IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. **JR686/03**

In the matter between:

FRANCOIS WILHELM RIEKERT Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

M S RAFFEE N.O. Second Respondent

EMERALD SAFARI RESORT AND CASINO (PTY) LTD Third Respondent

JUDGMENT

Nel, AJ

1. This is an application for review in terms of Section 145 of the Labour Relations Act of an award issued by the Second Respondent ("the Commissioner") wherein he found that the Applicant's dismissal was both procedurally and substantively fair.

2. In this matter the Third Respondent suspended the Applicant on 17 January 2002. On 19 January 2005, the Applicant was notified of a disciplinary enquiry to be held on 22 February 2002. The disciplinary notification in part read as follows:

   "Alleged offence details. *Gross misconduct in that you have:*

   (1) Gained access to management drawers without authorisation.

   (2) Undermining of the good relations of company management.

   Date of alleged offence:

   (1) On or about the 3rd December 2001."

3. The disciplinary enquiry was held on 22 February 2002. On 28 February 2002, the chairperson of the enquiry, Mr Kaipa, advised the Applicant that he had been found guilty of both the offences he had been charged with. After the parties addressed the

chairperson on mitigating and aggravating circumstances, a sanction of dismissal was imposed. The Applicant thereupon referred a dispute to the First Respondent and when the dispute remained unresolved, it was referred to arbitration before the Commissioner. The arbitration lasted six days and Mr. William Kaipa, Mr. Flannagan Brown (the investigator and initiator at the disciplinary hearing), Messrs. Steven Mawonga, Deon Basson and Martin Rice testified on behalf of the Third Respondent. The Applicant, Mesdames Annelise Minnie, Trix Barnard and Mariette Oberholzer (a polygraph expert) testified for the Applicant.

PROCEDURAL FAIRNESS

4. The Third Respondent has a very extensive disciplinary procedures code. The Commissioner dealt with this in the following terms in his award:

"*(3) The Applicant's representative attacked the internal procedure relating specifically to the Respondent's disciplinary code and procedure. The Applicant's representative threw the book at the Respondent concerning none (sic) compliance of its internal disciplinary code. The following were all the points raised by the Respondent (sic) concerning its attack, which are as follows:*

(a) Any process that does not meet the requirements of a fair procedure will not be acceptable. It may be argued that in certain severe cases managers may use a procedure that does not conform to all three legs of the fair procedure. This would be extremely rare and may only be done (with the) express permission of senior management.

(b) An employee must be put in a position to defend himself or herself at every stage of the process.

(c) That the process of an investigation should be (tied) up within a few days and further that the whole investigation should not take more than two days.

(d) Disciplinary action must commence within a reasonable time after the offence has been committed.

(e) That the procedure must stipulate specific time limits for dealing with disciplinary problems so that tensions may be prevented from escalating.

(f) *That the investigator should open a case file which would be used for a (sic) record keeping purposes during investigation and where all relevant information statements and preparation are kept.*

(g) *A suitable and impartial chairperson should deal with a case it depends on the complexity.*

(h) *Allegations against an employee must be clear enough in order for an employee to know the case that he will have to defend.*

(i) *In addition to the notice of enquiry the employee should be given copies of any statement and the employee should be allowed to view any other evidence in the Respondent's presence.*

(j) *Failure by the investigator to present the relevant evidence to the witnesses may lead to a dismissal of the case on the basis of insufficient evidence.*

(k) *That the Respondent must ensure that a minute taker should be organised and the minute taker must read the guidelines for minute taking.*

(l) *Written reasons for the penalty will be given by the chairperson.*

(m) *In practice the appeal may take place after the referral to the CCMA.*

(n) *No reliance can be place(d) on statements which had not been introduced at the hearing.*

(o) *An employee will have the right to call its (sic) own witnesses.*

(p) *It is imperative that accurate records of any procedures are maintained and furthermore that employees are entitled to a copy of the minutes which must fairly reflect the contents of the proceedings.*

(q) *The findings must be substantiated on the evidence presented and minuted and not on a gut feel.*

(r) *It is the chairperson's duty to ensure that the minutes are correct and that the employer had a copy thereof and then refer all documentation to the HR Department.*

(s) No employee may be dismissed except by the authority of the Department Head and then only after consultations with the HR Department."

5. The Commissioner then proceeded to specifically deal in his award with each of these parts of the book which he held the Applicant had thrown at the Third Respondent. He, correctly, I believe, concluded that in respect of paragraphs (a), (b), (g), (h), (j), (m) and (n) there was no evidence to suggest that the Third Respondent had not complied with the requirements of these paragraphs.

6. The Commissioner then dealt specifically with paragraphs (c), (d) and (e) of the above stated requirements of the Third Respondent's disciplinary code, which in essence dictate that disciplinary action must be instituted within a reasonable period of time. The Commissioner then dealt with the case of <u>Leonard Dingler (Pty) Ltd v Ngwenya [1999] 5 BLLR 431 (LAC)</u>. It would appear as if the Commissioner referred to this and other authority in support of his view (which he did not specifically state, but which I deduct he intended doing) that disciplinary codes are guidelines to be applied in a flexible manner and that whilst employers are generally required to follow agreed disciplinary procedures, failure to do so does not necessarily render a dismissal unfair. I also accept that the Commissioner intended to convey his thinking in line with that of Kroon JA where he, in the Leonard Dingler case, with approval referred to Le Roux & Van Niekerk's *The Law of Unfair Dismissal in South Africa* and *National Education Health & Allied Workers Union v Director-General of Agriculture & another (1993) 14 ILJ 1488 (IC) at 1500* where it was stated that:

> "…. *the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strictly legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity."*

Kroon JA went on to say:

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

7. It is not clear from the Commissioner's award what circumstances, and what times of alleged misconduct he had regard to in coming to his conclusion that the requirements

of procedural fairness were substantially fairly, reasonably and equitably complied with by the Third Respondent.

8. Nor does one see from the Commissioner's reasoning whether he took into consideration at all the time period which, based on the Third Respondent's own evidence, it took the Third Respondent until it held its disciplinary enquiry into the Applicant's alleged misconduct.

9. Likewise, one does not see from the Commissioner's award whether he had any regard whatsoever for the manner in which the enquiry was held, with specific reference to:

9.1 the keeping of minutes and the giving of written reasons for the penalty by the chairperson;

9.2 the fact that the Third Respondent's disciplinary code regarded it as imperative that accurate records of any procedures were to be maintained and that employees were entitled to a copy of the minutes, which must fairly reflect the contents of the proceedings;

9.3 the fact that it was the chairperson's duty to ensure that minutes are correct and that the employer had a copy thereof and that all documentation be referred to the HR department.

10. It is further apparent that the Commissioner did not in his award deal with two of the specific requirements stipulated in the Third Respondent's code namely that the finding of the internal disciplinary enquiry must be substantiated on evidence presented and minuted at the enquiry and not just on gut feel as well as the further requirement that no employee may be dismissed except by the authority of the department head and then only after consultation with the HR Department.

11. I will deal with all of the above in more detail later herein.

12. During argument I was referred to the Applicant's contract of employment and more particularly the following paragraph contained therein:

> "*Given the company's involvement in the sensitive industry of gaming, strict adherence to all Company, and Gaming Board rules, Regulations and Procedures is required of every employee and is a condition of employment. The highest standards of confidentiality and behaviour are expected of all staff. It is the employee's responsibility to be aware of all the aforementioned rules and regulations.*"

13. Ms Erasmus, appearing for the Applicant, submitted that adherence to company rules, based on this part of the Applicant's contract, was accordingly made part of his contract. In this regard she referred me to the case of Denel (Pty) Ltd vs Vorster [2005] 4 BLLR 313 (SCA). In the Denel case, the court noted that the procedures the employer was required to follow before dismissing an employee was set out in a disciplinary code, which was expressly incorporated in the employer's contract of employment. Nugent JA stated the following at page 318(I):

> "*The procedure provided for in the disciplinary code was clearly a fair one - it would hardly be open to the Appellant to suggest that it was not – and the respondent was entitled to insist that the Appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the Appellant was just as good.*"

14. I am of the view that the Applicant herein was entitled to insist that the Third Respondent abide by its contractual undertaking, namely to comply with its disciplinary code and procedure. I believe the Third Respondent failed to do so. However, that is not the issue herein. Rather, the question is whether the Commissioner was justified in his conclusion that the Third Respondent's conduct was procedurally fair notwithstanding the fact that it did not comply with all the terms of its own disciplinary code and procedure. (The Third Respondent conceded both at the arbitration and before me that it had not complied in every respect with its own disciplinary code).

15. In considering this question (whether despite non-compliance with some aspects of its disciplinary code, the Third respondent nevertheless acted procedurally fairly) I believe a more appropriate, and relevant, authority which I was referred to by Ms Erasmus is the case of Black Mountain vs CCMA & Others [2005] 1 BLLR 1 (LC). Mr Cook argued before me that this case is distinguishable from the present one before me as, what was in issue in the Black Mountain case was the application of the employer's Standard Procedure for Alcohol and Drug-related Behaviour policy. Mr Cook accordingly argued that if an employer has such a policy, in conjunction with its disciplinary code, that policy must be applied and can not be overridden by the employer's disciplinary code. He argued that in the present matter I was not dealing with a separate policy that had been breached, but only with the question of compliance with the Third Respondent's disciplinary code, which he said was only a guideline. Accordingly, so he argued, although the Third Respondent had admittedly not complied with every term of its own code, as the code was only a guideline, the Commissioner had correctly concluded that,

notwithstanding breaches by the Third respondent of it's own disciplinary code, it had nevertheless acted procedurally fairly.

16. In the Black Mountain case, like in this matter, the employer argued that the status of a disciplinary code is that of a guideline not requiring slavish adherence. With reference to the cases the employer's representative cited in support of this proposition (at page 7 G – H of the Black Mountain judgement), Murphy AJ commented that the matters referred to all dealt with relatively minor departures from procedural aspects of the prevailing disciplinary code such as the failure of the chairperson to appoint a prosecutor on appeal or the appointment of a presiding officer not strictly in accordance with the prescribed guidelines. Murphy AJ went on to say that"………. *Where the employer's disciplinary code and policy provide for a particular approach it will generally be considered unfair to follow a different approach without legitimate justification. Justice requires that employers should be held to the standards they have adopted. (see* *Changula vs Bell Equipment (1992) 13 ILJ 101 (LAC)* *and* *SA Clothing and Textiles Workers Union & Another vs Martin Johnson (Pty) Ltd (1993) 14 ILJ 1033 (LAC)).*"

I fully associate myself fully with these sentiments of Murphy AJ.

17. In considering the Commissioner's finding that the breaches by the Third Respondent of its own procedure did not render the dismissal procedurally unfair, I am very mindful of the fact that, in determining whether this finding is justifiable in terms of the reasons given for it, I will be making value judgments which involve the considering by me of the merits of the matter. I am also aware that I am entering the merits not in order to substitute my own opinion on the correctness thereof for that of the Commissioner, but only for the purpose of determining whether the Commissioner's finding that the Third Respondent's dismissal was procedurally fair is justifiable in terms of the reasons given for it.

18. In considering the evidence before the Commissioner relating to his finding that, notwithstanding non-compliance with every aspect of its disciplinary code, the Third Respondent's acted procedurally fairly, I considered the following:

18.1 that the conduct complained of relating to undermining of management commenced in July 2001 (and in respect of which the evidence was that Mr. Coertzen was involved in).

18.2 the witness Annelise Minnie testified that she already in July 2001 brought to Mr Basson’s attention what Coertzen was doing (relating to undermining of management).

18.3 Mr Basson's evidence was that two employees (Annalise Minnie and Trix Barnard) had told him from September to December 2001 that the Applicant was part of this alleged conspiracy.

18.4 on the Third Respondent’s own version of events, it knew of the Applicant’s alleged involvement in conduct undermining of its management since September to December 2001. (I hasten to mention that this evidence of Basson’s was directly contradicted by these witnesses who, when they were not called by the Third Respondent, were called by the Applicant. They denied that they had ever implicated the Applicant in any undermining of management, but only Mr Coertzen.)

18.5 the Applicant made his first written statement (on which the Third Respondent so heavily relied at the enquiry) on 29 December 2001, his supplementary one on 12 January 2002 and his interview with Mr Flannagan Brown on 17 January 2002. The Applicant was brought before a disciplinary enquiry on 22 February 2002.

18.6 at best for the Third Respondent, the latest that the alleged misconduct of the Applicant occurred was on or about 11 December 2001. This particular conduct complained of was a simple matter of the Applicant allegedly having gained access to management drawers without consent.

18.7 the fact that no statements were taken from the witnesses who on the Third Respondent’s version implicated the Applicant with having conspired against the Third respondent’s management, (and in this regard there were also contradictions between these two witnesses on the one hand and Basson on the other, with Basson alleging that they had given statements implicating the Applicant and these witnesses, called by the Applicant, denying ever having done so. Their statements, handed in by the Third Respondent’s representative at a late stage of the arbitration, when the witnesses were testifying on behalf of the Applicant, contained no allegations against the Applicant).

18.8 the evidence of the Applicant that he was denied the opportunity to call his witnesses, and the contradictions between the evidence of Brown and the Chairman of the disciplinary enquiry on this issue.

18.9 the fact that the Third Respondent did not provide convincing evidence that there was compliance with the requirement that no employee may be dismissed except by the authority of the department head and then only after consultations with the HR Department.

18.10 in many instances questions posed to the Third Respondent's witnesses during the arbitration could not be answered by the witness, or were answered in an unsatisfactory manner. Mr Kaipa could, for example, not indicate why he had made certain decisions during the enquiry. No minuted evidence was produced on which he based his findings. (I believe this was to a large extent, if not entirely, because no proper minutes and records of the disciplinary proceedings had been kept, from which all parties could then refresh there memories, and which could be used as a legitimate source for leading and cross examining witnesses).

18.11 the HR Manager conceded that minutes of the disciplinary enquiry had to be kept. No such minutes were handed in at the arbitration.

18.12 the requirement in the Third Respondent's disciplinary code that the investigator should open a case file which would be used for record keeping purposes during investigation and where all relevant information, statements and preparation are kept. No such file was presented at the disciplinary enquiry. Mr Brown could not give an answer if such file existed. (As stated above, the vagueness of the evidence of many of Third Respondent's witnesses during the arbitration, particularly relating to dates when the alleged incidents occurred, as well as with reference to the vagueness as to which employees were allegedly involved, can, I believe, be directly attributed to the non-compliance by the Third Respondent with this aspect of its own disciplinary enquiry).

18.13 the Third Respondent's disciplinary code requires that an employee should be given copies of any statement and should be allowed to view any other evidence in the Respondent's presence. This was not done. Basson testified that he, as well as the employees (Annelise Minnie and Trix Barnard) had made statements, (which was later testified by them only related to Mr Henk Coertzen). These statements were not given to the Applicant. In fact, Minnie and Barnard’s statements were only at a very late stage of the arbitration proceedings handed to the Applicant's representative.

18.14 the requirement that no employee may be dismissed except by the authority of the Department head, and only after consultation with the HR department, is a very express requirement, clearly intended to ensure a procedurally and substantially fair process. (Whether Third Respondent complied with this particular rule in its disciplinary code is as clear as mud having regard to the evidence of the various witnesses on this issue. The Commissioner does not specifically deal with this issue. It is therefor not known whether he found that it did happen. I do not believe that the Commissioner could justifiably have concluded that there was compliance with this part of the Third Respondent's disciplinary code).

18.15 Ms Minnie testified that Mr Basson had already in December 2001 advised her that five employees would lose their jobs and that one of them was the Applicant. (If the Applicant's dismissal was, at least as far as Basson was concerned, such a foregone conclusion, why did the disciplinary enquiry only take place on 22 February 2002?)

18.16 the Third Respondent gave some reasons for the delay in instituting the disciplinary enquiry. These reasons had to be assessed against the time the alleged conspiracy was first brought to the Third Respondent's attention (July 2001) and again from September to December 2001. The simplicity of the allegation that the Applicant had removed documents from a management drawer (which he was charged with happened on or about 3 December 2001) also clearly had to be weighed. Viewed against these facts, the reasons tendered by the Third Respondent for the delay in taking disciplinary action against the Applicant are unpersuasive and unacceptable.

18.17 no justification whatsoever was shown by the Third Respondent for not having complied with a number of the specific requirements of its disciplinary code.

19. These are in the main the factors which, if properly considered, I believe drives one to the ineluctable view that the Commissioner's conclusion (that the non-compliance by the Third Respondent with its own procedure did not render its conduct procedurally unfair) is not justifiable in terms of the reasons given for that conclusion.

20. A further aspect, which I also considered in relation to the question whether the Commissioner was justified in his conclusion that the Third respondent had acted procedurally fairly, relates to whether the Applicant was prevented from calling his

witnesses, as he alleged. The Commissioner, correctly, states that the right to call witnesses is fundamental to all proceedings. Mr Brown, the so called initiator at the disciplinary enquiry, and Mr Kaipa, the chairperson of the disciplinary enquiry, contradicted each other in respect of the material issues surrounding the question whether the Applicant was allowed to call witnesses. Mr Brown, under cross-examination, testified that the Applicant's witnesses had to be present and that the disciplinary hearing could not be postponed. Mr Kaipa, on the other hand, denied that there was any such suggestion from Mr Brown. It would appear as if the initiator, and not the chairperson, controlled the process. The Commissioner does not deal with these contradictions at all. The Applicant, on the other hand, was adamant that he was refused the opportunity to call his witnesses. He testified at the arbitration that he was not allowed the opportunity to call his witnesses as he was told that he was not allowed a short adjournment to call them. This allegation is in part supported by what Brown testified at the arbitration, although he (Brown) denied that the Applicant was denied the right to call his witnesses. The Commissioner does not deal with this at all. He only looks at the Applicant’s credibility in regard to this particular issue and he comes to the conclusion that there are no convincing facts that the Applicant was barred from calling witnesses. The Commissioner clearly did not consider the evidence of Brown and Kaipa at all in this regard and did not apply his mind properly to this aspect of whether the Applicant was denied the right to call witnesses. I find this a particularly serious omission in light of the fact that the Third Respondent's witnesses contradicted each other in this regard. The Commissioner’s conclusion in this regard is not reasoned, and I find them not justified. This in and by itself renders the Commissioners award reviewable.

21. Having regard to the paragraph extracted from the Applicant's contract of employment referred to above, the Third Respondent has clearly set for itself very particular standards in its disciplinary code which as the code itself states "*is a necessary basis for establishing guidelines of substantive fairness, an agreed procedure ….. required to ensure that discipline is administered in a consistent and procedurally fair manner.*" As stated, no acceptable grounds or justification were shown by the Third Respondent why it could not strictly comply with its own disciplinary code in the present case. The Third Respondent also did not show any, or good, cause why it should, under the circumstances relating to the present case, have been allowed not to comply with its own code. It is apparent that the specific environment in which the Third Respondent operates is one where it deemed it necessary to have a very detailed and specific disciplinary code, setting very express requirements that have to be complied with.

22. I am in agreement with the proposition that disciplinary codes are guidelines and that an employer will not necessarily be regarded as having acted procedurally unfairly if it did not comply with certain specific parts of its code. I do not believe that the fact that there is clear case law to the effect that disciplinary codes are guidelines can under any circumstance be understood by employers as meaning that they may chop and change the disciplinary procedures they have themselves set as and when they wish. Employees (and employers) are entitled to expect that their employers (and employees) will comply with the prescribed rules of the game as far as disciplinary enquiries go (and for that matter, as far as all rules set in the workplace, for both employers and employees, are concerned). When an employer does not comply with aspects of its own disciplinary procedures, there must be good reason shown for its failure to comply with its own set of rules. An employer must justify the non-compliance with its own code and, having regard to all the relevant circumstances, the employer bears the onus to satisfy the objective requirement that their conduct was substantially fair, reasonable and equitable.

23. Having regard to all the above, I am satisfied that the Commissioner failed to properly apply his mind to the evidence on which he was obliged to focus relating to the determination whether the Third Respondent acted procedurally fairly.

24. In the absence of good cause having been showed by the Third Respondent why it should be allowed to have deviated from its own disciplinary code and procedure, and having specific regard to all the factors I have mentioned above (many of which it is apparent the Commissioner did not apply his mind to at all, or properly), I am satisfied that there is not a rational and objective basis justifying the connection made by the Commissioner between the material properly available to him and the conclusion he eventually arrived at that the Third Respondent acted procedurally fairly in dismissing the Applicant.

25. Having regard to all the circumstances relevant herein, such as:

25.1 the time when certain misconduct came to the Third Respondent’s attention;

25.2 its delays in taking disciplinary action against the Applicant;

25.3 the failure by the Third Respondent to do a number of things its code expressly required it to do and which I referred to above;

25.4 the manner in which Brown, for example, investigated the matter and particularly his failure to open an investigation file, his failure to take statements from witnesses and to show statements to the Applicant;

25.5 the manner in which the Third Respondent conducted the disciplinary enquiry into the alleged misconduct of the Applicant and the number of failures surrounding the actual enquiry, such as the failure to keep proper minutes, and the apparent failure to consult the HR department before dismissing the Applicant,

I find that the Third respondent acted procedurally unfairly in respect of the disciplinary action it instituted against the Applicant.

SUBSTANTIVE FAIRNESS

26. Turning to the question of substantive fairness, it is clear that the only evidence adduced by the Respondent before the disciplinary enquiry, as well as during the arbitration, in respect of the Applicant "*undermining…. the good relations of company management*" was in effect the Applicant's own written statements which he had made on 29 December 2001 and later on 12 January 2002, as well as the transcript of the interview Brown held with the Applicant. In addition, there is also Mr. Basson's evidence that the Applicant, in addition to these written statements, had *"verbally explained to (him) also that he was part of the conspiracy"* - which the Applicant in turn denied when he testified.

27. Mr. Basson did not tender any direct evidence in this regard. He only gave hearsay evidence that employees, who he said had the guts to come forward, warned them against the Applicant and Mr. Henk Coertzen. Basson testified that these employees told him that the Applicant was part of this conspiracy (presumably to undermine the Third Respondent's management). Basson testified that employees Barnard and Minnie had made full written statements implicating the Applicant and that these witnesses would be called and that the written statements would be provided during the course of the arbitration. The Third Respondent did not call these witnesses, nor did it produce their statements. When the Third Respondent did not call these witnesses, the Applicant did and they very specifically contradicted Mr. Basson's evidence in a number of very relevant respects. They expressly denied that they had ever implicated the Applicant as being part of a conspiracy against, or undermining of, the Third Respondent's management or that they had deposed to statements to that effect. The Commissioner does not deal with this clear and relevant aspect of the evidence at all.

28. Such statements as these employees did depose to (and which the Third Respondent only made available when these witnesses testified on behalf of the Applicant) did not reflect that they implicated the Applicant at all. In addition, these witnesses testified that, when they gave evidence at the disciplinary enquiry of Mr Henk Coertzen, the Applicant did not even feature. One finds it very strange that, where the conduct of which the Applicant is accused of involved discussions with Mr Henk Coertzen, the Applicant is not even mentioned by witnesses during Coertzen's disciplinary enquiry.

29. The list of questions grows. Why were proper minutes not held of the enquiry? Why was there no clear evidence that the chairperson of the disciplinary enquiry consulted the HR department before terminating the Applicant's employment? Why were no witnesses called to give direct evidence about the Applicant undermining the Third Respondent's management, which direct evidence Basson alleged the Third Respondent had (in the persons of Barnard and Minnie at least)? Why was the Applicant called as a witness in Coertzen's disciplinary enquiry, but Coertzen does not testify against the Applicant and no explanation (such as that he was a hostile witness, for example) is tendered why Coertzen was not called.

30. This all must be considered, and answered, against the background that the two employees who Basson testified had told him that the Applicant had undermined the Third Respondent's management, and who could (perhaps should) have given direct evidence on the Third Respondent's behalf, were not called by the Third Respondent. We do not need to speculate why they were not called. When the Applicant called them, they expressly testified that they had only made statements to the effect that Coertzen, and not the Applicant, had undermined the Third respondent's management. When these witnesses got into the witness box, they did not confirm Mr Basson's hearsay evidence that these employees had told him the Applicant had conspired (presumably against the Third Respondent's management). They contradicted Mr Basson in this specific regard (that the Applicant had undermined or conspired against the Third Respondent) and expressly testified that they had only implicated Mr Coertzen in that regard. The Commissioner about this evidence utters no word. He clearly did not apply his mind thereto at all.

31. Basson testified that, after the two employees (Minnie and Barnard) had advised him that the Applicant was part of a conspiracy (presumably against the Third Respondent's management) he deposed to a written statement. This statement of his, Basson conceded, did not even mention the Applicant at all, only Mr Henk Coertzen. When confronted with this in cross examination, Mr Basson said that the reason why he did not

mention the Applicant's name was that he was hoping to have the Applicant on their (presumably management's) side to testify against Mr Coertzen.

32. The Applicant's written statements (referred to above) do not in my view warrant the conclusion arrived at by the disciplinary enquiry, nor by the Commissioner, that it is proof of the Applicant having "*Undermin(ed)… the good relations of company management*."

33. The Commissioner does not, in my opinion, provide any reasons for his conclusion that the evidence before him justified his decision that the Applicant was correctly found guilty of undermining the good relations of the Third Respondents management. In fact, I will go further, a perusal of the evidence which was presented before the Commissioner, does not provide any basis, whatsoever, for this conclusion, namely that the Applicant was correctly found guilty of undermining the good relations of the Third Respondent's management.

34. It is patently clear from the evidence before the Commissioner that Mr Brown, in the disciplinary enquiry, (and in the arbitration) relied exclusively on the Applicant's own written statements for his allegation that the Applicant was guilty of undermining the good relations of the company's management. It appears that the chairperson of the disciplinary enquiry also relied on the Applicant's written statement for his conclusion that the Applicant was guilty of undermining the good relations of the company's management.

35. Mr Brown, with reference to the Applicant's written statements and/or the interview Brown had with the Applicant, came to conclusions in his evidence before the Commissioner which is not supported by these written statements or the transcript of the interview Brown had with the Applicant. For example, Brown testified that the Applicant said he was involved in "*complotting against Management".* This is not supported by any of the Applicant's statements. Brown testified (with reference to the interview – which was tape recorded and transcribed) that, during the interview, the Applicant admitted to breaking into the drawer. This is simply not true.

36. It appears as if the high water mark of the Third Respondent's complaint against the Applicant is that, having thought that Coertzen was undermining the Third Respondent's management, the Applicant did not advise management thereof.

37. It is not clear from the Commissioner's reasons at all what he relied on to come to the conclusion that the Applicant was guilty of "*undermining…. the good relations of*

company management". Fact of the matter is that, save for the Applicant's own statements, made to the Third Respondent in writing, his tape recorded interview with Brown, the mentioned evidence of Mr Basson that the Applicant *"verbally explained to (him) also that he was part of the conspiracy"* (which the Applicant did not admit) and the hearsay evidence of employees testified about by Basson as implicating the Applicant, (which these employees emphatically denied), there was no direct evidence whatsoever of the Applicant having undermined the good relations of the Third Respondent's management. His written statements and the transcript of the interview disclose discussions he had with Coertzen, but I am satisfied that what is contained in the Applicant's written statements does not, in and by itself, warrant the conclusion that the Applicant was guilty of undermining the good relations of the company's management. There is simply no direct evidence in support of this conclusion.

38. Nickelson JA in Crown Chickens (Pty) Ltd t/a Rocklands Poultry vs Kapp & Others [2002] 6 BLLR 493 (LAC) at paragraph 58 stated that:

> "*… the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.*"

I associate myself fully with this statement of Nicholson JA.

39. In respect of the alleged misconduct of the Applicant of "*undermining the good relations of company management*", I do not find any evidence of the Commissioner having applied his mind seriously, properly, or at all, to this particular issue. Nor do I find the Commissioner having reasoned his way properly to his conclusion. Such conclusion as he has reached, I do not find justifiable, neither as to the reasons given, nor do I find it justifiable in any respect. I do not believe the Commissioner applied his mind properly, or at all, to this aspect of the matter before him. The Commissioner dealt with the Applicant's evidence extensively in so far as it related to procedural fairness. In relation to the question as to whether the Applicant was guilty of the misconduct he was charged with, one does not see the Commissioner dealing with the evidence of the Applicant at all, save to state that *"The Applicant has not been open and frank in his evidence."* It certainly on the face of his award appears as if the Commissioner ignored the Applicant's version of events.

40. On the substantive fairness of the dismissal it is perhaps also to be noted that Mr Kaipa testified that, if the Applicant had not been found guilty of the removal of the document from the drawer, his decision would have been different. I understand this part of his evidence to be that, if the Applicant had only been found guilty of the charge of having undermined management, he would not have been dismissed.

41. Having considered all the evidence before the Commissioner, I am of the view that the Applicant was wrongly found guilty of "*undermining the good relations of company management*". That is not however the end of the matter.

42. I accordingly turn to deal with the other alleged misconduct of the Applicant namely that he had gained access to the (Third Respondent's) management drawers without authorisation. In this regard, in essence, the Commissioner had a single witnesses before him who testified that the Applicant had blatantly forced open the drawer in question in front of him and removed the confidential document. Not only did the Applicant, according to this witness, do this openly in front of him, but the Applicant, according to Mr. Mawonga compounded the position by actually making a copy of the document and handing it to the witness, Mr Mawonga.

43. Corroboration for this single witness could be argued was to be found in the evidence of Brown that Mawonga had presented this confidential document to him. Mawonga, however, contradicted himself as to when he had allegedly given this document to Brown. Initially, during his evidence in chief, Mr. Mawonga was very clear and adamant in his evidence that he phoned Brown the next morning (after he had been given the statement by the Applicant) and that Brown agreed to meet him at 09H00 that same morning. He duly met Brown and told him of the document and handed it over to Brown. Under cross examination, Mawonga testified that it could have been the following day or after three to four days that he called Brown. Then he testified that he did call Brown the next day, but that he could have handed him the documents three or four days later. Brown's evidence in this regard was also not clear in every respect. Particularly as it related to the date on which the Applicant allegedly had removed the document. The charge against the Applicant was that (he had removed the document) "on or about 3 December 2001". It was only after it was pointed out in cross examination to witnesses that the document which allegedly had been removed without authority "on or about 3 December 2001" referred to events on 5 and 6 December 2001, that the evidence of both Brown and Mawonga started becoming vague, and in some respects not corroborating of each other.

44. Regarding the allegation that the Applicant had removed a document from Mr Basson's drawer on or about 3 December 2001, it is also relevant to note that only when it was pointed out to Basson that this statement could not have been removed on 3 December 2001 because the document contained references to events on the 5th or 6th of December 2001, did Mr Basson testify that it could have happened later. Here, again, one reverts to the impact of the absence of a properly documented investigating file with written statements from the witnesses. Mr Brown testified that the date when the Applicant removed the statement was not relevant. He tried to say that the "on or about 3rd December" made provision for some leeway in respect of the actual date, but he nevertheless confirmed that he had taken notes while getting evidence. Again these notes and statements were not produced. In this regard Brown later testified that he made notes in his mind! Of course, even more relevant is that, on Mr Brown's own version, Mr Mawonga had handed him the statement very soon after the date. As stated, this incident is one that did not require the length of time it took to finally bring the Applicant before a disciplinary enquiry. It could, and should, have been dealt with in terms of the Third Respondent's disciplinary code and particularly the time periods stipulated therein. The delay in instituting disciplinary action in respect of this simple allegation is inexcusable. Mr Mawonga testified that he phoned Mr Brown the day after the Applicant had removed the document from the drawer. Mr Mawonga changed his version in cross-examination, saying that he spoke to Mr Brown three or four days after, and not the following day. Even still, no reason existed for this simple matter not being dealt with immediately and independent of the other allegations against the Applicant.

45. The aspect of the alleged date of the misconduct namely that the Third Respondent charged the Applicant with having perpetrated the misconduct "*on or about 3 December 2001*" is relevant, particularly where the accused denies the allegation in its entirety. This is perhaps one area best illustrating the consequences of delays in instituting disciplinary enquiries and why it should, as a general rule, be instituted without delay. This being such a patently clear matter in which to institute disciplinary action against the Applicant, why was such action not instituted within a few days of the statement having allegedly been handed to Brown? If Brown had taken the most basic statement from Mawonga, the date of the misconduct would not have been so vague and controversial. Why, if the statement obtained by Mawonga from the Applicant was handed to Brown, as Mawonga alleges, immediately on him having received it from the Applicant, or for that matter a few days later, is it so difficult to have stated the date of the offence with precision? The allegation of unauthorised removal of a document from management's drawers is the simplest of cases to bring against the Applicant.

Mawonga makes the allegation that the document was removed unlawfully, hands the document to Brown, on his evidence, at best for the Third Respondent, by around 11 December 2001. Why did it take the Applicant until 19 February 2002 to issue a disciplinary notice and to only hold an enquiry on 22 February 2002 in respect of this alleged misconduct? Why was a proper witness statement not taken from Mr Mawonga?

46. On this issue of dates, it is to be noted that Mr Kaipa said that, he had not seen the discrepancy (with the date) and if he had seen the discrepancies relating to the date on which Mr Mawonga had alleged the Applicant had taken the document, he would have looked at it differently. This appears to be a subliminal concession by Mr Kaipa that, had he been alerted to the discrepancies relating to the date on which the Applicant had allegedly taken the document, he may not have found the Applicant guilty. Be that as it may, the date of the alleged misconduct is most relevant and the Third respondent's witnesses were not at all persuasive in their evidence on this allegation against the Applicant.

47. The Commissioner does not at all deal in a reasoned manner with the probabilities in this matter. He does not give any reasons for his conclusion that "*The balance of probabilities favour the version of the Respondent considerably.*" His conclusion is not justified, nor reasoned.

48. I am of the view that in respect of the allegation that the Applicant removed a statement from management drawers without authority, the probabilities do not favour the Third Respondent. It is highly improbable that a man will commit misconduct in front of a witness, particularly where he has every opportunity to do so privately and without being observed. Why would a perpetrator of misconduct provide clear proof of his misconduct to an eyewitness by giving a copy of the document he had removed without authority? The question may therefor legitimately be asked, why would the Applicant have taken a document like the one in question in the presence of Mr Mawonga when he had eight hours time during his shift, or even for days before, when he was alone in the office, to do so? Why would he wait until Mr Mawonga is in the office and then take the document in front of him?

49. On the probabilities, I believe, it is therefor improbable that the Applicant removed the document as alleged. The evidence of the only witness who allegedly saw the Applicant do this is, to say the least, not satisfactory. As stated, corroboration for his allegations may have been found in the fact that Mr Brown testified that Mr Mawonga handed him

the document in question. But in this regard, as well, there are contradictions as to exactly when Mawonga gave Mr Brown the document. The date on which the misconduct happened, also became controversial and in the end unclear.

50. The Commissioner does not favour us with a reasoned conclusion why he finds the Third Respondent's witnesses more credible than the Applicant. He rather baldly states that the Applicant was not open and frank in his evidence. This statement is preceded by the statement of the Commissioner that *"There was no evidence placed before me to suggest any reason or motive why (Mawonga's) testimony should be discredited"*. This is however not correct. Evidence was placed before the Commissioner that Mr. Mawonga was promised a position at Ithonga should he testify against the Applicant and that Mawonga was subsequently employed there. Mr Mawonga confirmed that he in fact was promoted to a senior position in Ithonga Security after the Applicant had been dismissed. The Commissioner did not apply his mind to this evidence at all.

51. I am mindful that one does not lightly interfere with a tribunal's findings of credibility. I am also very mindful that I am not at liberty to substitute my opinion on the correctness of the Commissioner's finding that the Applicant was guilty of having *"gained access to management drawers without authorisation"* for that of the Commissioner. In my search, however, to find justification for the Commissioner's conclusions in this specific regard, and in the process having considered the merits of the matter, I am unable to conclude that the Commissioner applied his mind properly to the issues on hand. Nor am I able to conclude that he properly reasoned his way to his conclusions on this aspect of the proceedings before him.

52. I particularly do not find his conclusions justifiable having regard to the reasons given (or the absence of reasons given). I do not find his conclusion defensible.

53. Having considered all the evidence before the Commissioner, I am of the view that the Commissioner could not, on a balance of probability, have found that the Applicant was guilty of having removed the document in question without authority.

54. It follows that the Applicant was also wrongly found guilty of having *"gained access to management drawers without authorisation"*.

55. In the result, the Commissioner's award should be reviewed and set aside. I have carefully considered whether this is a matter which appropriately should be referred back to the First Respondent for a re-hearing by a different Commissioner. I do not

believe that any purpose will be served by doing this. I, accordingly, need to consider an appropriate sanction.

56. In argument before me the Applicant's representative only sought a compensation order.

57. From the arbitration record it appears that the Applicant was unemployed from the date of his dismissal for 3½ months and that he then got temporary employment at a company called Maxi Security. The Applicant testified that he earned R4 000 at Maxi Security. After his temporary employment at Maxi Security, the Applicant was unemployed for a further 2 weeks, whereafter he was re-employed at Cell C. No evidence was adduced by the Applicant of what his salary was at Cell C and I can only assume that no evidence was adduced in this regard because of the fact that the Applicant received substantially the same salary at Cell C than he had at the Third Respondent.

58. It further appears from a memorandum from Maxi Security that the Applicant's contract with Maxi Security terminated on or about 4 October 2002.

59. In determining what a proper compensation order herein may be, I have therefore taken into consideration that the Applicant was unemployed for a period of 4 months after his unfair dismissal by the Third Respondent. I further took into consideration that for a further period of 4 months, whilst employed at Maxi Security, the Applicant only received R4 000 per month which was R9 621 per month less than the R13 621 per month he received at the Third Respondent.

60. I accordingly am of the view that an appropriate compensation order for the Applicant will be that he should receive the equivalent of 4 months salary at R13 621 per month and a further 4 months at R9 621 which, as stated, is the difference between what the Applicant received at Maxi Security and what he would have received at the Third Respondent, had he not been unfairly dismissed. The total amount comes to R92 968.

61. The Order which I accordingly make is the following:

61.1 the arbitration award of the Second Respondent under case number GA 7221-02, dated 21 February 2003 is reviewed and set aside;

61.2 the dismissal of the Applicant by the Third Respondent on 28 February 2002 is declared to have been procedurally and substantively unfair;

61.3 the Third Respondent is ordered to pay the Applicant compensation in the amount of R92 968 together with interest in terms of the Prescribed Rate of Interest Act 55 of 1975 calculated from the date of this Order until the date of payment;

61.4 the Third Respondent is to pay the Applicant's costs.

NEL, AJ
28 SEPTEMBER 2005