

## IN THE INDUSTRIAL COURT OF ESWATINI

### JUDGEMENT

CASE NO. 60/2014

In the matter between:-

**DANYARAJ SUNDERLALL**

**APPLICANT**

AND

**FASHION INTERNATIONAL SWAZILAND [PTY] LTD**     **RESPONDENT**

Neutral citation : *Danyaraj Sunderlall v Fashion International Swaziland [Pty] Ltd (60/2014) [2024] SZIC 10 (08 February 2024)*

CORAM : **DLAMINI J,**  
*(Sitting with A.S. Ntiwane & S.P. Mamba Nominated Members of the Court)*

Last heard : 30 November 2023

Judgement Delivered : 08 February 2024

*Summary: Labour law – Unfair Dismissal: Applicant charged with gross negligence, gross incompetence and gross misconduct charges following an incident in which some goods were delivered and received damaged and short on 21 May 2013. After the Applicant had been notified about the damaged consignment he took photographs of the damaged bales and attempted to call his immediate Supervisor but could not get hold of him. He then sent him an email, which he also copied to the Head Office to notify them of the damaged goods. The next day he informed his Supervisor about the damaged goods and the Supervisor decided that the rolls inside the damaged bales be counted. When it was discovered that there were some missing rolls the Applicant was hauled before a disciplinary hearing to face the three charges. He was found guilty only in respect of the gross negligence charge and dismissed. Held: Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm. Held further: The Applicant did not consciously and voluntarily disregard the need to use reasonable care. As a matter of fact, it was only the Applicant who made a note about the damaged bales and further promptly notified his immediate Supervisor and the Head Office. Held Further: The Respondent has failed to explain why it decided that only the Applicant should be disciplined in respect of this incident. As such, the Court comes to the decision that the dismissal of the Applicant was substantively unfair.*

1. Danyaraj Sunderlall is the Applicant in this matter. He is a former employee of the Respondent, Fashion International (Pty) Ltd. The Applicant is before Court seeking that the dispute he has with his former employer be determined and decided by this Court. He contends that he was unfairly dismissed by the Respondent and now seeks to be paid compensation and terminal benefits for his alleged unfair dismissal.
2. The Respondent on the other hand vehemently opposes the Applicant's application. It denies that the dismissal of the Applicant was procedurally and substantively unfair, contending instead that Sunderlall's dismissal met all the requirements of a fair dismissal. The matter is now before this Court for determination on the entailing question of whether the dismissal of the Applicant by the Respondent was fair or not.
4. The evidence of the Applicant under oath was as follows; he was initially employed by the Respondent in the capacity of Manager, in the Fabric Stores and Receiving department, in month of May 2011. He worked continuously until the month of June 2013, when he was unfairly dismissed. When he was first employed, the Applicant says he initially reported to Vick Royce but after a few months he says he then reported to Gavin Farhenhite. At the time of his dismissal the Applicant says he was earning a monthly salary of E17,500+. He worked from Monday to Friday between the hours of 07:30am and 4:30pm. On some weekends they worked overtime, but such overtime had to be sanctioned by the Factory Manager.
5. Testifying on the circumstances that ultimately lead to the termination of his services, the Applicant informed the Court that he was slapped with 3 charges, namely; gross negligence, gross incompetence and gross

misconduct. These charges arose from an incident in which he says bales containing fabric rolls were damaged. According to the charge sheet, the gross negligence charge emanated from the fact that the Applicant, despite his experience and knowledge in the field of inventory control, material was received short and damaged on 21 May 2013. This charge went on to state that the shortage and damage was not assessed with the supplier's representative, and that the signed delivery notes only indicated that the goods were damaged. This resulted in the company failing to prove who was responsible for the damage and missing material, which may cause damage approximately E56,000.

6. The gross incompetence charge related to the Applicant's general running of his department, which was said to be below standards required and was said to be not contributing to efficiency and cost saving.
7. The last charge preferred against the Applicant was gross misconduct. In respect of this charge, the allegation against the Applicant was that he demonstrated an inability to follow clear and concise instructions.
8. At the conclusion of his hearing, the Applicant says the Chairperson found him guilty only in respect of the gross negligence charge, and that in respect of the 2 other charges he returned verdicts of not guilty.
9. The Applicant referred the Court to the minutes of his disciplinary hearing, which are at pages 8 – 12 of document exhibit 'DS 1'. He complains that the allegation against him was that his negligence cost the company E56,000 but no evidence was adduced to prove that indeed the company suffered such a loss.

10. Testifying on how he and other employees discovered the damage and shortage on the day of the delivery, the Applicant informed the Court that on 21 May 2013, he was supervising the delivery of a consignment from the Respondent's transporter, UK Transport, at around 4 pm. The procedure for receiving such consignment, according to the Applicant, was that before receiving same, he had to call the ESwatini Revenue Authority (ERA) Customs department and give them a description of the consignment being delivered. In this case he says he procedurally called the ERA Customs department and described the consignment being delivered and was given the go ahead to off-load the goods being delivered.
11. According to the further evidence of the Applicant, the delivery note indicated that the consignment consisted of 119 bales, each containing a different number of rolls inside. Together with his team, he says they did a security check and a receiving clerk check. As they processed the delivery, he says they discovered that some of the bales had been opened and were damaged. On discovery of the damaged and opened bales, the Applicant says he immediately summoned the driver of the delivery truck and his (Driver's) Assistant, the Respondent's Security and the Receiving Clerk and showed them the damaged and opened bales. He says he also took photographs of the damaged and opened bales, and further made a note on the delivery note indicating the noted damage. In this regard, the Applicant referred the Court to document exhibit 'DS 1' pages 25, 26 and 27, where he made an endorsement to the effect that the bales had been 'received damaged and opened', thereafter he appended his signature next to such endorsement. This, according to the Applicant was done in the presence of the UK Transport Driver and his Assistant. The photographs the Applicant took are at pages 34 and 35 of 'DS 1'.

12. The Applicant also referred the Court to pages 37 – 41 of the same 'DS 1' which he informed the Court are photographs sent by the container depot in Durban, where UK Transport picked up the consignment. They show that when the load was picked up by the transportation agent, the packages were untempered with, they were in good condition. The Applicant says after discovering that the goods were damaged he called his Supervisor, Gavin Fahrenfort, but could not reach him since he was out of the office. He says the purpose of the call to Fahrenfort was to report the damaged consignment. He then decided to send an email to Fahrenfort, which he also copied to the head office, advising them of the damage. At page 24 of 'DS 1' is a copy of the email. It reflects that it was sent through at 04:34 PM, and was copied to Kevin Reddy (In Charge - Shipping) and Derize van der Merwe (In Charge - Fabrics) at the Respondent's head office. In this email, the Applicant also undertook to send the photographs of the damage he was notifying his Supervisor and the head office personnel about.
13. Indeed on the next day, which was the 22<sup>nd</sup> May 2013, the Applicant sent through the photos of the damaged and opened bales to Reddy, van der Merwe, his Supervisor Fahrenfort, Sandile Shongwe and Tom Dowding. Thereafter, the Applicant says he confirmed with Fahrenfort if he had received the email and photos, which he confirmed he had. Fahrenfort instructed him to check all the bales individually to see if any rolls were missing. All this time, the Applicant says his Supervisor did not show any misgiving about him having received the damaged bales.
14. After checking the bales individually as directed by his supervisor, the Applicant says he discovered that there were some missing rolls from some of them. He informed Fahrenfort about this, and he (Fahrenfort) instructed him to call the Respondent's transporter, UK Transport, and advise them of

the damages and shortages, which he did. The UK Transport Supervisor, together with the Applicant, Gavin Fahrenfort, the Respondent's Security Officer, the Respondent's Receiving Clerk and the Warehouse Supervisor all proceeded to do an inspection of the damaged bales and they all confirmed the shortages of the rolls inside of the bales. Thereafter, the UK Transport Supervisor undertook to inform his head office in Durban about the damaged bales and the missing rolls.

15. When the Applicant was questioned by his Attorney, Mr. Manyatsi, on why they decided to receive damaged packages, the Applicant informed the Court that they had previously received damaged consignments but there were no shortages then. He informed the Court that according to the records, the bales had to be 119 in total, and when they counted them they found that indeed there were the 119 bales and only discovered that the rolls inside were missing the next morning. He also informed the Court that the Respondent's chosen transporter's delivery note indicated that *'Notification of claim after 48 hours from date of delivery will not be valid'*. This, the Applicant understood to mean that if there were any shortages, the Respondent could lodge a claim with its transporter, UK Transport, within 48 hours.
16. The Applicant further informed the Court that he had previously received a warning for not accepting delivery of a consignment that was to be delivered on a Saturday. However, the said consignment eventually arrived and was delivered on the following Monday. In relation to the incident that lead to the termination of his services, the Applicant vehemently denies that he was grossly negligent, hence his claim for compensation and payment of terminal benefits for what he says was the unfair termination of his services.

17. Under cross questioning by the Respondent's Counsel, Attorney Mr. Gamedze, the Applicant denied that he was called to a meeting together with the Receiving Clerk, where Fahrenfort allegedly explained the new receiving procedures. Instead, according to the Applicant, the receiving procedure at page 13 of exhibit document 'FS 1' related to 'outwork dispatching procedures' of all goods leaving eSwatini for TRACLO in South Africa. The Applicant also denied that he took the photographs because he did not want to work overtime by counting the rolls in the damaged bales. He pointed out that the email he sent to Fahrenfort was after working hours, indicating that he had no qualms in doing overtime work as and when necessary.
18. The Applicant also denied that the Receiving Clerk, Sandile Shongwe, raised the issue of the damaged bales and the need to count the rolls inside the damaged bales. He informed the Court that the counting was done on the next day, 22 May 2013, when they got permission from Fahrenfort to go through the bales one by one. It was only then that it was determined that there were actually 42 rolls were missing. According to the Applicant, the shortage had to be attributed to the Respondent's transporter, UK Transport.
19. Under further cross examination by Attorney Mr. Gamedze, the Applicant insisted that he was not negligent in the manner he handled this issue, informing the Court that the fact that he made an entry in the delivery note about the damages and that he also took photographs of the damaged bales, is an indication that he took necessary steps to address the issue at the time. He also informed the Court that the Driver of the delivery truck and his Assistant were promptly made aware of the damaged bales and that the photos of the damages were taken in their presence.

20. Under re-examination by his Attorney, the Applicant informed the Court that when they receive stock, they count the total number of bales delivered and thereafter receive the consignment into the warehouse. Counting of the rolls inside the bales is done the next day if delivery was done in the late afternoon. But if it is still within the work hours, the counting of the rolls is done on the same day. He says on this day of the delivery of this consignment, counting could not be done at the same time because it was already after working hours and overtime had not been sanctioned. That, in a nutshell was the Applicant's case.
21. First to testify in support of the Respondent's case was Sandile Shongwe. He informed the Court under oath that he has been with the Respondent since 2008, and at the time of the incident holding the position of Fabric Receiving Supervisor. He informed the Court as well that his principal duties are; to ensure that incoming goods are as per records, that goods received are in perfect/good condition and, finally, that goods received are all present as per the records. He further testified that if any goods received are not in good or perfect condition, or are missing, or are not as per the records, then he has a duty to promptly inform his Supervisor. In his department he says he has people reporting to him, whom he supervises. These subordinates also have a duty to report to him, anything amiss with a delivery.
22. In relation to the damaged consignment delivered on 21 May 2013, Shongwe informed the Court that he was aware of the incident as he was also present when the consignment was received on the said date. He testified that his team, consisting of a certain Mabizo Mbuyisa, received the consignment and off loaded it from the delivery truck. This was at around 4pm, after their knock off time. As they were off loading the packages,



Shongwe says they noticed that some of the bales were damaged and/or open. He inspected the damage and then went to inform the Applicant. The Applicant came to inspect the damaged/opened bales, went back to his office to get a camera with which he then took photographs of the damaged/opened bales. Thereafter the Applicant instructed them to continue off loading the consignment into the warehouse. He says the Applicant informed them that they would check and count the contents of the bales the next day, the 22<sup>nd</sup> May.

23. Witness Sandile Shongwe further testified that on the day of the delivery, he and his team did not do the counting. He says the Applicant informed them that the counting would be done on the next day. When the counting was eventually done the next day, they discovered that there were 42 fabric rolls short in the bales.
24. Procedurally, according to witness Shongwe, after off loading, the Driver of UK Transport was supposed to hand over to the person receiving the consignment a weigh bill, which is a document that had to be signed by the receiver of the goods, confirming that they (goods) were received in good condition. The Driver of the UK Transport also has to append his signature on the weigh bill and indicate the total number of the bales delivered and the condition in which they were delivered. In this case, Shongwe informed the Court that it was Mabizo Mbuyisa who signed the weigh bill confirming the quantity of the bales and the condition they were in. The driver of UK Transport also signed to confirm the quantity and condition of the consignment.
25. Further testimony from witness Sandile Shongwe was to the effect that the Applicant made a note in the space for the description of the goods to the

effect that the bales had been received '*damaged and opened.*' On the other hand, according to Shongwe's evidence, Mabizo signed to say that the consignment had been received in '*good order and condition.*' Clearly this was a contradiction in observation between Mabizo and the Applicant. One was obviously left to wonder why Mabizo recorded that the goods were received in 'good order and condition' when they were obviously not?

26. According to witness Sandile Shongwe the company procedure was that all goods received must be in good condition and that they must be complete. If it is discovered that the goods are not in good condition or that there are some shortages, such must be reported immediately. Shongwe also informed the Court that the Applicant had the final word in respect of consignments received short or not in good condition. He further testified that when the consignment was received on 21 May 2013, the company procedure in respect of damaged goods was not followed because they were received and placed in the warehouse.
27. Under cross examination by Attorney Manyatsi, on behalf of the Applicant, witness Shongwe first informed the Court that there were some rolls which were damaged in the bales received. But when confronted with evidence which indicated that he never mentioned anything about damaged rolls at the Applicant's disciplinary hearing and the fact that all the evidence before Court indicated that it was only the bales which were damaged and not the rolls, Shongwe conceded that indeed there were no damaged rolls. He further confirmed that the correct number of bales was received, and that only the rolls inside the bales were short. The shortage of the rolls was only discovered the next morning after the Applicant had said they should count them. Witness Shongwe also confirmed that the Applicant took the photos

of the damaged bales and made the endorsement about their shortage in the delivery note in the presence of the UK Transport driver.

28. When questioned as to whether Mabizo Mbuyisa was charged in relation to this incident, Shongwe informed the Court that Mabizo was never charged but was only called as a witness at the disciplinary hearing of the Applicant. Attorney Manyatsi though wondered why Mabizo was never charged when he had signed to say that the goods were received in good condition when they were not, and witness Shongwe could not explain why that was the case. He could only inform the Court that he speculates that Mabizo must have made a mistake by endorsing his signature to say the goods were received in good condition when they were not. Witness Shongwe was finally questioned about whether he, as a Supervisor, had suggested to the Applicant or anyone else, that the rolls inside the bales be counted on the day of the incident (21 May) and he informed the Court that he did not. He stated that he only brought it to the attention of the Applicant that some of the bales were damaged or opened. He conceded as well that he was not aware that the Applicant had written an email to Gavin Fahrenfort, and copied to Kevin Reddy and Derize van der Merwe, informing them about the opened and damaged bales.
29. Gavin Fahrenfort was the Respondent's second witness. He informed the Court that he is employed by the Respondent as a Senior Industrial Engineer. He was also the Respondent's Project Manager, and was also responsible for the IT Department.
30. Fahrenfort testified that the Applicant was employed as the Fabric and Trim Store Manager. He says the Applicant's department mainly concentrated on the storage of trims and zips, chemicals for cleaning and cartons and

plastics for the storage of finished products. He was also responsible for the storage of fabric/raw material which were mainly sourced from the Republic of South Africa. Apparently, the Applicant was employed on the basis that he had knowledge and expertise in the receipt and dispatch of goods.

31. Explaining the circumstances that lead to the dismissal of the Applicant, Fahrenfort testified that there were shortages discovered in respect of 2 shipments which came in 20 and 21 May 2013. He says these shortages amounted to E56,000 (Fifty six thousand emalangeneni). He confirmed that the Applicant had sent an email addressed to him and copied to Kevin and Derize in South Africa in which he notified him and the 2 others about the shipments. Fahrenfort informed the Court that when the Applicant sent the email, he did not have sight of it because he was apparently busy with an Auditor from Woolworths South Africa.
32. According to witness Fahrenfort, procedurally, when a consignment is received, there has to be present the following personnel; a Security Officer, a Receiving Clerk, a Warehouse Supervisor, the Driver of the delivery truck and the Warehouse Manager. The delivery truck Driver then has to present his delivery documents which relate to the consignment he has come to deliver. Whilst the consignment is being off-loaded, the Respondent's staff has to count the goods to ensure that it corresponds with the delivery documents presented by the Driver of the truck.
33. If, in the counting process, there is a discrepancy discovered, there has to be a verification process to determine what exactly is short and that such discrepancy has to be verified in the presence of the Driver. The first person who has to do the counting is the Receiving Clerk. If the Receiving Clerk

discovers that there is a shortage, he has to inform his Supervisor who also has to verify that indeed there is such a shortage but also count the consignment. Finally, it is the Manager who then also has to verify that indeed there is such shortage.

34. Fahrefort further informed the Court that once the shortage has been confirmed, and there is a dispute with the delivery company on same, which the Manager (Applicant in this case) cannot resolve, the Manager then has to report to him (Fahrenfort). If for some reason, he (Fahrenfort) is not present, the Applicant then has to report to the next level of authority to be guided on what to do.
35. Then in relation to what witness Fahrenfort calls written procedures for receiving and dispatching goods, he specifically referred the Court to the exhibit document 'FIS 2' at page 13, which he says are there to guide all employees on what was to be done on receipt or dispatch of goods. This document is an email from this witness to Shaun Moodley and copied to a number of employees including the Applicant. It is titled ***'RE: FASHION INTERNATIONAL: OUTWORK DESPATCHING (Sic) PROCEDURES – PLEATING / PRINTING / EMBROIDERY / CRUSHING, ETC'***. Fahrenfort says this email was meant to address shortages. In this regard, he emphasized that all goods received had to be counted immediately upon receipt. He further informed the Court that the Applicant had a duty to email, daily, an update status report of what has been received, after counting.
36. Testifying on the delivery of 21 May 2013, Fahrenfort informed the Court that there was a large batch of missing rolls from the consignment received on the day. He states that the main issue was that there was no counting

done on the day, yet his staff, specifically Mabizo, had signed off that the goods were received in good order and condition. On the contrary, according to the evidence of Fahrenfort, the Applicant endorsed on the delivery note/tax invoice that the bales were received damaged and opened.

37. Fahrenfort further informed the Court that the Applicant and his team only did the counting the next day, where it was determined that indeed there was a shortage of 42 bales. Apparently, according to Fahrenfort, when the Applicant and his team did the counting on the next day, the Driver of the transport company was not present. As such, the transport company did not accept liability for the shortage because the counting was not done in their presence. He also informed the Court that another reason for the transport company not admitting liability for the shortage was that even though the Applicant had endorsed that the bales were received 'damaged and opened' there was no mention of any shortage because they had only counted the next day.
38. Even though Fahrenfort acknowledges that the Applicant sent the email indicating that the bales were received damaged and opened, he says that he had done so after hours and there was no way he could access same. He states that the main issue was that even though the damage was visible to the Applicant, he did not attempt to verify if there was a shortage on the same day and he failed to get anyone in authority, physically or telephonically, to notify him or anyone else in senior management about the damage.
39. When questioned on why Mabizo and Sandile Shongwe were not charged for their role in this shortage fiasco, this witness informed the Court that Mabizo and Sandile Shongwe informed him that the Applicant had advised

them to take the consignment into the warehouse, and that counting would be done in the morning.

40. The shortage of the 42 bales severely impacted the Respondent, according to Fahrenfort, as a result, an entire order had to be pulled from the production cycle because the company could not deliver the order that had to be produced with the missing fabric rolls. He blames the Applicant for failing to consult senior management about the need to work overtime in this case
41. Under cross examination, Fahrenfort was questioned about whether he had seen a document that specifically spelt out the Applicant's job description, and he informed the Court that he had never seen one. When questioned about the quantity of the total bales that had to be received, he confirmed that 119 bales had to be delivered and that the correct number of bales was received. In fact, Fahrenfort confirmed that according to the weigh bills presented by the transport company upon delivery, there was nothing to indicate how many rolls were expected. Fahrenfort confirmed as well that the charges against the Applicant did not include anything about any shortage of 20 May.
42. Fahrenfort insisted under further cross examination that the Applicant, Mabizo Mbuyisa and Sandile Shongwe should have insisted and ensured that counting was done on the same day the consignment was received. However, he confirmed that without anyone in senior management present, to authorize overtime work, the Applicant could not make the call that the staff he supervised should work overtime. Fahrenfort confirmed as well that the Applicant was the only one who made a report about the damaged and

opened consignment and that both Mabizo and Sandile Shongwe made no such note or report.

43. When questioned on why Mabizo Mbuyisa was not charged when he had clearly misrepresented information by signing to say the consignment was received in good order and condition when that was not the case, Fahrenfort informed the Court that he (Mabizo) was not charged because he said he was following instructions from the Applicant. Clearly, this was not true. It is improbable that the Applicant could make an endorsement that the goods were received opened and damaged, then instruct Mabizo to acknowledge that the goods were received in good order and condition. That would clearly be a contradiction. Fahrenfort could also not explain why the charge against the Applicant was classified as gross when he (Applicant) was the only one who took the initiative to take photographs of the damaged bales, attempt to call him (Fahrenfort) and wrote the email to him to notify him of the damaged consignment.
44. Then in relation to the state of the consignment when it left Durban, Fahrenfort confirmed that the shipment left the manufacturer's depot intact. This in effect means that whatever damage that occurred was to be imputed to the transport company. Finally, Fahrenfort confirmed under cross questioning that when Mabizo signed to say the goods were received in good order and condition, he was being dishonest and that he did so on behalf of the Respondent.
45. The Respondent's third witness was Mabizo Mbuyisa. He testified under oath that he was the Receiving Clerk on the date of the incident. He informed the Court further that on 21 May 2013, they received a container from Durban. When the container was opened, it was discovered that the



bales had been tampered with. The Applicant was informed of this discovery and he took photographs of the bales and thereafter reported to Mr. Royce who was the Managing Director of the Respondent.

46. Since it was already late, Mabizo says they off loaded the bales and packed them in the warehouse and knocked off. The next day they counted the bales and discovered that they were short. When questioned on why he signed to say the goods were received in good order and condition when they were not, Mabizo informed the Court that he was instructed by the Applicant to endorse that the goods were in good condition and order, when that was not the case.
47. Under cross examination by the Applicant's Counsel, Attorney Mr. Manyatsi, witness Mabizo confirmed that he was responsible for receiving all incoming consignments and that he reported to Sandile Shongwe. He confirmed as well that the Applicant was only called to the delivery bay after the discovery that the bales were tampered with. He also confirmed that the Applicant took photographs of the damaged bales and thereafter informed Mr. Royce, even though he says he is not sure if he was still in the premises.
48. Then in relation to him signing to say the goods had been received in good order and condition, Mabizo insisted that he was instructed by the Applicant to so sign. When questioned though on why he did not state this fact at the Applicant's disciplinary hearing, he was dumbfounded, only confirming that indeed at the hearing he did not state this fact. He also could not state why the Applicant would say he should sign to receive the goods 'in good order and condition' and then he (Applicant) would endorse that they were damaged and opened. Clearly, it was a contradiction to say

that the Applicant would say Mabizo should endorse that the consignment was in perfect condition and then he would endorse that it was not in perfect condition. When Attorney Manyatsi finally put it to witness Mabizo that he was fabricating the issue about the Applicant having instructed him to endorse that the consignment was received in good condition, he (Mabizo) could only coyly inform the Court that he had no comment. Clearly, the Court concludes that he was not being candid.

49. In his closing submissions and arguments, the Applicant's Counsel contended that the Applicant did not commit any workplace misconduct and thus did not contravene any workplace rule or policy in relation to the incident of 21 May 2013. Attorney Manyatsi further contended that the Respondent had failed to prove that indeed the conduct of the Applicant on the date in question could be classified as being '*gross*'.
50. The Applicant's Attorney also took issue with the fact that witness Mabizo Mbuyisa was not charged with any offence in relation with the incident which lead to the dismissal of the Applicant. This is despite the fact that witness Mbuyisa had signed for the goods as being in good order and condition, when they were obviously not. He vigorously submitted that the selective charging of the Applicant, and non-charging of the witness Mabizo Mbuyisa is grossly unfair to the Applicant, especially because Mbuyisa was never even called to account for the reason why he deceived the Employer by stating that the goods were in '*good order and condition*' when they were not.
51. In this regard, the Court was referred to the South African Labour Appeal Court in *Burton And Others V MEC for The Department of Health*

***Eastern Cape Province & Others (PA11/16) [2022] ZALAC 101***, where ***Tokota AJA*** had this to say;

*“The parity principle requires that like cases be treated alike which is an element of disciplinary fairness. It applies where there are two or more employees engaged in the same or similar conduct at the same time but only one or some of them are disciplined or where different penalties are imposed. Unfairness flows from the principle that like cases should in fairness be treated alike.”*

52. There is also another complaint by the Applicant that he was not allowed legal representation at his appeal hearing, yet he desired to be so represented.
53. As such, the contention by the Applicant, is that his dismissal was both procedurally and substantively unfair and he therefore demands that he be compensated for such unfair termination of his service.
54. For and on behalf of the Respondent, Attorney Mr. Gamedze submitted that the evidence lead by the Respondent’s witness pointed to the fact that there was a workplace rule relating to receiving goods, which the Applicant failed to follow, and for which he was charged and subsequently dismissed following a disciplinary hearing after a finding of guilt. This rule, according to Attorney Gamedze, was meant to safeguard and/or protect the Respondent against unwarranted losses.
55. The contention by the Respondent herein is that, after discovering that there were damaged bales, the Applicant ought to have foreseen that there was a need for him to engage the subordinate employees under his supervision to work overtime as opposed to what he (Applicant) did by taking

photographs of the damaged bales, which Attorney Gamedze calls a '*short cut*'. A prudent man ought to have foreseen that the measures taken by the Applicant were not sufficient under the circumstances.

56. Then in respect to the issue of Mabizo Mbuyisa not being charged, Attorney Mr. Gamedze submitted that Mbuyisa is the one who informed the Respondent's senior management about the fact that there were some damaged bales and missing rolls in the goods received on the date in question. He states that Mabizo only signed the delivery note, where he stated that the goods had been received in good order and condition, only after he had reported to management about the damages and missing rolls.
57. Then on the issue of the Applicant being refused representation at the appeal hearing, Gamedze informed the Court that the Chairperson of the appeal hearing had stated his reasons for denying the Applicant's request for legal representation. He states that after the Chairperson's refusal, the Applicant decided to continue with the appeal hearing as he seemed comfortable proceeding unrepresented. The justice scales were balanced at the appeal hearing stage, according to Gamedze, as even the Appeal Hearing Chairperson was also an employee of the Respondent.
58. For the foregoing submissions and arguments, it is the Respondent's contention that the dismissal of the Applicant was both procedurally and substantively fair.
59. In determining whether the dismissal of the Applicant was fair or not, the Court needs to first probe the charge in which the Applicant was found guilty to understand exactly how and why he was condemned for it and if

indeed such condemnation justified the ultimate decision to have his service terminated.

60. To start off, one needs to perhaps point out that there is quite a distinction between 'ordinary' negligence and 'gross' negligence, and that such distinction is very important in our labour law/industrial relations. It is so important because 'ordinary' negligence is usually not a dismissible offence but, on the other hand, 'gross' negligence is dismissible, even for a first offence. The distinction between ordinary and gross negligence comes down to a matter of degree – in other words, it boils down to a judgement call.
61. One needs to point out as well that the legal test for negligence is an objective one, i.e. *'...how would a reasonable person in the same position as the accused employee have acted – or failed to act?'* According to Professor PAK Le Roux, the following two elements must be taken into account when dealing with negligence;
1. *Whether a reasonable person in the same situation as the employee could have reasonably foreseen that his or her conduct could cause harm or damage to another person or that person's property?*
  2. *Whether a reasonable person would have reasonably taken preventive action to avoid such harm or damage caused?*
- If the answer to the above questions is 'yes', then the employee will most likely be guilty of being negligent.*
62. Gross negligence on the other hand is more severe than ordinary negligence, and more often than not, warrants dismissal for a first offence. Gross negligence is said to have occurred when an employee is persistently

negligent or if the omission or act in itself is regarded to be very serious, especially when an employer can prove actual damage.

63. In the South African case of *The National Union of Metal Workers of South Africa obo Selepe V ORAWAB Investments (PTY) Ltd t/a Bergview Engen One-Stop* [2013] 5 BALR 481 (MIBC), gross negligence is defined as a conscious and voluntary disregard of the need to use reasonable care, which has or is likely to cause foreseeable grave injury or harm to persons, property or both. This case further distinguishes that gross negligence is conduct that is extreme when compared to negligence.
64. An excellent example of gross negligence is found in the case of *Afrox Healthcare V CCMA & Others* [2012] 7 BLLR 649 LAC where; a patient was admitted to the intensive care unit after surgery. The doctors thought the patient would recover but unfortunately passed away the following day. What apparently transpired was that the patient developed complications in the course of the night. These complications were, however, never mentioned to the day shift staff. The senior nurse in charge of the night shift staff and an assistant were charged with gross negligence and dismissed. The senior nurse had chosen one of the least experienced nurses in the unit to supervise the patient and was aware that his subordinate made a mistake on the patient's chart. The senior nurse subsequently failed dismally in his duty of due diligence and care expected from a person in his position. He had not drawn the doctor on duty's attention to the errors committed by the junior nurse.
65. The Court stated that it is clear that the senior nurse failed to supervise his subordinate properly and failed to act responsibly once he became aware that the patient's condition was becoming worse. Making matters worse,

the senior nurse handed over to the day shift staff without mentioning that the patient was experiencing difficulties. The dismissal of the senior nurse was held fair when considering the nature of the employee's work and experience.

66. This case of *Afrox Healthcare* serves as an excellent example of gross negligence because it shows an apparent and conscious disregard of a need to use reasonable care. A reasonable person could see that such disregard could lead to grave injury or harm to the patient and the employer.
67. As opposed to 'gross negligence,' therefore, 'ordinary negligence' often arises due to the mere carelessness to act under the required standard of care. When such carelessness becomes blatant disregard of the standard of care, knowing that such disregard can cause grave injury or harm, or the act of carelessness has resulted in severe loss or damage, then you are dealing with a case of gross negligence.
68. There is then the pertinent and follow up question of what the definition of a reasonable person is? Who exactly is the reasonable man? The reasonable man is merely a fictional person which the law invents in order to have a workable objective form for conduct in society. Accordingly, a reasonable man is not an exceptionally gifted, careful or developed person, but neither is he under developed, nor someone who recklessly takes chances or who has no prudence. Different law scholars and authors are agreed that between the two extremes, the qualities of a reasonable man are found. (See: *J. Neethling, J.N. Potgieter & P.D. Visser, The Law of Delict, Butterworths 1989, at page 110*)

69. Now coming to this matter at hand, perhaps one needs to point out that the test for the alleged Applicant's negligence cannot and should not be applied *in vacuo* or against the standard of reasonable people generally, but it is to be applied in the context of his workplace or the industry he was engaged in. Again, in determining whether the Applicant was merely negligent or grossly negligent, as alleged by his former employer, the Court has to take cognisance of Van Aarde's summation in the *National Union of Metal Workers of South Africa (supra)* case where, in differentiating between ordinary negligence and gross negligence, he stated that; *'The carelessness or mere failure, which constitutes ordinary negligence, changes in gross negligence to an indifference to, and blatant violation of a workplace duty. Gross negligence can be described as a 'conscious and voluntary' disregard of the need to use reasonable care.'*
70. In this present matter, the evidence of the Applicant was that the consignment of bales was supposed to be a total of 119 bales, and indeed they were 119. After the Applicant had been informed about some of the damaged bales, he went to the delivery bay and took photographs of the damaged bales. The time then was apparently after knock off time. The Applicant's evidence was also that he had previously refused to accept delivery of a consignment that was to be delivered on a Saturday, and for such refusal he was slapped with a sanction of a warning. As such, he contends that he could not refuse to accept delivery of the damaged bales because of his previous experience of being sanctioned with a warning for refusing to accept delivery of a consignment. Hence his decision to accept delivery of the damaged bales, after he had taken photographs of same.
71. As precautionary measures, the Applicant says he (a) took photos of the damages, (b) made a note in the delivery note about the damages observed



on the bales and (c) contacted his Supervisor, Fahrenfort telephonically and when he could not get hold of him, he then sent him an email, which he copied to the Respondent's personnel at the head office, (Kevin Reddy – In-Charge Shipping and Derize Van der Merwe In-Charge Fabrics).

72. The Applicant further stated that the very next morning he contacted Fahrenfort about the previous day's occurrence and after having discussed it with him, Fahrenfort instructed that they should count all the rolls inside the bales to determine if there were any shortages. According to the Applicant, Fahrenfort did not exhibit any misgiving about how the Applicant had handled the issue the previous day. When the shortage was discovered after the counting, Fahrenfort again instructed the Applicant to call the Transport Company to report about the damages and shortage of the rolls. In this regard, one can conclude that this was in line with the Transport Company's policy that claims had to be lodged within 48 hours.
73. There is also the evidence of witness Sandile Shongwe, the Fabric Receiving Supervisor. Shongwe's principal duties were to (a) ensure that incoming goods are as per the record, (b) that goods received were all in good and perfect condition, and (c) that goods received were all accounted for. Interestingly though, Shongwe was never charged in respect of the incident of 21 May 2013, neither was Mabizo Mbuyisa. Mbuyisa was not even charged when he had recorded and endorsed that the goods had been received in good order and condition when they were obviously not. When Shongwe was questioned why Mbuyisa signed to say the goods had been received in good order and condition when they were not, he informed the Court that his speculation was that he made a mistake in so stating, which the Court rejects.

74. This, the Court rejects because, firstly, the same Mabizo Mbuyisa informed the Court that he was instructed by the Applicant to endorse that the goods had been received in good order and condition, when they were not. Secondly, the Applicant could not have informed Mabizo to record that the goods were received in good order and condition and then he (Applicant) record that they had been received damaged.
75. Mabizo Mbuyisa's evidence was that the Applicant was only called to the delivery bay after they discovered that the goods were damaged. And when the Applicant noted that the consignment had been tampered with, he took photographs of the damage and further that he was going to report to Fahrenfort about the damage he had noted. Indeed, evidence before Court indicates that he attempted to get hold of Fahrenfort telephonically but he was unreachable, so he wrote the email in which he informed him, together with the Reddy (In-Charge Shipping) and Van der Merwe (In-Charge Fabrics) of the damage. None, between Shongwe and Mbuyisa, bothered to do anything beyond informing the Applicant of the damage. If anything, it was only the Applicant took the initiative of taking photos of the damage and further reporting same.
76. Interestingly though, the employer decided that only the Applicant should be charged for the incident in question. Not only was the Applicant the only one charged, the employer decided that he should be slapped with a gross negligence charge. I am failing to comprehend why the employer decided that the Applicant should be charged with the severe misconduct count when he was the only one who took the initiative of taking photographs of the damage on the consignment. Not only that, the Applicant further attempted to get in touch with Fahrenfort telephonically, to report the

incident, and when he could not get hold of him (Fahrenfort) he then dropped him and the head office personnel the email.

77. What the Applicant did on noting the damage on the consignment, is an indication that he was concerned about the discovery. The evidence before Court indicates that it is only the Applicant who took the initiative of attempting to report the damage to the employer's management. Sandile Shongwe and Mabizo Mbuyisa did nothing beyond informing the Applicant. Interestingly, Shongwe and Mbuyisa, as Receiving Supervisor and Receiving Clerk respectively, were not charged in respect of this incident despite that they were the very first port of call employees, whose principal and main duty was to ensure that all goods received were as per records, that the goods were in good condition and that they were all accounted for.
78. As stated earlier on in this judgement, gross negligence has been defined as a 'conscious and voluntary' disregard of the need to use reasonable care. A question one should ask himself in relation to the present matter is whether it can be said that the Applicant took a conscious and voluntary decision not to use reasonable care? The obvious answer to this question, taking into account the totality of the evidence before Court, is that the Applicant did everything to ensure that the damages in the received consignment were noted and further attempted to get in touch with his Supervisor, Fahrenfort, and when he could not get him on the phone he sent him and the personnel at the head office an email notifying them of the damages.
79. If anything, it was Shongwe and Mbuyisa who should have been charged with gross negligence, and not the Applicant. The employer blames the Applicant for not having conducted a verification count to determine how

many bales were missing. Even then, I see no reason to blame the Applicant because he could not locate Fahrenfort to authorise that the employees work overtime, to do the count, since the delivery of the consignment was after work hours. The verification count was done the very next morning, after the Applicant had approached Fahrenfort before engaging in any other work. Even if the verification count had been done the previous day, that would not have changed anything because the rolls inside the bales would still have been discovered to be short. As such, it is the Court's finding that the shortage could not be imputed on the Applicant. The Respondent also seems to rely on the email of 23 October 2012, which was specifically headed '**OUTWORK DISPATCHING PROCEDURES**', to want blame the Applicant for not counting on the same day of 21 May 2013. Again I ask myself, why charge only the Applicant? And secondly, this email of 23 October 2012, was specific that it was for all goods leaving for TRALCO.

80. Our law requires that employers should apply discipline fairly and consistently. But in this case the decision to only charge the Applicant and not Mabizo Mbuyisa and Sandile Shongwe was clearly selective discipline, and this was clearly unfair to the Applicant. Mabizo Mbuyisa's case is even worse because he falsely recorded that the goods had been received in good order and condition when that was obviously not the case. Discipline in the work place should be consistently and fairly applied. As authors *Alan Rycroft & Another* in the publication *South African Labour Law, 2<sup>nd</sup> Edition* at page 202 – 203 put it, '*...it would be unfair of an employer to selectively or to discriminate in respect of employees who are guilty of the same offence*'.

81. Attorney Mr. Manyatsi correctly referred the Court to the authoritative South African Labour Appeal Court case of *Burton & Others v MEC for the Department of Health Eastern Cape Province & Others* [2022] ZALAC 101 where Takota AJA succinctly stated the basic rule as follows at paragraph 28;

*“[28] The parity principle requires that like cases be treated alike which is an element of disciplinary fairness. It applies where there are two or more employees engaged in the same or similar conduct at the same time but only one or some of them are disciplined or where different penalties are imposed. Unfairness flows from the principle that like cases should in fairness be treated alike...*

*[29] Where a number of employees commit the same misconduct but the employer arbitrarily selects some of them to be disciplined leaving the other transgressors unaffected, the employer is guilty of applying discipline inconsistently”*

82. This Court has previously stated in a number of judgements that the substantive fairness of any dismissal is to be determined on the basis of the reasons on which the employer relies for arriving at the decision to terminate the service of the employee. The law requires that the employer must prove that the employee committed an act of misconduct so severe as to warrant dismissal. So that if the employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the employee is not guilty, the dismissal will be deemed to be substantively unfair.
83. *Cameron, Cheadle and Thompson* in the publication *‘The New Labour Relations Act: The Law After the 1998 Amendments* at page 144 – 145 state as follows;

*“A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship...Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case – including the action with which the employee is charged are considered. (Court’s underlining.)*

84. This, before Court, is one matter where the employer has failed to prove that the Applicant, Danyaraj Sunderlall, committed an act of misconduct so severe or grave as to warrant his dismissal. The Respondent has also failed to justify the dismissal of the Applicant according to the requirements of equity, when all the relevant features of the Applicant’s case are taken into consideration. With that said, it is accordingly a finding of this Court that the dismissal of the Applicant was substantively unfair.
85. The Applicant also complains that his dismissal was procedurally unfair because he was not allowed legal representation at his appeal hearing. From the evidence before Court though, the Court notes that after being initially refused such legal representation, the Applicant approached this Court and by consent of the parties’ respective Attorneys, under Industrial Court Case No. 289/2013, it was agreed that the Applicant would motivate his request for such representation, after which the Respondent would consider same. Indeed the Applicant and his Attorney were given an audience by the Chairperson of his appeal hearing, whereat they made representations on why the Applicant was requesting that he be represented by a representative of his choice. After due consideration, the Applicant’s request was denied. The Chairperson informed the Applicant and his Attorneys why he felt his motivation had no substance, hence his decision to deny him legal

representation. The Applicant though was allowed representation by a fellow employee at his appeal hearing.

86. If, for whatever reason, the Applicant felt the reasons advanced by the Chairperson for the denial of his request, he ought to have again approached this Court for urgent redress. If, for instance he felt none of his colleagues could adequately represent him, he should have again instructed his Attorneys to urgently approach this Court for the necessary remedy. For these reasons, it is accordingly a finding of this Court that the dismissal of the Applicant met all the prerequisites of fair procedure.
87. The Applicant had been employed by the Respondent in May of 2011, and had worked continuously until his unfair dismissal in June of the year 2013. This means he had just completed two full years when he was dismissed. At the time when the matter was heard, he had not yet secured alternative employment. He is married with three children who are now all adults. When he testified before Court he was 62 years old, meaning he is now a pensioner.
88. After a careful consideration of all the evidence before Court, together with the submissions and arguments of the respective protagonist's Attorneys, and the interests of justice and fairness, plus the personal circumstances of the Applicant, the Court makes the following orders;

- a) The Respondent is hereby ordered and directed to forthwith pay the Applicant as follows;

<b>i) Notice Pay</b>	<b>E 17, 769.23</b>
<b>ii) Severance Allowance</b>	<b>E 8, 076.90</b>
<b>iii) Additional Notice Pay</b>	<b>E 3, 230.76</b>

iv) 9 months Compensation for unfair dismissal      E 159, 923.07


---

Total      E 188, 999.96

---

87. The Court also orders that the Respondent pays the Applicant's costs of suit.

The Members agree.

  
T. A. DLAMINI  
JUDGE – INDUSTRIAL COURT

**DELIVERED IN OPEN COURT ON THIS 08<sup>TH</sup> DAY OF FEBRUARY 2024**

*For the Applicant: Attorney Mr. L. Manyatsi (Manyatsi & Associates)*

*For the Respondent: Attorney Mr. B. Gamedze (Musa M. Sibandze Attorneys)*