ARBITRATION **1st Respondent**

KHABO MAMBA N.0 **2nd Respondent**

RAWU obo ADELINE MASILELA **3rd Respondent**

JUDGMENT

AC BASSON, J

Parties

[1] The Applicant is Truworths Limited, a company duly registered in accordance with the company laws of South Africa having its Northern Gauteng divisional offices situated at Cnr Church and Andries Streets, Pretoria, Gauteng. The Applicant operates a chain of retail stores throughout Southern African and is the employer party in the dismissal dispute that was referred by the Third Respondent to the First Respondent and in respect of which the Second Respondent (hereinafter referred to as "the Commissioner") issued an arbitration award.

[2] The Third Respondent is the Retail and Allied Workers Union ("RAWU"), a registered trade union. The Third Respondent is acting on behalf of Ms Adeline Masilela (hereinafter referred to as "the Respondent") who was employed by the Applicant until the time of her dismissal.

Nature of the application

[3] This is an application to review and set aside an award made by the Commissioner on 8 March 2007. In terms of this award the

Commissioner found the dismissal of the Respondent substantively unfair. The Applicant was ordered to reinstate the Respondent retrospectively.

[4] The Respondent seeks to set aside the award on one or more of the following grounds:

1. The Commissioner committed a gross irregularity in the proceedings; alternatively the Commissioner exceeded her powers by disregarding common cause facts;

2. The Commissioner committed misconduct and/or a gross irregularity in the proceedings by failing to appreciate material evidence led by Applicant in respect of the polygraph test;

3. The Commissioner committed misconduct and/or gross irregularity in the proceedings by failing to take into account relevant and material evidence relating to the key register and the locksmith;

4. The Commissioner committed misconduct and/or gross irregularity in the proceedings in relation to the Respondent's credibility; and/or

5. The Commissioner's findings in relation to Ms. Wali's credibility are not rationally justifiable.

Brief exposition of the relevant background facts

[5] The Respondent was employed as a supervisor of four departments. She was responsible to oversee these four departments and to perform duties incidental thereto. She was employed for 26 years and was accordingly familiar with all the procedures including procedures to secure company assets and proper handover procedures. On 21 June 2005 the Respondent was issued with a final written warning for failure to follow rules and procedures. I will refer to the handover procedures in more detail hereinbelow.

[6] On 31 March 2006 eight (8) watches were stolen / removed from the fine jewelry department. Ms. Bulelwa Wali (hereinafter referred to as "Wali") is normally responsible for the fine jewelry department. During teatimes she will, however, hand over the department to another employee who will then be responsible for the department until Wali returns. It was common cause that Wali handed over the responsibility of the department to the Respondent on this day. It was further common cause that the Respondent was in charge of the jewelry department between 15H30 and 16H00 on 31 March 2008.

The Applicant alleged that it was during that period that the watches went missing. This was strongly disputed by the Respondent.

Key register / Handover procedures

[7] It was common cause that, when one employee takes over a department from another employee (as happened in this case when the Respondent took over from Wali for a period of about 30 minutes during which Wali went on her tea break) a key register has to be signed. It is not clear from the evidence what an employee acknowledges when he or she signs the key register. It was argued by Mr. Khoza on behalf of the Respondent that an employee who takes over a department merely signs the key register to indicate that she is now in possession of the keys and to confirm that all cabinets are locked with their stoppers in place. The evidence was not that an employee who signs the key register also acknowledges that he or she has also checked the stock. From the award it would, however, appear that the Commissioner was under the impression that when an employee signs the key register, it is to indicate that *"everything"* is in order. The Respondent's own evidence also appears to support the conclusion that before an employee signs the key register, an employee must first check that "*everything is in order*" "*like if the cabinets are locked*". From the Respondent's

evidence it would therefore appear that the signing of the key register involves more than merely checking if the cabinets are in order. What is, however, clear from the evidence is that, at the very least, an employee must check that all the cabinets are locked.

[8] It was common cause that on the day in question, the Respondent had signed the key lock register at 15H30 and that the responsibility of the department then went over to the Respondent for the period between 15H30 – 16H00 in order to allow Wali to go on her tea break. It is also common cause that before Wali left, she and the Respondent performed a counter check in accordance with standard procedures as set out in the aforegoing paragraphs. Wali and the Respondent checked the cabinets and checked whether they were all locked with their stoppers in place. Wali confirmed in her evidence that *"everything was fine"* and that the *"stoppers were all there"* and that the Respondent confirmed that everything was fine before she (Wali) left. Once the cabinet check was done, the key register was signed by both Wali and the Respondent. Wali thereafter went on her tea break. Wali confirmed that she would not have gone for tea if there had been a problem with the cabinets.

Events between 15H30 – 16H00

[9] It was common cause that between 15H30 – 16H00, Lydia Breytenbach (hereinafter referred to as "Breytenbach") - a sales consultant - came to the jewelry department with a customer. Breytenbach came to perform a store look-up for a customer on the computer in the fine jewelry department. It was not the evidence that Breytenbach had opened any of the counters in the fine jewelry department. It was further common cause that Breytenbach did not have any keys to the counters.

Events at 16H00 and thereafter

[10] On her way back from tea, Wali collected her float and returned to the department. It was her evidence that when she arrived at the counter the Respondent did not check the counters with her as per the standard handover procedures. She testified that the Respondent just handed her the keys for the counters and that the Respondent immediately left for tea. According to Wali, the Respondent was in a hurry to leave for tea. Wali further testified that she still had her float with her and was about to put it in the drawer when Breytenbach came to the department and handed her an empty watch holder that she had found in the Daniel Hechter department. Breytenbach also confirmed in her evidence that she immediately after Wali returned from tea approached her to tell her

about the watch clip. Breytenbach also confirmed in her evidence that Wali could not have had the time to open the cabinet when she had returned from tea. It was at that stage that Wali then checked the counters and discouvered that one of the cabinets was opened and that a stopper was missing. She also checked the keys and found no stopper on the keys. Wali then immediately phoned the Respondent in the tearoom but could not get through. Breytenbach then returned with the floor manager at which time Wali then informed the floor manager what had happened.

[11] Wali testified that she had spend very little time in the department before Breytenbach came to the department. In fact, she did not even have time to put her float away before Breytenbach had arrived at the department. Wali estimated that between the time Breytenbach told her about the watch holder and the time she looked at the cabinets only a few seconds went by. Mr. Khoza on behalf of the Respondent also conceded that not more than 5 minutes could have gone by between the time the Respondent handed Wali the keys and left and the time Breytenbach had arrived at the department.

[12] Wali testified that when she had found the stopper missing from the cabinet, she also found that 8 watches were missing. She testified that if the Respondent had waited (as she should have done) and checked the locks with her (as she was supposed to have done), the Respondent would have seen that the stopper was missing.

When did Wali sign the key lock register?

[13] It was common cause that Wali did not sign the key lock register when the Respondent left the department at 16H00 and it was further common cause that Wali only signed the key lock register after it was discouvered that the watches had gone missing and after she had reported the incident to management. It is significant to refer to this fact as it appears from the award that the Commissioner drew a negative inference from the fact that Wali had signed the register only later. The Commissioner found that no plausible explanation was given to the arbitration why Wali had signed the key register after it was discovered that 8 watches were missing. I will again return to this point hereinbelow. Suffice to point out that an explanation was in fact given by Wali. She testified that the Respondent had left before the counter check could be done and that she only later signed the key lock register to acknowledge that she was handed the keys by the Respondent. Crous, on behalf of

the company, testified that Wali had acted properly when she signed the register after the incident was discovered and reported. Wali explained that although she had signed the key register it was merely to acknowledge that the keys were handed to her and that it was *not* an acknowledgement that the hand over at 16H00 was done properly.

[14] The Commissioner, however, did not accept the evidence of Wali that the handover was done hastily. This is clear from question posed by the Commissioner: Why did Wali then sign the register if the handover was done hastily? The reverse is, however, equally true. If the handover was done properly Wali would have signed the register in the presence of the Respondent and not after the incident was reported to management. Wali's evidence that there was not a proper handover is in fact supported by the fact that she did not sign the key register and is further supportive of her evidence that the Respondent was in a hurry to leave the department and that the Respondent in fact did not perform a counter check and that she did not wait for Wali to sign the register. To repeat: If there was a proper handover Wali would have signed after the counter check was done and would have signed together with the Respondent as that was exactly what she and the Respondent did at the first handover which

occurred at 15H30. Mr. Khoza put it to Wali in cross examination that she had never indicated when she had signed the key register that the proper handover procedures were not followed when the Respondent left for her tea break. Wali, however, insisted that although she did sign, procedures were not followed and that she merely signed to indicate that the Respondent had given her the keys and not to confirm that the handover was done properly.

Allegations of intimidation by Mr Khoza of company witnesses

[15] Wali also confirmed in her evidence that Mr. Khoza, (who was also the representative during the arbitration) intimidated her and Breytenbach prior to the commencement of the hearing. It is clear from the record that Breytenbach was nervous and that she was nervous from the moment that she had started with her evidence in chief. Breytenbach also confirmed in her evidence before the CCMA that Mr. Khoza tried to intimidate her and Wali prior to the commencement of the arbitration hearing. She also testified that she was very shocked when Mr. Khoza approached them prior to the hearing to tell them them that he was going to cross examine them for two hours. The Commissioner on record pointed out that if the company wanted her to draw an inference from Mr. Khoza's behaviour, the company could argue that in closing. Notwithstanding

the fact that the Commissioner was specifically informed about Mr. Khoza's behaviour and the effect thereof on especially Breytenbach, the Commissioner, without even referring to the alleged intimidation allegation, drew a negative inference from Breytenbach's demeanor and concluded that she was not a credible witness. I will return to this point hereinbelow.

How was the lock of the cabinet opened?

[16] Wali confirmed in her evidence that the cabinet stopper cannot be opened without a key. This was also the evidence of the locksmith who testified that only a trained locksmith or someone who knew how to do it could open the stopper without a key. In respect of this particular lock, it was the locksmith's express evidence that there were no signs of a forced opening of the lock as there were no scratches on the glass. The locksmith thus expressly confirmed that the stopper in this particular case was opened by a key. Wali also confirmed that there were no signs of a forceful entry and confirmed that a customer could not have opened the stopper. Wali also confirmed that there was only one key that could have opened the stopper and that that was the key that the Respondent had for 30 minutes and which was given back to her (Wali) at 16H00. The Commissioner, in assessing the probabilities, however came to the

conclusion that it was probable than Breytenbach or a customer (although the Commissioner accepted that they did not have a key) could have opened the lock. It is clear from the award that the Commissioner did not properly consider the locksmith's evidence in respect of the opening of the stopper when considering the probabilities. If the Commissioner had applied her mind to the locksmith's evidence, she would not have come to the conclusion that it was probable that Breytenbach or the customer could have removed the watches. More in particular, the Commissioner would not have considered it as a probability that Breytenbach knew *"something about the watches"* if proper consideration was given to the express evidence of the locksmith that the lock in the present case was not forcefully opened but that it was opened by a key. It was not in dispute that neither Breytenbach nor the customer had a key to the cabinet and that only Wali and the Respondent had a key. On the evidence that was presented to the arbitration, neither Breytenbach nor a customer could therefore have had access to the cabinets between 15H30 and 16H00. I will return to this point when I consider whether it was therefore reasonable for the Commissioner to have included Breytenbach and the customer in the equation when evaluating the probabilities.

[17] The Respondent was called to the department after the watches were discouvered to be missing. She denied any knowledge of the missing watches. The Respondent and Wali were both suspended. Only the Respondent was charged with misconduct; dishonesty and or gross negligence in that she was responsible for the missing watches and that it led to a loss to the company. She was found guilty of dishonesty and dismissed.

Referral to the CCMA

[18] The dispute was referred to the CCMA. In essence it was the Applicant's contention that the jewelry went missing during the time when the Respondent was at the jewelry department. It was the Respondent's contention that when she handed over the department everything was in order which is confirmed by the fact that Wali had signed the key register. It was therefore the Respondent's case that if anything was wrong, Wali should not have signed the register.

The award

[19] The commissioner gave a brief overview of the relevant facts that led to the dispute and pointed out that in essence the dispute that she had to decide was whether, on the probabilities, it can be concluded that the Respondent was guilty as charged.

[20] In coming to a conclusion that it was not probable that the Respondent was guilty as charged, the Commissioner, *inter alia*, made the following important findings:

(i) Breytenbach did not impress the Commissioner as a witness. A negative inference was drawn from the fact that Breytenbach was nervous during the arbitration hearing and from the fact that Breytenbach, according to the Commissioner "*empathically*" refused to undergo a polygraph test. The commissioner then came to the conclusion that it was probable that Breytenbach "*knew something about the watches*".

(ii) By signing the key register, Wali confirmed that everything in her department was in order and that Wali was therefore satisfied that everything was in order. In coming to this conclusion, the Commissioner posed the following question: "*why did Wali then sign the Key register?*" The Commissioner concluded that the fact that Wali had signed the key register after the alleged incident made *"things worse"* and again asked why Wali then sign the register knowing well that the handover was not done properly and that there were 8 watches missing.

Finally the Commissioner also took into account that when Wali wrote her statement at the time of the incident, she made no mention of the fact that there was an improper handover.

(iii) A negative inference was drawn from the fact that Wali had amended her written statement (after the incident) in respect of the time when she came back from tea. Initially it was stated in the statement to her employer that she had came back from tea at 16H00. Her statement was subsequently changed to 15H45. The change was affected on the statement itself by crossing out the 16H00 and changing it to 15H45. During arbitration the time was again changed to 16H00. In the *"opinion"* of the Commissioner it was probable that the watches could have gone missing during the time Wali was at the jewelry department.

(iv) There is no clear evidence when the watches went missing. More in particular there is no evidence that the watches went missing during the time the Respondent was on duty. The Commissioner also took into account the evidence to the effect that the lock could have been open within 5 minutes.

(v) The Commissioner accepted that it was possible that a customer could have opened the cabinet. In coming to this conclusion the Commissioner relied on the fact that the cabinet could have been opened without a key.

(vi) The commissioner, accepted that because the Respondent had a key and was at the jewelry counter, she could have opened the counter and could have removed the watches. The Commissioner, however, rejected this version in light of the fact that there was no evidence which placed the Respondent in Breytenbach's department where the watch holder was found. On this basis the Commissioner concluded that the Applicant's (employer's) version was not more probable than the Respondent's (employee's) version.

Probabilities identified by the Commissioner

[21] In essence the Commissioner weighed up all the evidence and came to the conclusion that there were more than one possible version in respect of how the watches could have disappeared. The following four probabilities were identified by the Commissioner:

(i) It is probable that the watches could have gone missing at the time when Wali was at the jewelry department. The Commissioner apparently came to this conclusion in light of the fact that Wali was found not to be a credible witness: Firstly, because she had signed the key register *after* the incident was reported without a plausible explanation. Secondly, because there was no evidence that the hand over procedure was not done properly. Thirdly, because Wali's statement to her employer after the incident was changed in respect of the time she had returned to the department.

(ii) Breytenbach knew *"something about the watches".* The Commissioner arrived at this conclusion after making an adverse finding in respect of Breytenbach's credibility. Firstly, because Breytenbach was nervous and secondly because she had *"emphatically"* refused to undertake a polygraph.

(iii) A customer could have opened the cabinet without a key. The Commissioner came to this conclusion by accepting that the cabinet could be opened without keys by someone who knew how to do it.

(iv) The Respondent could have removed the watches because she was in the department and she had a key.

Test for review

[22] Section 145 of the LRA, in terms of which this review application is brought, provides as follows:

"*Review of arbitration awards*

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award —

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means:

(a) that the commissioner:

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained"

[23] Apart from the above expressed grounds of review, it has recently been held by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC) that section 145 of the LRA must be *"suffused"* with the test of reasonableness in section 33 of the Constitution. Accordingly the essential question one should ask when deciding whether an arbitration award should be reviewed is the following:

"*Is the award one that a reasonable decision-maker could not reach*".

[24] Accordingly, besides the review grounds enunciated in section 145

of the LRA the Labour Court is bound to have regard to the aforementioned test formulated by the Constitutional Court in deciding whether the award made by the Commissioner is reviewable.

[25] This court will not easily interfere with a decision of a CCMA arbitrator. See in this regard the decision in: *Moodley v Illovo Gledhow & Others* [2004] 2 BLLR 150 (LC) at paragraph 22 where the Court held as follows:

> "*It should be extremely reluctant to upset the findings of the arbitrator, unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilt with her functions as an arbitration that her findings can only be considered to be so grossly irregular as to warrant interference from this Court*."

[26] This Court will however interfere where it is clear that factual findings are not supported by the evidence. See *Vita Foam SA v CCMA* [1999] 12 BLLR 1375 (LC) at paragraph 22 – 24 where the Court held as follows:

> "*It is clear that these factual findings of the commissioner, which was not supported by the evidence before her, must have influenced her reasoning when she decided on the seriousness of the misconduct of the five individuals concerned.*
>
> *In the result, this finding which was not justified on the basis of the evidence presented, must have had a bearing on the outcome of the arbitration award.*
>
> *For this reason alone it appears that the arbitration award must be set aside as it contains this very serious defect.*"

[27] In considering the reasonableness of an award, the Court should always bear in mind the distinction between a review and an appeal. What is therefore in essence this Court's function is to consider whether or not the Commissioner's decision falls within the boundaries of reasonableness. See in this regard *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004) 4 SA 290 (CC) 2004 (4) SA 290 (CC).

[28] It cannot be said that a decision was reasonable if the Commissioner disregarded material relevant facts or factors placed before it in coming to a decision. This point was emphasized by the

Constitutional Court in *Bato Star Fishing (Pty) Ltd v Mininster of Environmental Affairs & Others* 2004 (4) SA 490 (CC) (*supra*):

> *"[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."*
>
> *….*
>
> *"[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role*

of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the

complexity of the decision or the identity of the decision-maker." (My emphasis.)

[29] In light of the aforegoing, I will now proceed and briefly evaluate the findings of the Commissioner against the record in order to come to a decision whether or not the award is reasonable:

Credibility finding against Wali

[30] As already pointed out, the Commissioner made a credibility finding against Wali, inter *alia*, on the basis that Wali had changed her evidence in respect of the time that she came back from tea. Firstly, the Commissioner arrived at this conclusion despite the fact that the Commissioner has recorded as a common cause fact that Wali had signed on from the Respondent at 16H00. Once a fact has been considered as being accurate or correct between the parties it becomes common cause. Secondly, it was not Wali who had changed her version of when she arrived back from tea on her statement to her employer. It was in fact the chairperson of the disciplinary hearing who had changed the time on Wali's statement. Thirdly, this fact has never been challenged by the union in Wali's evidence nor was a contrary version put to Wali in respect of this issue. The facts upon which the Commissioner arrived in making the

adverse credibility finding therefore do not support an adverse finding in respect of Wali's credibility.

[31] This credibility finding is particularly unreasonable if regard is had to the fact that no credibility finding was made against the Respondent despite the existence of ample factors which could have, if the Commissioner had taken cognizance thereof, led to an adverse credibility finding against the Respondent. I will return to this point hereinbelow.

Credibility finding against Breytenbach

[32] Breytenbach's adverse credibility finding is based on the fact that she was nervous and that she had, according to the Commissioner refused to undergo a polygraph test like Wali and the Respondent. This conclusion is not supported by the evidence. The Commissioner asked Breytenbach whether she was subjected to a polygraph test. This question was asked by the Commissioner in light of the evidence that both Wali and the Respondent went for a polygraph. The Commissioner however, when asking the question stated that she did not "*want to draw a negative inference from what you [Breytenbach] are saying*". Despite this assurance the Commissioner proceeded to do precisely that.

[33] Is this a reasonable finding? Put differently, is this adverse credibility finding supported by the evidence? Firstly, the evidence was that Breytenbach was never requested by her employer to undergo a polygraph after the incident because Breytenbach did not have access to the fine jewelry. It is clear that the Commissioner completely disregarded the detailed evidence led on behalf of the Respondent as to why Breytenbach was not asked or required to undergo a polygraph test. Charlotte Kganyago (hereinafter referred to as "Kganyago") who is the assistant store manager, explained why Breytenbach was not subjected to a polygraph test. In this regard she testified as follows:

> "*Charlotte: LYDIA [Breytenbach] was not polygraphed because she does not have access to the keys of fine jewellery.*
>
> *Madame Commissioner: Yes*
>
> *Charlotte: We called in the people who had access to the fine jewelry to go for polygraphing, because they are the only people that can open up a cabinet*."

Secondly, if Breytenbach's answers to questions posed by Mr. Khoza under cross-examination is perused, it cannot be concluded that she had refused to go for a polygraph: Mr. Khoza asked

Breytenbach in cross examination whether she was asked to undergo a polygraph test to which she replied "*no"*. Mr. Khoza then asked Breytenbach: "*If now can you – if they request you to go for polygraph test, will you be able – will you agree to go for polygraph test?" to which Breytenbach responded: "Hoekom moet ek gaan? Waarvoor?" Vir wat moet ek gaan?*"

Is it in light of her answer reasonable to have come to a conclusion that Beytenbach had *"emphatically"* refused to undergo a polygraph when she has never been asked, by her employer, in the first place to undergo a polygraph test? The answer is no. Breytenbach did not refuse to undergo a polygraph test when asked by Mr. Khoza whether she would go for a test. She merely responded by asking why should she go.

[34] Despite this negative inference which is unconnected with the evidence, the Commissioner does not draw a negative inference from the fact that the Respondent herself had initially refused to go for a polygraph nor from the fact that the Respondent had actually failed the polygraph. No mention is also made of the fact that Wali who also took the polygraph actually passed the polygraph. Wali was in fact found to be honest and co-operative. If the evidence in

respect of the polygraph is perused it appears that the Respondent had obtained very low scores in her polygraph test and was in fact found to be dishonest. Although it is trite that the probative value of a polygraph test on its own is not sufficient to find a person guilty, the result of a polygraph test is, however, one of the factors that may be considered in evaluating the fairness of a dismissal.

[35]Extensive evidence was led at the arbitration by Mr. Floscher who is a trained polygraph examiner and accredited by the American Polygraph Association. He confirmed in his evidence that the test was properly administered. He also explained how the answers to the questions had to be interpreted. He explained that the Respondent, was found not to be an honest witness and in fact obtained low scores on some of the questions.

[35] The Commissioner in her award makes no reference to the fact that the Respondent had obtained a low score on her polygraph test. In fact, there is no indication from the award that the Commissioner even considered the outcome of the polygraph test when considering the probabilities. In stark contrast thereto is the negative inference that the Commissioner draws from the fact that Breytenbach had "*emphatically*" stated that she would not undergo a polygraph test which, as already indicated is not supported by the evidence nor by

Breytenbach's answers in cross-examination. On the basis of this conclusion and Breytenbach's demeanor, the Commissioner concluded that Breytenbach was not a credible witness and that she in fact knew "*something about the watches*".

[36] It is accepted that a polygraph is a controversial method of gathering information and that opinion is divided on the probative value of the results probative value of the result. Professor Grogan in Sosibo & Others / CTM (Ceramic Tile Market) [2001] 5 BALR 518 (CCMA) sets out the divergent approaches in respect of polygraphs.

> "*Following the Mahlangu case, attitudes to polygraph test evidence have followed the several and divergent lines:*
>
> *(1) Some cases have held the view that "our courts do not accept polygraph tests as reliable and admissible. Nor do they draw an adverse inference if an accused employee refuses to undergo such a test". See Kroutz v Distillers Corporation Ltd (1999) 8 CCMA 8.8.16 Case No. KN25613; Malgas v Stadium Security Management (1999) 8 CCMA 10.8.1 GA21495; E Themba & R Luthuli v National Trading Company CCMA (1998) KN16887;*

(2) *Polygraph test evidence is not admissible as evidence if there was no evidence on the qualifications of the polygraphist, and if he or she was not called to give evidence. See Sterns Jewellers v SACCAWU (1997) 1 CCMA 7.3.12 Case No. NP144; Mudley v Beacon Sweets & Chocolates (1998) 7 CCMA 8.13.3 KN10527; Spoornet – Johannesburg v SARHWU obo JS Tshukudu (1997) 6 ARB 2.12.1 GAAR002861; Chad Boonzaaier v HICOR Ltd CCMA (1999) WE18745;*

(3) *Although admissible as expert evidence, polygraph results standing alone cannot prove guilt. See the arbitration Metro Rail v SATAWU obo Makhubela (2000) 9 ARB 8.8.3 GAAR003888; NUMSA obo Masuku v Marthinusen & Coutts (1998) 7 CCMA 2.9.1 (Case No MP5036); Ndlovu v Chapelat Industries (Pty) Ltd (1999) 8 ARB 8.8.19 GAAR003528; but see Govender and Chetty v Container Services CCMA (1997) KN4881 where the dismissal was upheld even though there was no direct evidence linking the applicants to the theft. The commissioner found the inference of the polygraph test to be "overwhelming*".

> *(4) Where there is other supporting evidence, polygraph evidence may be taken into account. See CWIU obo Frank v Druggist Distributors (Pty) Ltd t/a Heynes Mathew (1998) 7 CCMA 8.8.19 Case No.WE10734."*

[37] What appears from the aforegoing is that a polygraph test on its own cannot be used to determine the guilt of an employee (see also John Grogan Workplace Law 9th edition page 160.) However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt.

[38] I have already made reference to the fact that is it appears from the award that the Commissioner completely ignored the outcome of the polygraph test in circumstances where a trained polygraphist

testified at the arbitration and explained the results of the polygraph and the manner in which the test was conducted. Although these types of tests should be approached with caution, at the very least the Commissioner ought to have considered the outcome of the polygraph test as part and parcel of the totality of evidence which had to be weighed up in assessing the probabilities. If the Commissioner was of the view that the polygraph test should not be taken into account or that it was not relevant then she should not have drawn a negative inference from Breytenbach's perceived refusal to take a polygraph test as indicative of possible knowledge of the missing watches. She should also not have drawn a negative inference in respect of Beytenbach's credibility if she was of the view that the polygraph test was irrelevant.

[39] To restate: The Commissioner's finding that Breytenbach thus "*emphatically*" refused to undergo a polygraph test is totally unfounded if regard is had to the record: Firstly, Breytenbach did not refuse to undergo a polygraph test. She was never asked by her employer to undergo a polygraph at the time of the incident. She also did not "*emphatically*" refuse to go for a polygraph. The Commissioner's finding that on the basis of this that *"the inference that could be drawn for refusing to take a test is that the individual*

has something to hide or that they are afraid of the unknown" and that this means that "*it is also probable that she knows something about the watches*" is thus totally unconnected to the evidence. The Commissioner also completely overlooked the common cause fact that Breytenbach never had a key to the cabinets and the fact that the evidence was clear that there was no forced entry to the cabinet and that a key was used to open the cabinet.

[40] The adverse credibility finding in respect of Breytenbach it thus factually incorrect and therefore unreasonable.

Probabilities in respect of the customer

[41] It appears from the award that the Commissioner accepted that it was possible that the cabinet could have been opened without keys. On the basis of this assumption the Commissioner then concluded that it is thus probable that a customer could have removed the watches. In coming to this conclusion the Commissioner took into account to the evidence of the locksmith and his evidence that it was possible for someone who knew how to open the stopper of the cabinet to do so without a key within 5 minutes. What the Commissioner overlooked is the fact that the locksmith (and Wali) specifically testified that there was *no* evidence that the lock in this

particular case had been tampered with. Furthermore, she overlooked the fact that it was the evidence of the locksmith that this specific lock was opened with a key. The locksmith specifically dismissed the possibility that a customer could have opened the lock in the present case without a key as there was no evidence that anyone had forced the lock out. In light of the aforegoing, the probability that a customer or Breytenbach could have taken the watches is not supported by the evidence. Breytenbach also confirmed in her evidence that a customer could not have opened the cabinet since she was with the customer in the jewelry department.

Probabilities in respect of the Respondent

[42] Although the Commissioner identified as one of the probabilities the fact that that the Respondent could have been involved in the removal of the watches in light of the fact that she had a key to the cabinets, the Commissioner dismissed this possibility because she (the Commissioner) could not understand "*how the watch holder could have got to Breytenbach's department when no evidence was led that the applicant was seen there nor was there any evidence led that the applicant was with a customer who could have place the watch holder there*". Is this a reasonable conclusion?

[43] Firstly, on the evidence only two individuals could have removed the watches: Wali or the Respondent. I have already pointed out that although the Commissioner had identified four possibilities, two of these probabilities identified by the Commissioner are not supported by the evidence: Neither Breytenbach nor the customer could have removed the watches. Moreover, in weighing up the probabilities, the Commissioner was quick to made adverse credibility findings against Breytenbach and Wali but not willing to make any credibility finding against the Respondent. A perusal of the record reveals a number of instances where the evidence of the Respondent was contradictory and/or inconsistent yet no reference is made to this fact. For example the Respondent's evidence in respect of the circumstances when Kganyago and Crous were paged after the incident. In her evidence in chief in the arbitration proceedings, the Respondent in recounting the sequence of events on the day in question when the watches went missing, stated that while she was on tea in the canteen she heard Kganyago and Crous the store manager being paged to the fine jewellery department.

> "*Ms Masilela: I was drinking tea, and then I hear the CHARLOTTE and BENITA being paged. They were called to the fine jewellery department*."

Evidence was, however, led by the chairperson of the Respondent's appeal hearing (Mr. Simi Ramiah ("Ramiah")) at the arbitration proceedings that the Respondent had testified that she did not hear Kganyago and Crous being paged to the fine jewelry department as the pager in the canteen was broken. During cross-examination Rees (obo the Applicant) questioned the Respondent about the discrepancies in her testimony. The Respondent was not able to adequately explain these discrepancies.

[44] The Respondent's evidence in respect of the checking of counters and locks was also inconsistent. At the disciplinary hearing, in response to a question from Crous, the Respondent gave evidence that she had checked the locks. However as part of the polygraph test, the Respondent stated to the polygraph examiner that she only checked the drawers and not the stoppers. At the disciplinary hearing, in response to a question from her own representative, the Respondent gave evidence that she did not check the cabinets as she was busy. At the appeal hearing, the Respondent testified that she had not done a full check because she was busy on that day and all she had checked was the drawers at the bottom. At the arbitration proceedings, Masilela gave evidence that she had checked the counters. Despite the

fact that the Applicant's representative had placed these contradictions before the Commissioner and the fact that the Respondent had three different versions in respect of whether she had checked the cabinets or not, the Commissioner simply chose to ignore the evidence. Again the Respondent was not able to provide a reasonable explanation for her inconsistencies and contradictions. The Commissioner rejected Wali's evidence that a proper handover was not done yet she completely overlooked the glaring inconstancies in the Respondent's evidence in respect of the handover procedure.

[45] I am on the evidence satisfied that the Commissioner had failed to properly consider the evidence before her. This failure led to an unreasonable adverse credibility finding in respect of Wali and Breytenbach. This failure also resulted in the Commissioner incorrectly weighing up the probabilities and also resulted in a failure to consider the consequences of the inconsistencies and contradictions in the Respondent's evidence. I am therefore satisfied that the Commissioner came to a conclusion that is not reasonable. See in this respect: *Clinix Private Hospital Soweto (Pty) Ltd v Ralefeta NO & Others* (2007) 28 ILJ 1075 (LC). In this matter the employer called four witnesses to testify to a particular act of misconduct committed by the employee, yet despite this

testimony the arbitrator accepted the employee's version and found in her favour. The Court in that matter held that the Commissioner clearly did not apply his mind to the evidence before him and accepted the employee's version of the facts in the face of clear evidence that her version was probably false and also improbable. Furthermore, the Court found that the Commissioner drew adverse inferences against some witnesses and not others and that in this regard he had selected from the witnesses' testimony evidence which only favoured the employee. See also *ABSA Investment Management Services (Pty) Ltd v Crowhurst* [2006] 2 BLLR 107 (LAC). The LAC criticised the Labour Court's failure to assess the credibility of the respective witnesses in the proceedings in the Court a quo. It held that although our Courts have on many occasions cautioned against attaching undue weight to witnesses' demeanour, an assessment of credibility goes much further. It involves an assessment of how witnesses' fared especially under cross-examination and in light of the probabilities pertaining to the particular dispute. The Applicant submitted that if the principle enunciated by the LAC in the above matter is to be followed in this particular case, it is clear that the Respondent fared particularly badly under cross-examination. Her testimony was consistently riddled with inconsistencies, contradictions and highly improbable

versions of events. Accordingly, if regard is had to this, it is clear that she was not in any way or manner a credible witness. Therefore, the Commissioner's complete failure to accord any weight to this is, clearly a reviewable irregularity in the proceedings which warrants the reviewing and setting side of the Award.

[46] I am, therefore, satisfied that the award falls to be reviewed and set aside. The Commissioner arrived at various factual conclusions which are simply not substantiated by the evidence as it appears from the record. These incorrect unsubstantiated factual findings impact materially on the reasonableness of the award. This is not a case where, despite certain wrong conclusions the outcome of the award is nonetheless reasonable. Crucial incorrect findings in respect of the credibility of witnesses; the absence of any credibility finding in respect of the Respondent and the fact that the reasoning in respect of the probabilities are fundamentally incorrect, resulted in a conclusion that is unreasonable to such an extent that no reasonable Commissioner could have arrived at a finding that the dismissal was unfair. In the event the review succeeds.

[47] In light of the fact that the record is complete, I am of the view that it would be in the interest of justice and fairness to substitute the

award with an order that the Respondent's is dismissal was fair. In coming to this conclusion I had regard to, *inter alia* the following factors:

i) The locks of the cabinets were secure when the Respondent took over the department.

ii) Immediately after Wali took over, it was discovered that one of the locks of a cabinet was missing / opened.

iii) It is common cause that mere minutes lapsed between the time when the Respondent left at 16H00 and the time Breytenbach arrived at the counter with the empty watch holder. This much was conceded by Mr. Khoza.

iv) Walli still had her float in her hands when Breytenbach arrived at the counter.

v) The cabinets were then checked and it was only then discouvered that one of the locks was missing.

vi) The handover was not done properly. Although the Respondent tried to convince the arbitrator that there was a proper handover, the fact that Wali did not sign the key lock register when the keys were handed over to her is indicative of the fact that a proper handover did not take place. If there was a proper handover Wali would have signed the key lock register in the presence of the Respondent as per the proceedings.

vii) Wali willingly undertook the polygraph test. The Respondent initially refused to do so. Wali passed her test whereas the Respondent had dismally failed her test.

viii) The locks were in place when the Respondent took over the department. One of the locks were missing when the Respondent had left on the evidence Wali did not have sufficient time to open the lock. Wali still had her float in her hands when Breytenbach arrived at the department. I have already pointed out that on the common cause facts Bretenbach arrived minutes after the Respondent had left the department.

ix) The Respondent had ample opportunity to remove the watches: She was in the department for 30 minutes and she had a key.

x) Wali was a credible witness. The Respondent, on the other hand, contradicted herself to such an extent that an adverse credibility finding against her could be made.

xi) On the evidence only two people could have had access to the watches and that is Walli and the Respondent. Breytenbach and the customer could not have removed the watches. This is borne out by the evidence of the locksmith.

[48] I am thus on the evidence satisfied that the probabilities favour the conclusion that the Respondent was guilty as charged and that her

dismissal was fair. I can see no reason why costs should not follow the result.

[49] In the event the following order is made:

[1] The dismissal of the Third Respondent Ms. Adeline Masilela was fair.

[2] The Third Respondent is ordered to pay the costs, the one paying the other to be obsolved.

_____

BASSON J

FOR THE APPLICANT: EDWARD NATHAN SONNENBERGS

FOR THE RESPONDENT: MR. KHOZA (RAWU)

DATE OF HEARING: 26 JUNE 2008

DATE OF JUDGMENT: 1 AUGUSTUS 2008