

166336

IN THE LABOUR COURT OF SOUTH AFRICA

(SITTING IN CAPE TOWN)

CASE NO: **C367/98**

In the matter between:

CAPE TOWN CITY COUNCIL

Applicant

And

**SOUTH AFRICAN MUNICIPAL WORKERS UNION
(SAMWU)**

First
Respondent

MR P BEUKES

Second
Respondent

MR E DOLLIE

Third
Respondent

JUDGMENT

STELZNER AJ

1. This matter came before me by way of a referral of a dispute in terms of section 191(6) of the Labour Relations Act, 66 of 1995, (“the Act”). It concerns the dismissals of the second and third respondents by the applicant (hereinafter in the main referred to as “the Council”) for alleged misconduct in the circumstances described more fully below. For the sake of convenience the second and third respondents are referred to as “Beukes” and “Dollie” respectively. Beukes and Dollie were both members of the first respondent, which is

referred to for ease of reference as “SAMWU”. SAMWU represented Beukes and Dollie during the internal disciplinary proceedings conducted by the Council.

2. Beukes and Dollie were dismissed at the conclusion of a disciplinary enquiry, conducted jointly, on or about 21 April 1997. The dismissals were confirmed on appeal. The Director of the Commission for Conciliation, Mediation and Arbitration, (“the CCMA”), determined on 8 July 1998 that the matter should be referred to this Court for adjudication in response to an application brought by the Council in terms of the provisions of section 191(6) of the Act. The matter ought to have been referred to this Court within fourteen days of the aforesaid referral by the Director but, in the event, was only referred on 25 June 1999. The respondents did not oppose the late referral of the dispute to this Court. Furthermore, the parties were in agreement that the matter came before me in the nature of a “test case” with some approximately forty such cases pending between the parties before the CCMA, the remaining cases having been held in abeyance while awaiting an authoritative ruling from this Court on this matter specifically and, more particularly, certain issues of principle arising from the facts of this case. For purposes of the record I confirm that the application for condonation in respect of the late referral is granted.
3. The parties conducted a pre-trial conference and filed a pre-trial minute arising therefrom in which they stipulated the following facts as being common cause. Beukes (for thirty three years) and Dollie (for eighteen years) were at all material times employed by the Council in its Electricity Department and were members of SAMWU. On Friday 8 November 1996 two private investigators, employed by the Council (or, more specifically, as emerged from the evidence, employed by the business with which the Council contracted), entered into transactions with Beukes and Dollie in terms of which Beukes and Dollie sold to the private investigators electrical cable, the property of the Council, worth at least R300,00. (It emerged during the proceedings before me that the two private investigators concerned, Kevin Albertus and Philippa Fisher (hereinafter referred to as “Albertus” and “Fisher”) were employees of a business known as SA Management.) The aforesaid transaction was concluded during working hours and at Maitland, Cape Town. In exchange for the sale of the electrical cable Beukes and Dollie received a cash payment of at least

R300,00. (The exact amount of the cash payment, it subsequently emerged, was in dispute). During the course of the transaction the electrical cable was transferred from a vehicle, the property of the Council, used by Beukes and Dollie (during the course and scope of their employment with the Council) to a private vehicle belonging to the private investigators. At the time of the transaction Beukes and Dollie had neither the authority nor the consent of the Council to use the vehicle for the purposes of the transaction or to sell the electrical cable to the private investigators.

4. The parties went on in the pre-trial minute to record their position in regard to the facts in dispute in the following terms which I have for the record repeated verbatim:

“The parties agree that the facts in dispute concern the following:-

1. *The modus operandi adopted or followed by the private investigators.*
2. *Whether the transaction was entered into voluntarily by agreement or whether the second and third respondents were induced thereto unfairly and illegally by the private investigators.*
3. *The exact amount of money received by the second and third respondents for the sale of the electrical cable.*
4. *The cause of the transactions taking place being whether the second and third respondents entered into the transactions by their own volition or whether they were unfairly and illegally induced into the transaction.”*
5. The parties then went on to stipulate that the issue this Court needs to decide is *“the substantive fairness of the dismissal of the second and third respondents by the applicant.”*
6. Before proceeding to deal in detail with the evidence which was placed before me I pause to deal with a specific issue concerning the parameters of the pre-trial minute which was raised by the Council’s legal representative obliquely during argument and thereafter more pertinently by the Council’s attorneys in a

written note which was delivered to me some ten days after argument was concluded. (I was advised in the note that a copy thereof had been forwarded to the respondents' attorneys and received no objection subsequent thereto from respondents' legal representative to this late introduction of further argument). The tenor of the note taken together with the submissions made during argument appears to be that I am required to confine myself specifically to the agreed facts in dispute as set out in the pre-trial minute in considering the matter. In the note I was referred to the decision of the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 at 161G-164I. The submission, read in the context of the aforementioned decision to which I was referred, appears to be that the pre-trial minute constitutes a binding agreement on certain issues, to which issues I should confine myself in deciding this matter.

7. In the paragraphs to which I was specifically referred the Labour Appeal Court canvasses the issue in some detail with reference to various decided cases. The Labour Appeal Court then summarises its view at 163F-H as follows:

“To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pre-trial agreement or pre-trial minute has been concluded in a case depends on whether it can be said that the parties seeking to rely upon or introduce or raise such cause of action or issue has abandoned that cause of action or has agreed either expressly or by implication (I would say necessary implication) not to pursue or rely upon such cause of action or point or has informed the court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed. If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract.”

8. Zondo AJP (as he then was) goes on to state that despite the existence of a pre-trial minute a party will be permitted to apply for an amendment even if such amendment introduces another cause of action or defence, which application would be considered on its merits, unless it is apparent from the terms of the pre-trial

minute that the parties had specifically reached agreement precluding such cause of action or defence. *“However, in my view, before a court could hold this to be the case in a matter, the agreement of the parties would have to be clear and leave no doubt that that is what the parties intended.”* (At 164C).

9. I am of the view that in the case before me the parties in identifying the facts in dispute were attempting to give the Court as clear as possible an indication of the parameters of the issues with which this matter was concerned. Aside from the common cause facts, referred to already, there was no specific indication that the parties had agreed to confine themselves to no factual disputes other than those pertinently outlined in the relevant paragraph of the pre-trial minute. I am, accordingly, of the view that to the extent that further related factual disputes emerged from the evidence I am entirely at liberty to have regard to and, where necessary, make a ruling on such factual disputes. Although the words themselves are not specifically used in the pre-trial minute it was abundantly clear both during the leading of evidence and during argument that this case is essentially a “test case” concerning the issue of alleged entrapment. It was the respondents’ case that the dismissals of Beukes and Dollie were substantively and, in a related sense, procedurally unfair (the allegation of procedural unfairness being simply in relation to the methods used to secure the finding against them in substance). Respondents’ submission was that the methods used by the Council (alleged by the Council to be reasonable, necessary and justified to combat pilferage and shrinkage) amounted to entrapment in that the idea for stealing the Council’s cable came from the traps (the private investigators, in this instance being Albertus and Fisher), and not from Beukes and Dollie and that this amounted to incitement to commit a crime. The respondents’ case was that the resistance of Beukes and Dollie was systematically broken down by the traps who persistently urged and induced them to engage in illegal activity using unfair verbal persuasion. It was alleged further that although the offences were ultimately committed by Beukes and Dollie, they were not predisposed to committing such offences and, indeed, would not have committed the offences “but for” the intervention of the traps. It was also argued that SA Management, through its employees, randomly targeted Council employees, including Beukes and Dollie, and in that sense Beukes and Dollie were manipulated by the Council’s agents (the private investigators)

into committing an offence which offence the Council in turn relied on in order to punish them by way of dismissal.

10. It will become apparent as I later deal with the legal principles involved that the particular facts and circumstances surrounding the case against Beukes and Dollie are highly relevant. I turn, therefore, to deal in some detail with those facts as they emerged from the evidence presented to me.
11. The Council's case was made by way of the evidence of Mr Marius Van Der Westhuizen ("Van Der Westhuizen"), the assistant City Electrical Engineer, employed by the Council in its Directorate Electrical Services. Further testimony was heard from Pieter Wouter Groenewald ("Groenewald"), the operations manager of SA Management International Corporate Investigators, being the full title of the firm of private investigators which I refer to elsewhere in this judgment by its shorter title of "SA Management". Groenewald's evidence was followed by that of Albertus and that of Fisher. The respondents' case was put by way of the evidence of Robert Adams ("Adams"), the Provincial Secretary for SAMWU in the Western Cape, Faried Minnaar ("Minnaar") an employee of the Council, still so employed, in the Electricity Department and thereafter the testimony of Beukes and Dollie themselves.
12. The evidence of Van Der Westhuizen was relevant predominantly in setting the scene for the circumstances in which the encounters between Beukes and Dollie, on the one hand, and Albertus and Fisher, on the other, took place. His evidence was that the Council was approached by SA Management on the basis that SA Management had evidence and/or information of incidents of theft involving City Council employees and, of specific relevance to this case, employees in the Electricity Department. It emerged that SA Management had been conducting investigations on behalf of the Council in another department when it came forward with the information about underhand dealings concerning employees in the Electricity Department. Van Der Westhuizen expressed surprise when he heard that employees in his department were apparently involved in theft of Council property. In response to the information supplied by SA Management, however, he authorised a further investigation for which SA Management would be paid a fee based on

hourly rates but up to a maximum of R5 000,00 (excluding “expenses”). The terms of the arrangement were recorded in a letter, dated 9 September 1996, which was handed in in evidence. The letter recorded, *inter alia*, that “*an investigation shall be carried out for City of Cape Town Electricity Department on the targeted employee(s) concerned*”. The upshot of this mandate was that SA Management was authorised on behalf of the Council to “investigate” any employee within the Electrical Department (the so-called “targeted” employees).

13. When subsequently shown the video footage recorded by the investigators (with an audio soundtrack, the quality of which was not very good) of a transaction concluded between the SA Management operatives and Beukes and Dollie, Van Der Westhuizen expressed considerable surprise at being presented with evidence to the effect that they (Beukes and Dollie) were involved in unlawful activities. From this it is clear that neither Beukes nor Dollie were regarded as employees under suspicion who, for that reason, needed to be subjected to investigation with a view to obtaining evidence in support of such suspicion.
14. Groenewald dealt in his evidence with his “supervision” of the SA Management employees involved in undercover operations, in this instance, Albertus and Fisher. He testified, further, that it was he who liaised with the Council management employees and reported on the status of the investigation. He testified that he held “debriefing” sessions with Albertus and Fisher in which they reported to him as to the investigations which they had conducted. The investigation team also filed certain written reports (in this instance the evidence was that Fisher was the one who completed the written recording of incidents). Using this information as well as his personal viewing of any video recording and by listening to the audio soundtracks, Groenewald compiled a written report which was submitted to the client. Groenewald then demonstrated in Court during his evidence the equipment which had been used in making the video and audio recordings of the transaction concluded between Fisher and Albertus and Beukes and Dollie. The video equipment was concealed in a “moonbag” worn around the waist, with the camera lens being hidden in a patchwork leather jacket so that it recorded from a concealed opening in the chest area of the jacket. The jacket also covered the “moonbag”. From the demonstration it was apparent that the persons whose

actions and voices were being recorded would not, in all likelihood, have been aware thereof.

15. One of the written reports compiled by Groenewald and presented to the Council pursuant to the investigative system referred to above was produced during the course of the proceedings before me, being a letter dated 12 November 1996 and entitled “*Interim investigation report : Electricity Department*”. The report covered the period Tuesday 29 October 1996 to Tuesday 12 November 1996 and included an incident which involved the so-called “investigation team A”. It was common cause that this did not mean Albertus and Fisher. Albertus and Fisher, it was common cause, were referred to as “investigation team C”. The entries in the report for Wednesday 6 November, Thursday 7 November and Friday 8 November 1996 concerned the dealings of “investigation team C”.
16. When the document was adduced during the evidence in chief of Groenewald, Mr Gamble, Counsel for the respondents, objected to the admission of same insofar as the contents thereof were concerned on the basis that the contents clearly constituted hearsay evidence. Mr Arendse, Counsel for the applicant, stated that he was not seeking to rely on the contents but merely through the witness to confirm that reports of such a nature were presented to the Council pursuant to the investigation. On that basis I allowed the document in. The contents of the document were subsequently referred to by Mr Gamble during the cross examination of applicant’s witnesses because of obvious contradictions and discrepancies between the contents of the report and the evidence given by the witnesses in this Court. I am satisfied that once the document was introduced by the applicant’s Counsel, albeit on the limited basis referred to above, it was proper for Mr Gamble to canvass the contents thereof with the Council’s witnesses in cross examination.
17. The contents of the aforesaid report provided one of the “litmus tests” against which, ultimately, the evidence of Albertus and Fisher could be weighed. There were a number of major discrepancies between the version put up by Albertus and Fisher and the versions put up by Beukes and Dollie. When weighing up the evidence of these four witnesses I hasten to add that not one of them made model, entirely credible witnesses. I had difficulties with at least aspects of the evidence of all of them. Nevertheless, I am still

required to consider which version was, in the circumstances, the most probable, bearing in mind that the Council bears the onus in this case of establishing a fair and valid reason for the dismissal of Beukes and Dollie. Thus if I am unable at the end of the day to prefer a version on the probabilities and if the factual findings to be made are material to my decision as to whether or not the Council has proved that it had a fair reason to dismiss, then it would be the Council which would, by virtue of bearing the onus, have to fail.

18. Fisher testified that she had, at the time of the incident in question, been employed by SA Management for some six years. Prior to that she had been an informer for the SA Police on a part time basis, being paid for each job done. She had been an informer since the age of sixteen and was now forty three years old. She had at one stage also been employed by a security company. At the time of giving evidence in this Court, Albertus was employed by the SA Police Services and had been so employed for some seven months, having resigned from SA Management by whom he had previously been employed as an investigator. Before taking up employment with SA Management in 1995 he had been an assistant warehouse manager for a furniture store, and before that a fitter and turner. He moved into the investigating line of business after being retrenched from his earlier employment. It emerged in evidence that during the course of their dealings with Beukes and Dollie, Fisher and Albertus had not given their real names but had used aliases (or “alien” names, as Fisher would have it). They had given their first names as “Cheryl” and “Trevor” respectively. For convenience I have dealt with the substance of their evidence in conjunction with dealing with the evidence of Beukes and Dollie.

19. Beukes was, at the time of the incidents relevant to this dispute, the foreman of a team (which he referred to as a “gang”) of approximately twenty five workers. This gang worked on overhead electricity lines known as 132 kV lines. Dollie was the driver assigned to transporting that team / gang to the various sites at which tasks had to be performed. The working base of Beukes and his gang at the time was in Maitland and was known as the Maitland or Dublin Street substation. Although Dollie would attend at the Maitland substation to collect the gang or sometimes Beukes on his own, as required, he reported to work in the first instance each day at different premises, being the electricity depot in Melck Street, Ndabeni.

20. The evidence of Beukes and Dollie was that they met up with Albertus and Fisher for the first time on 28 October 1996 when parked on the roadside in Vanguard Drive while the gang was performing some maintenance work, involving the painting of pylons. They testified that Fisher and Albertus, who were of course at that stage not known to them, pulled up on the side of the road a few metres in front of where the Council truck in which they were seated was parked. On the day (28 October 1996, according to Beukes and Dollie) and at the time (approximately 10h30) in question both Beukes and Dollie were seated in the front of the truck, Beukes reading the newspaper and Dollie reading a book. It was common cause that Albertus and Fisher were at all stages during the time period relevant to this dispute driving a cream Mazda. According to Beukes and Dollie, after parking the Mazda in front of the Council truck, Fisher got out and waved to them. According to Beukes and Dollie she was dressed flashily in a denim mini-skirt and was wearing lots of gold jewellery. Dollie got out of the truck and approached her thinking that perhaps she required directions. Fisher, however, according to Dollie, asked him whether he could help her out with some cable. Dollie said that he indicated to her that he was only the driver and that he referred her to Beukes, his foreman, seated in the truck. Beukes then got out of the vehicle and had words with Fisher. According to him, when she asked him whether he could help her out with some cable he indicated that he did not work with cable. (The work which Beukes “gang” performed was with 132 kV overhead lines, as already mentioned, and not the cable which ultimately became the subject of this case.) He also testified that Fisher said that she was working in Khayelitsha with underprivileged children and required the cable in order to run electricity to a container which was being used in that regard. He did indicate in his evidence that Fisher’s plea had not left him unmoved or completely disinclined to considering trying to help her. In response to the question put to him in chief as to how one responded to a plea of that nature he said “*Hulle sit jou ‘n bietjie in ‘n bedwingenis because almal sukkel maar, en dit laat jou wonder. Dit laat jou wonder waar gaan jy nou iets kry om die man weg te help.*”

21. The evidence of Fisher and Albertus was that a meeting similar to the one described by Beukes and Dollie in the preceding paragraph did take place but that this meeting took place on Wednesday 6 November 1996.

Albertus was not able to testify as to the exact words which passed between Fisher on the one hand and Beukes and Dollie on the other as, according to him, he remained seated in the passenger seat of the cream Mazda throughout the interchange. Fisher's version also differed from that of Beukes and Dollie in certain material respects. For instance, she indicated that the reason which she gave as to why she required cable was that she wanted to use it in connection with a shebeen or tavern which she was running. She also denied having been dressed flashily or that she had been wearing a mini-skirt. She, furthermore, testified that when she first approached Dollie with the request that she be supplied with some cable his response was to ask her whether or not she was a trap as they were aware that the Council was placing trappers on the road to catch employees. According to Fisher her response was that if Dollie did not want to help her then that was "okay". She testified that Dollie then went to the truck, returned and told her that there was no cable, they would have to fetch cable at Melck Street and she should wait. After waiting for about an hour she testified that they (she and Albertus) proceeded to Mitchells Plain on another assignment but came back to the spot on Vanguard Drive en route back from Mitchells Plain. Shortly thereafter, the truck returned and Dollie approached them with a piece of cable, about sixteen or seventeen metres, for which Albertus paid R240,00. This was all the money that Albertus had on him at the time. Fisher also testified that Dollie said that if they wanted more cable they should come to the Maitland Substation and that she supplied Dollie with her cell phone number as a means of making contact with her.

22. On the version of Beukes and Dollie, Fisher and Albertus approached them (specifically Beukes) on 6 November 1996 at the Maitland substation (not at Vanguard Drive) and this was the second occasion on which they had contact with the investigators. The evidence was that they were approached again with a request that they supply her with cable and that on that occasion she told them that she had arranged for an electrician to be at the premises concerned (in Khayalitsha) on Saturday 9 November 1996, could they therefore "make a plan" for her.
23. On Beukes and Dollie's version Fisher and Albertus were again seen at the substation in the cream Mazda on Thursday 7 November 1996 looking for them, however, Beukes had in his capacity as a foreman

attended a Health & Safety meeting at a different location on that day (to which meeting Dollie had driven him and remained waiting for him in the truck for the duration of the meeting) and that Fisher and Albertus were therefore unable to make contact with them on that day. They were, however, informed that “the people in the cream Mazda” had been looking for them by another member of the gang, Minnaar.

24. Minnaar gave evidence on the respondents behalf and confirmed not only that the man and woman in the cream Mazda had been looking for Beukes and Dollie at the Maitland substation on the day when Beukes had attended a meeting elsewhere, but also that he had seen the woman on a Wednesday or Thursday towards the end of the previous month (the 27th or 28th) when her car was parked in front of the truck as it stood on the roadside in Vanguard Drive (while the gang was busy painting pylons). He also confirmed the evidence of Beukes and Dollie to the effect that Fisher had been dressed in a mini-skirt and had been wearing lots of gold jewellery. He colloquially described her as “*daai goose wat kort gekap is ...met...goue ringe en goed*”. He further confirmed that the man had appeared at the Maitland substation on the Friday, the day after the occasion when Beukes had been attending the meeting, looking for him at the door. He also recalled that on the Wednesday of that week the gang had been called out to attend to a problem in Faure (this being the day when according to Fisher and Albertus they had first made contact with Beukes and Dollie on Vanguard Drive).
25. The evidence of Minnaar thus corroborated that of Beukes and Dollie in material respects, however, a (non-material) inconsistency which remained unexplained was his persistent reference to the fact that he had observed a child on the back seat of the cream Mazda. It is also true that he did not give evidence on behalf of Beukes and Dollie during the internal disciplinary process. His answer to the question put to him in cross examination was that although he had been aware of the enquiry no-one had asked him to give evidence and he could not have attended simply of his own accord. In any event, he simply knew in general terms that the enquiry had arisen in circumstances in which Beukes and Dollie had been “trapped”. Later he bumped into Beukes at the shops and thus Beukes became aware that he might be able to assist with the case. The explanation for Minnaar’s failure to testify at an earlier stage was thus, to my mind, satisfactory.

26. It was not in dispute that on Friday 8 November 1996 the cream Mazda appeared in the morning at the Maitland substation. On Beukes and Dollie's version this was the fourth attempt to make contact with them and to prevail upon them to supply cable, albeit that no contact was in fact made on the previous day, the 7th. The interaction which took place at the substation and later at a nearby sportsfield was the interaction recorded by the video equipment concealed under the leather jacket worn by Albertus. There was, thus, for obvious reasons a degree of correlation between the evidence of the respective witnesses as to what occurred that day. Not surprisingly, however, the various witnesses sought to draw different inferences from events which could be seen from the video but in respect of which the quality of the sound track was very poor. It was constantly difficult to make out the exact words which were used by the various parties on the video and at times the witnesses and legal representatives resorted to speculation as to the exact words which had been used.
27. There was further discrepancy as to the events leading up to the transaction which took place on Friday 8 November 1996. According to Fisher after the meeting, which she testified took place on Wednesday 6 November 1996, and after she had supplied Dollie with her cellphone number, Dollie made a number of telephone calls to her on Thursday 7 November 1996 in an attempt to set up a meeting for a further transaction. Dollie denied that he made any such telephone calls. According to Fisher, although an undertaking was given for a further meeting, she and Albertus were busy with another investigation on the Thursday and were unable to meet with Beukes and Dollie. Furthermore, she testified that on the Friday morning they were on their way to Mitchells Plain to purchase Huggies (a brand of disposable nappy) pursuant to a different investigation. For the purposes of purchasing Huggies Albertus had with him a total of R630,00. (According to Fisher a packet of Huggies would have been purchased for R20,00 which meant that she and Albertus had planned that morning on purchasing 31½ packets of Huggies – simply one of the improbabilities in her version.) On Fisher's version, she and Albertus simply decided on the spur of the moment, and on recalling Dollie's attempt to set up a transaction the previous day, to stop off at the Maitland substation en route to Mitchells Plain to see whether Beukes and/or Dollie were there. She had

remained in the car in the parking area while Albertus, wired up with the video and audio recorder, approached the door to the substation and attempted to call Beukes away from the game of cards with which he was involved in the corner. (She said that they had been planning to record the Huggies transaction and were thus prepared in that regard.) It was common cause that the “gang” was not working that day because it was raining. On Albertus’ version Dollie was not present when he approached the substation looking for Beukes. Furthermore, when Beukes made the arrangement to meet him near the sportsfield in order to carry out the transaction he indicated that he would have to wait for Dollie who was somewhere else at the time with his truck. Dollie and Beukes, however, testified that Dollie was indeed present and sitting with the group of card players in the corner. Both Beukes and Dollie identified Dollie with reference to a particularly distinctive woollen cap (called a “*moessie*”) which he was wearing at the time. At one point on the video recording a person wearing the cap so described appears at the doorway while Beukes is talking to Albertus and although only the top half of his head is visible the cap does appear to be identical to the one which Dollie is clearly wearing during the transaction which took place a little bit later at the sportsfield.

28. It is clear that arrangements were made during the course of the conversation between Albertus and Beukes to meet shortly thereafter at the sportsfield at which time cable would be handed over. According to Fisher and Albertus the deal was for the sale of fifty six metres of cable at a price of R14.00 per metre. Beukes testified that there was no specific, or pre-existing, arrangement as to quantity or price. He said that he simply, during the course of the conversation that morning, decided that he would help them out with a piece of cable which he happened to have in a container at the substation and which had been earmarked for some time for use in lighting one of the containers which was used for storage at the substation. According to Beukes, he was swayed by the persistent request from the investigators to help them out with reference to their work with underprivileged children in Khayelitsha and on the basis that they kept on saying that an electrician had been organised for the following day, Saturday 9 November 1996.

29. Beukes conceded that he knew at the time that what he was planning to do was wrong. He admitted that that was the main reason why he arranged for the transaction to take place away from the substation.

30. The video footage (on which a date and time was clearly visible) continued some half an hour later, it being common cause that at that stage the parties were at their rendezvous near the sportsfield. The footage showed a yellow City Council truck and the cream Mazda, and then Dollie carrying a piece of cable from the truck and placing same inside the Mazda through the rear passenger door. The cable was wound in a coil and Dollie appeared to carry it without too much difficulty. It was impossible to state with any certainty from the video what the actual length of the cable was but it certainly did not look anything near fifty six metres in length. Moreover, under cross-examination consensus was reached that one meter of cable weighed in the region of one kilogram. If there had indeed been fifty six metres of cable it is improbable that Dollie would have been able to carry it without difficulty. The video footage then shows Albertus handing something over to Dollie. According to Fisher and Albertus this was the R630,00 which Albertus had in his possession for the proposed Huggies transaction. According to Dollie he did not count it at the time but only looked at the money for the first time when he was back in the truck and then discovered that it was R300,00 in fifty rand notes. He testified that he was surprised to receive money. He sought to convince the Court that the initial reaction of him and Beukes had been to attempt to chase after Fisher and Albertus with a view to giving the money back. When they were not able to catch up with them he testified that he gave the money to Beukes who kept it in his locker for some two weeks before eventually dividing it between the two of them. Dollie's evidence in this regard was contradicted by that of Beukes who said that the money had immediately been split between them. Where he was in agreement with Dollie, however, was to the effect that the receipt of the money had been unexpected. Beukes went further and said that he used R100,00 of his share of the money to purchase a Community Chest raffle ticket which stood him in line to win a BMW motor vehicle (the inference which he was asking me to draw I assume was that he had in effect given the money to charity). Dollie's version about the attempt to chase after Fisher and Albertus was improbable and, in my view, falls to be rejected. While acknowledging that he had gotten involved in a transaction which was wrong, he tried in giving evidence to shift most of the blame onto Beukes, implying that he simply became inadvertently embroiled in the transaction because Beukes needed a driver. In my view he was not being entirely truthful and was vainly attempting to lessen

his apparent blameworthiness in this regard.

31. Fisher and Albertus testified that after handing over what they stated to be R630,00 there was a balance of R154,00 owing on the transaction and that arrangements were made to hand over the balance later that afternoon at Manenberg post office. The video footage was played on a number of separate occasions during the course of the trial and I must confess that I was unable on any one of those occasions to pick up any reference in the muffled dialogue to the alleged arrangements in regard to a subsequent meeting at Manenberg post office.
32. According to the testimony of Fisher and Albertus after the transaction was concluded they returned to the SA Management offices in Vasco Boulevard, Goodwood, where the cable was laid out on the grass and identified as City Council property by a City Council employee, a Mr Esterhuizen. (The same Mr Esterhuizen was the initiator at the disciplinary enquiry and appeal hearing of Beukes and Dollie). It was then, according to Fisher, that they discovered for the first time that they had not in fact received fifty six metres of cable but, in Fisher's words, had been "done in" – ("*ingedoen*"). Under cross examination Fisher conceded that when measured the cable was, in fact, only in the region of twelve or at most fifteen metres. On the basis of a price of R14,00 per meter Fisher accepted that she should therefore have paid only in the region of R210,00 for that cable. Nevertheless, according to Fisher and Albertus, they still felt bound to adhere to the rendezvous at Manenberg post office that afternoon where they handed over the balance of R154,00 to Beukes and Dollie. Both Beukes and Dollie were adamant that there was no arrangement for a subsequent meeting at Manenberg post office nor did such a meeting ever take place. The transaction was clearly not recorded on video, the explanation of Fisher and Albertus being that the battery was flat by that stage. However, since they went back to their offices before proceedings to Manenberg and since, on their version, the specifically went to Manenberg to conclude the transaction I find this explanation improbable.
33. Furthermore, Dollie maintained that the tacograph fitted to his vehicle at the time would have produced a record which could have corroborated their version in this regard. These records were requested by the

respondents' Counsel during the course of the proceedings before me but applicant's (the Council's) Counsel indicated that such records were, so long after the event, no longer available. There was some dispute as to whether or not Dollie had asked for these records during the course of his disciplinary enquiry. The minutes of the disciplinary enquiry (admittedly not a comprehensive record of the proceedings) failed to indicate that such a request had been specifically addressed although Dollie maintained that he had raised the issue with his representative from SAMWU at the time. In the circumstances of this case where from the time of the initial disciplinary hearing it was apparent that the whereabouts of Beukes and Dollie and their truck at various stages was the subject of a factual dispute it is surprising that the Council did not at that stage already consider the tacograph records to be relevant and ensure that same were preserved. The said records would also apparently have been able to accurately verify the whereabouts of Beukes and Dollie on Wednesday 6 November 1996 when Fisher and Albertus maintained the initial meeting had taken place on Vanguard Drive and when Beukes and Dollie maintained that they had been attending to a problem near Boys Town in Faure on that day.

34. As I have already said earlier I did not find either Beukes or Dollie to be models of consistency and clarity when they gave evidence. However, for a number of reasons I am inclined on balance, and in a general and overall sense, to prefer their version to that of Fisher and Albertus. Certainly, insofar as the Council bears the onus in this matter I would have to say that where there are material disputes of fact they have failed to discharge that onus. One of the reasons for preferring the version of Beukes and Dollie is the complete and utter inconsistency between the version put up by Albertus and Fisher in the witness box and the written report of Groenewald which was submitted to the Council. If a meeting had in fact taken place between Fisher and Albertus on the one hand and Beukes and Dollie on the other on 28 October 1996 in Vanguard Drive at which a transaction involving the purchase and sale of cable had taken place one would have expected that transaction to feature in Groenewald's report, but it did not even deserve a mention. The report only refers to interaction between investigation team C and Beukes and Dollie on 6, 7 and 8 November 1996.

35. I also find the version of Fisher and Albertus in regard to a further exchange of money at Manenberg post office on the afternoon of 8 November 1996 highly improbable. Firstly, as I have already suggested, one would have expected that transaction to have been recorded by the video camera as was the transaction earlier in the day at the sportsfield. More importantly, however, it seems to me highly improbable that Fisher and Albertus would have gone to Manenberg post office to pay a further R154,00 in respect of the earlier transaction where on their own version they had already discovered that they had been “*ingedoen*” and had paid R630,00 for only fifteen metres of cable when the price was R14,00 per metre. What seems clear is that Fisher and Albertus reported to their management that they had paid a particular sum for the cable, for which SA Management were reimbursed by the Council (this being a common cause fact). If they in fact only paid R300,00 over to Beukes and Dollie the inference to be drawn is that they were pocketing the difference for themselves. On the facts I think that it is entirely possible that that is what transpired and that the evasiveness and unsatisfactory responses to cross examination by Albertus and Fisher on this issue can be attributed to the fact that they were attempting to cover up for their own dishonesty. Fisher, for example, got herself tied into all sorts of knots on the question of whether or not SA Management employees were as a rule, or had in the past, been subjected to polygraph testing in order, presumably, to establish or check their own levels of honesty.
36. All in all I am not satisfied that the Council has succeeded in proving anything more than the facts which were admitted as common cause as part of the pre-trial process. This being so, Beukes and Dollie were guilty of selling cable belonging to the Council for a sum of R300,00. I am satisfied that at the time that the transaction took place both Beukes and Dollie willingly accepted the R300,00. I do not accept their story that they thought of returning or tried to return the money to the investigators. It was common cause that both Beukes and Dollie at their disciplinary enquiry pleaded guilty “*with reasons*”, as they put it. Those “*reasons*” on their evidence related to the fact that they were initially disinclined to deal with the investigators but were eventually persuaded to “*help them out*” when they persisted and, certainly from Beukes’ point of view, by virtue of Fisher’s story that she was working with under-privileged children in

Khayelitsha and that was the purpose for which the cable was required.

37. Both Beukes and Dollie had lengthy service with the Council prior to their dismissal without any disciplinary record. There was no evidence whatsoever, therefore, on which it could be said that there was any suspicion specifically directed towards either Beukes or Dollie to the effect that they either had been in the past or were likely to be party to unlawful transactions involving Council property. They both in their evidence conceded, in my view quite properly, that what they did was wrong. Their case, however, was that but for the initiative of the investigators (or traps as they were at times referred to by the respondents) they would not have engaged in those transactions.
38. There was a suggestion, based on the video footage, that after the transaction involving the cable which took place at the sportsfield on the morning of 8 November 1996, Beukes and Dollie suggested to Fisher and Albertus that they had fluorescent lights (also property of the Council) available for sale. Fisher testified that Dollie said that he had these lights hidden away in his roof (I assume what was meant was that they were stored in the area above the ceiling). Once again, the exact verbal interchange cannot be made out clearly on the soundtrack of the video. There is, nevertheless, a gesture consistent with pointing out fluorescent lights and some talk of same being exchanged for a bottle of whisky. Dollie and Beukes did not deny that such a discussion took place but indicated that the discussion was conducted in jest. Dollie also suggested that the lights which he had were not City Council lights. On the evidence before me it is certainly possible that a further transaction involving lights was discussed but again I cannot be satisfied on the probabilities that the Council has discharged the onus of establishing the facts pertinent to this proposed transaction or that the lights in question were City Council property.
39. Before turning to deal with the legal issues involved in this case I pause to mention the evidence of the one witness with which I have not dealt as yet. I briefly touch on this evidence for the sake of completeness although, in my view, the evidence concerned does not add anything of relevance to the case before me nor did it weigh with me at all in arriving at my decision. I refer to the evidence of Adams who, as stated

previously, is the Provincial Secretary for SAMWU in the Western Cape, making him the most senior full time union official of SAMWU in the Western Cape. During 1996, however, he was the Cape Town Branch Secretary which Branch dealt mainly with the Cape Town City Council (the applicant in this matter, in other words). There was a vague attempt on Adams' part to suggest some inconsistency in the Council's treatment of theft cases. Not only did his evidence not establish facts sufficient to found inconsistency but alleged inconsistency did not form part of the respondents' case in this matter. Although, as I have indicated, this was not as it turns out an issue relevant to my decision in this matter, I might mention that I found the stance taken by Adams (particularly given his high ranking position within SAMWU) disappointing in one specific respect. Adams refused to make the concession which in my view ought properly to have been made, namely, that if theft of Council property were *properly* (my emphasis) proved, dismissal would be an appropriate sanction in the ordinary course of events, that is, barring exceptional circumstances. Indeed, he persisted in his stance that there were circumstances in which theft could be regarded as a "minor" infraction.

40. I turn now to look at the legal principles applicable to the issues which I am required to decide. The issue of entrapment does not appear to have been dealt with pertinently in the employment or labour law context, either by South African courts or in other jurisdictions. Certainly neither counsel who argued the matter before me were in a position to refer me to any authority in that regard. Counsel for the applicant did refer me to a few CCMA cases in which the issue was referred to peripherally, however, even if the CCMA cases could be regarded as authoritative or even instructive the cases are clearly not on point. This does not mean that the issue of entrapment has not enjoyed any attention from the courts in various jurisdictions, indeed, it appears to have been the subject of considerable controversy over the years receiving attention not only from the courts but also from academic writers. However, the decided cases and articles written have all been in the context of criminal law.

41. While the case law and commentaries on entrapment in the criminal context do provide valuable assistance and guidance in considering the issues before me I am mindful of the fact that in deciding this matter I am

exercising the jurisdiction conferred upon this Court by the Labour Relations Act and am therefore enjoined to consider issues of both law and fairness. An enquiry as to the fairness (as opposed to simply the lawfulness) of a dismissal involves a moral or value judgment based on all the relevant circumstances. Such fairness must have regard to the interests of both employer and employee.

42. In the matter of *Media Workers Association of SA v Press Corporation of SA Ltd* 1992 (4) SA 791 (A) (hereinafter referred to as the *Perskor* case), Grosskopf JA dealt extensively (albeit in a different context) with the approach to be adopted by a court in arriving at a finding of fairness. I see no reason why the approach as outlined in the *Perskor* case should not equally be applicable to the finding which I must make in this matter. Quoting extensively from *Salmond on Jurisprudence*, 12ed, at 65-75, the learned Judge pointed out (at 795-797 of the *Perskor* judgment) that the issue is really one of exercising a judicial discretion. At 795I of the judgment in the *Perskor* case, the following extract from *Salmond* is cited:

“The sphere of judicial discretion includes all questions as to what is right, just, equitable, reasonable – so far as not predetermined by authoritative rules of law but committed to the liberum arbitrium of the courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking the truth of the matter; determining questions of judicial discretion it seeks to discover the right or justice of the matter.”

43. In the exercise of a judicial discretion to determine the fairness of the dismissals of Beukes and Dollie in this matter, in the context of the existing Labour Relations Act, I must have regard to the prevailing Constitutional imperatives and am obliged to apply and develop labour jurisprudence in accordance with the democratic principles enshrined therein.

44. Before considering the issues in the context of South African jurisprudence, however, it does appear that some purpose would be served in having a look at what other jurisdictions have done. It appears that courts around the world (and within some jurisdictions) have considered the question of whether the issue of entrapment should be dealt with as a defence to a criminal charge or as an evidentiary issue, and the conclusions have differed. Counsel, in particular Counsel for the applicant, referred me at some length to the manner in which the issue of entrapment has been dealt with in foreign jurisdictions. The issue has, however, enjoyed considerable attention, albeit also only in the criminal context, in South Africa, both by the courts, by way of academic commentary and, more recently, by the Legislature. A resort to dictionary definitions also seems, inevitably, to lead one along a path towards the criminal arena.
45. The *Concise Oxford Dictionary* (10th edition) defines the word “*entrap*” to mean “*catch in or as in a trap (of a police officer), deceive (someone) into committing a crime in order to secure their prosecution*”. The *Oxford Dictionary of Law* (4th edition, 1997) defines the noun “*entrapment*” to mean “*deliberately trapping a person into committing a crime in order to secure his conviction, as by offering to buy drugs*”. From the dictionary definitions alone it is apparent that central to the concept of entrapment or trapping is the premise that a person is lured into committing a crime for the specific purpose of securing a conviction against that person. Although courts and commentators around the world appear to differ from time to time as to the manner in which they approach the issue from the point of view of principle, it seems to me that the nub of the concern which emerges as a common thread is that persons who, in the absence of intervention by the traps, might never have committed or considered committing a crime are caused by the conduct of the traps to enter into criminal activity, alternatively, their entrance into the criminal arena is facilitated by the conduct of the traps. The conduct of the trap/s is inevitably, in the absence of legislative intervention, in itself unlawful (as the inciter or accomplice to the crime committed) and yet that very conduct secures the conviction of the person “trapped”. The concern is that in such situations otherwise “innocent” persons, not predisposed to crime, are induced to violate the law by the police or other government officials. Despite this concern, however, it appears that only in the United States, and even there in a limited sense, has

entrapment being recognised as a substantive defence to a criminal charge. By the same token, however, no jurisdiction to which I was referred has held that evidence obtained by entrapment should in all circumstances be excluded.

46. Support for the recognition of a substantive defence of entrapment lies in the majority judgments in three cases of the Supreme Court of the United States. (See *Sorrells v United States* (1932) 287 US 435; *Sherman v United States* (1958) 356 US 369 and *United States v Russell* (1973) 411 US 423.) The basis for the limited nature of the defence is summarised by Rehnquist J in delivering the opinion of the court in *United States v Russell*:

“*Sorrells and Sherman both recognise ‘that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offence does not defeat the prosecution. Nor will the mere fact of deceit defeat a prosecution, see eg Lewis v United States, for there are circumstances where the use of deceit is the only practicable law enforcement technique available. It is only when the government’s deception actually implants the criminal design in the mind of the defendant that the defence of entrapment comes into play’.*” (At 435-6).

47. The High Court of Australia has not been prepared to go so far as accepting a defence of entrapment:

“*Analysis of the majority judgments in the United States Supreme Court discloses that they provide no satisfactory conceptual basis for the acceptance of entrapment as a substantive defence to a criminal charge under our law. In particular, those judgments do not identify any common law principle which is capable of sustaining the proposition that an otherwise guilty person is not guilty if, lacking previous intent or purpose, that person was induced or persuaded to do what he or she did by some government officer. As has been seen, their basis is a presumption of legislative intent, namely, that it was not the intention of congress that an ‘otherwise innocent’ person should be entrapped into to commission of criminal offences. That basis is not, however, adequate to sustain the creation of a substantive defence of entrapment in this*

country. Even if it be assumed that it would not have been the legislative intent that persons should be induced by government officials to commit crimes which they otherwise would not have committed, it is a very long step to the conclusion that, if a person does in fact commit a crime as a result of such inducement, he or she is nonetheless not guilty of it for the reason that there should be read into the express terms of any provision creating a statutory offence an unexpressed qualification establishing an applicable defence which is unknown to, and quite contrary to, our common law. Whatever may be the position in the United States, the principles of statutory construction provide no warrant for the taking of such a step by our courts". (See *Ridgeway v R* (1995) 129 ALR 41 at 46-47).

48. In the United States courts there have also been differences of opinion as to whether the entrapment defence, or the enquiry into establishing whether or not the defence should be allowed in a particular case, should focus on the government's investigative techniques or the accused's culpability. Proponents of the "subjective approach" would have the courts look at the states of mind of the defendants in considering whether or not the defendants in the particular case were innocent persons not predisposed to crime who were induced by government officials to violate the law. Proponents of the "objective test" on the other hand, advocate scrutiny of the investigative methods to determine whether the prosecution should obtain a conviction. These different approaches are considered and analysed by J H Heydon in "*The problems of entrapment*", an article which appeared in the *Cambridge Law Journal*, 32 (2) November 1973 at 268-286. Heydon suggests that a better approach to the process of drawing a line between what is permissible and what is not would be through the application of the law of illegally obtained evidence, the court's discretion in sentencing and the possibility of prosecuting police offenders in extreme cases. (See the article referred to (*supra*) at 285-286).
49. The courts in England, New Zealand and Canada have also not recognised entrapment as a defence, and so has this been the approach of the South African courts which have tended to have regard to the principles of the admissibility of evidence in considering cases involving alleged entrapment.

50. The earliest relevant reported case in South Africa was that of *The Queen v Mary Pound* (1882) 2 SC 2, a case involving the purchase of an uncut diamond in contravention of a particular Ordinance in force in Griqualand West at the time. The Court was required to grapple with the problem that at the time it was precluded from convicting an accused on the evidence of an accomplice unless the accomplice's evidence was corroborated by evidence from another source and provided that such corroborative evidence was itself sufficient to prove the commission of the offence. The long line of subsequent cases in which the issue of entrapment is considered indicates that the issue acquired much of its attention from the importance to the South African economy of diamonds and gold. The use of traps was initially predominantly used to control illicit dealings in these commodities but once such use became well established and recognised its usefulness in the control of other criminal activities became obvious. In his article in the *South African Law Journal*, Stegmann J traces the path by which judges over the years have grappled with balancing issues of principle with those of expediency while dealing with entrapment cases. (See *M S Stegmann* : "A point at which the law and morality may part", 1991 (108) SALJ 688). Stegmann J in the aforesaid article expresses strongly worded criticism and concern about use of the trapping system as a tool within the context of the South African criminal justice system. One line of his argument concerns the need to achieve clarity about the relevant legal principles. The second is "*to emphasise the importance to the well being of our society, and to the administration of justice in particular, of the use of 'clean' methods in the detection of crime and in the pursuit of criminals. The use of the trapping system by the police, and its encouragement by the courts, holds an insidious danger. By its very nature, the system must tend to corrupt those who use it, or who sanction its use.*" (See the SALJ article (*supra*) at 702). And further, "*my view is that any system of criminal justice which can tolerate such methods in the so-called fight against crime is seriously deficient. It defeats its own purposes. It throws the baby out with the bath water. It is our tolerance of the trapping system that is at fault.*" (See the SALJ article (*supra*) at 703).
51. Although the comments of Stegmann J are particularly strong his is certainly not a lone voice in expressing disquiet at the use of trapping methods. For instance, in *R v Clever* 1967 (4) SA (RAD) the Appellate

Division of Rhodesia (as it was then known) commented that “*the use of traps, in my opinion, is justified only where ordinary police methods have proved ineffective and, then, only in respect of ‘clearly defined offences, in which there is general recognition of the proprietary of police and departmental testing’*”. (At 257E). And further, “*to spread a net to catch the just and the unjust alike, can only have the effect of destroying public confidence and bringing disaster upon persons who, but for the existence of the trap, might never have transgressed.*” (At 257F-G).

52. Quenet, JP, in the *Clever* decision also had the following to say: “*In cases where there is general recognition of the propriety of employing the system the greatest care should be taken to see that the trap is a fair one. Verbal persuasion should not be used.*” (At 258E). And “*in those circumstances, the element of necessity in the public interest, rather than of mere expediency from the police point of view, is the important factor. I have always understood that to be the main basis upon which our courts tolerate the system of trapping and, when there is also a prevalence of that particular type of offence, this affords an additional justification for it.*” (At 260A).
53. (See also the following decisions in which South African courts have considered and dealt with the issue of entrapment: *R v Myers & Misnum* 1907 TS 760; *R v Vlok* 1954 (1) SA 203 (SWA); *R v Ahmed* 1958 (3) SA 313 (T); *S v Malinga* 1963 (1) SA 692 (AD); *R v Chanda* 1968 (3) SA 119 (R); *R v Small* 1968 (3) SA 561 (RAD); *S v Olifant* 1969 (2) PH H209 (NC); *S v Van Pittius* 1973 (3) SA 814 (C); *S v Azov* 1974 (1) SA 808 (T); *S v Pallis* 1976 (1) SA 235 (RAD); *S v Mabaso* 1978 (3) SA 5 (O); *S v Petkar* 1988 (3) SA 571 (A); *S v Ohlenschlagger* 1992 (1) SACR 695 (T) – a judgment of Stegmann J; *S v De Bruin* 1992 (2) SACR 574 (Nm); *S v Sellen* 1992 (2) SA795 (A); *Mendez & another v Kitching* NO 1995 (2) SACR 634 (E); *S v Nortje* 1996 (2) SACR 308 (C) and *S v Hassen* 1997 (1) SACR 247 (T); and in addition to the article of Stegmann J (*supra*) see also *H Colman* : “*The judicial approach to trapping cases*”, 1954 SALJ 120.)
54. In South Africa the use of the trapping system and the regulation of the circumstances under which evidence

so obtained will be admissible has now been dealt with by way of legislative intervention with the insertion, in November 1996, of section 252A into the *Criminal Procedure Act*, No 51 of 1977 (hereinafter referred to as “the CPA”). This legislative enactment came about largely as a result of a proposal by the South African Law Commission: “*The application of the trapping system*”, Working Paper 52, Project 85 (1993). The Law Commission’s proposals and the subsequent legislative amendment have been discussed in two articles by Ronald Louw: “*Police traps*” (1995) 8 SACJ 286 and “*Act 85 of 1996 : Legislative regulation of evidence obtained by police traps*” 1997 SACJ 186. As pointed out by Louw in the latter article, the long title of the amendment, which reads as follows: “*To regulate the setting of traps and the engaging in undercover operations [and] to determine the circumstances under which evidence so obtained will be admissible*”, is instructive as to the intention of the Legislature. He also comments as follows: “*Generally the Act is to be welcomed. It responds to a longstanding criticism of unfair trapping and seeks to bring the admission of such evidence into accord with the constitutional provisions of a fair trial.*” (At 188 of the article). The article goes on to comment critically on whether or not the legislature succeeds in achieving its stated objects. It does not appear appropriate to enter into that debate in the context of this decision. However, the fact that the Legislature has seen fit to regulate the use of the trapping system in this country in the context of criminal law is instructive. The legislative enactment has been made in the wake of this country acquiring a democratic Constitution. Therefore, in my view, the parameters of the legislative provisions are worthy of consideration in the context of this case. The wording of section 252A of the CPA is set out hereunder in full:

“252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained

- 1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be

admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

- a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;*
- b) the nature of the offence under investigation, including –*
 - i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;*
 - ii) the prevalence of the offence in the area concerned; and*
 - iii) the seriousness of such offence;*
- c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;*
- d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;*
- e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;*

- f) *the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;*
- g) *the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;*
- h) *whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;*
- i) *whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;*
- j) *the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;*
- k) *any threats, implied or expressed, by the official or his or her agent against the accused;*
- l) *whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;*
- m) *whether the official or his or her agent acted in good or bad faith; or*
- n) *any other factor which in the opinion of the court has a bearing on the question.*

3) (a) *If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence,*

the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

- i) The nature and seriousness of the offence, including-*
 - aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;*
 - bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;*
 - cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or*
 - dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;*
- ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-*
 - aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;*
 - bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was*

committed; or

cc) the prejudice to the accused resulting from any improper or unfair conduct;

iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

v) any other factor which in the opinion of the court ought to be taken into account.

4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

5) (a) An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.

6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

7) *The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.”*

55. What is clear from the provisions of section 252A of the CPA is that the Legislature approaches the issue from the point of view of the admissibility of evidence rather than a defence of entrapment. The section provides in the first instance that evidence obtained shall be admissible if the conduct of the trappers does not go beyond providing an opportunity to commit an offence, and goes on to provide a lengthy list of factors to be considered by the court in asking the question as to whether the conduct goes beyond providing an opportunity to commit an offence. Subsection 3 allows, further, for a discretion in regard to the admission of evidence even where it is found that the conduct goes beyond providing an opportunity to commit an offence, but through a process of weighing up the public interest against the personal interest of the accused with reference to, again, a list of stated factors.
56. The question which I need to consider in this matter is whether an approach similar to that provided for by section 252A of the CPA would be appropriate in the employment context and thus in the context of the case before me. Given the concerns which have been expressed over the years by our courts in the criminal context over the use of the trapping system (concerns echoed in other jurisdictions) and given the legislative intervention in the form of section 252A of the CPA, an amendment introduced in the context of a Constitutional dispensation in this country, I am of the view that guidelines and parameters no less rigid or strict than those set out in section 252A of the CPA should be applied in the context of the employment relationship. This is assuming, of course, that entrapment or use of the trapping system should be allowed at all in the employment context. If I accept that entrapment should be permissible at least in certain circumstances in the employment context then I must decide whether the restrictions to be placed on the use of entrapment in that context should be as strict as the parameters laid down by section 252A of the CPA, or more so.

57. Mr Gamble, who appeared for the respondents, submitted that a very clear distinction has to be drawn between the criminal law and labour jurisprudence. He submitted that non-recognition of the right of an employer to trap an employee would not lead to an undermining of the administration of justice generally. The trapping procedures would always be available in the criminal context and an employer could make use of that avenue of detection if so desired. He argued that in *Nortje's* case (*supra*) at 322A, Foxcroft J (with Van Reenen J concurring) concluded that the State, as *dominus litus* in those proceedings, had not come to court with “clean hands”. The decision also confirmed that as high a standard of fairness in the process leading up to a criminal charge is required as in the judicial process itself.
58. Mr Gamble also referred me to the detailed analysis of Stegmann J in the *Ohlenschlagger* case (*supra*) and the following specific findings made by the learned Judge. Firstly, the suggestion that a trap (by virtue of the authority of the State) does not commit an offence as principal offender or accomplice, cannot be supported. Secondly, a trap is defined as a person who proposes criminal conduct and partakes therein and who partakes in such criminal conduct notwithstanding the fact that the proposal may have been initiated by another. Thirdly, a trapper who intentionally incites another to commit an offence commits the common law crime of incitement or contravenes section 18(2)(b) of the *Riotous Assemblies Act* of 1956. Fourthly, the trap frequently commits fraud in order to trap his/her victim. Fifthly, where a person (and Mr Gamble submitted this should include a juristic person) gives a mandate to a trap to incite or procure a third party to commit an offence, the consequences are that no valid mandate is given, that the person giving the mandate is liable to prosecution for incitement (either at common law or statutorily) or any offence which the trap may commit within the limits of the mandate, and that the trap is similarly liable to prosecution if he or she carries out the mandate with the requisite *mens rea*. Finally, depending on the facts of the case, the trap may be regarded as an accomplice. (Of course the provisions of s 252A of the CPA have in some respects superseded the comments of Stegmann, J as summarised above. Nevertheless, in a non-criminal context, the “indemnity” provided for by sub-section 5 of section 252A of the CPA would clearly not apply.)

59. Mr Gamble submitted that the points made by Stegmann J and summarised above are all equally applicable

in the instant case to the conduct of the traps (Fisher and Albertus) and the Council, insofar as the mandate to trap was supplied by the Council. I should therefore find, as I understand his argument, that the Council comes before this Court with unclean hands. Mr Gamble also sought to argue that as a general principle in the context of an employment relationship, being a relationship of mutual trust, the use of the trapping system is inherently unfair and unacceptable.

60. For the purposes and on the facts of this case, I do not really need to decide whether or not the use of the trapping system is inherently unfair and unacceptable in the context of an employment relationship as I find that, applying the approach adopted by the Legislature in the criminal context, I would find in favour of the respondents in any event. I might state, by way of an aside, though that I would be reluctant if not unlikely to hold that a system of trapping (obviously properly constrained) may never be fair in the employment context. I say this because throughout the various jurisdictions to which I have referred already in this judgment it is noteworthy that despite a consistent sense of concern and disquiet about the unfettered use of entrapment, no jurisdiction has been prepared to hold (albeit in the criminal context) that entrapment should never be permissible. It seems that provided the courts are satisfied that the use of entrapment is properly scrutinised and the admissibility of evidence obtained as a result thereof carefully regulated, then courts tend to recognise that there are circumstances in which law enforcement (and the pursuit of justice generally) would be impeded if the evidence obtained from a trapping situation were excluded. I see no reason why that reasoning should not be equally applicable in the employment context, provided of course that the proper constraints are applied.

61. What is clear, thus, is that entrapment cannot be allowed to take place without regulation or careful scrutiny by the courts. The provisions of section 252A of the CPA provide a form of regulation, being that which after careful consideration of the issues by the Law Commission, the Legislature saw fit to adopt in the criminal context. There seems no reason why, on the face of it, the provisions of and factors utilised by section 252A cannot be invoked in the employment context (adapted if required to suit that context), at least as a guideline, even though the statutory indemnity of section 252A(5) would not apply. That is a risk that

the parties choosing to adopt a trapping procedure would have to take. If it becomes apparent on the facts and in the circumstances of a particular case that considerations of fairness require a more stringent test or the weighing up of additional considerations, this Court would be free to follow such a course in the exercise of its discretion.

62. Although this matter comes before me by way of a test case I am required to decide it in the context of its particular facts. In so doing, however, I have attempted to provide a degree of guidance on the relevant issues of principle for application in similar cases. On the facts of this case, however, and despite the comments I have made above, I am satisfied that an application of the principles and guidelines supplied under the banner of section 252A of the CPA, read together with the sorts of concerns expressed by our courts over the years regarding the use of entrapment, is sufficient to enable me to decide the matter.
63. On the facts, the SA Management operatives, Fisher and Albertus, clearly provided the opportunity for Beukes and Dollie to commit the offence (misconduct) in question. I am, moreover, of the view that their conduct went beyond providing an opportunity to commit the offence (misconduct) particularly if one has regard to the factors listed in section 252A(2) of the CPA.
64. On the facts before me it is apparent that the Council had no reason to suspect either Beukes or Dollie of any misdemeanours or misconduct or, in particular, to suspect them of theft of Council property. On the contrary, they were highly respected employees with long and unblemished work records. On the facts, SA Management approached the Council, unsolicited, with information suggesting that employees within the Electricity Department (in general) were involved in theft of Council property. On the basis of that information which, on Van Der Westhuizen's own version, took him by surprise, and without enquiring in any way as to the methods to be used by SA Management and its employees, the Council authorised SA Management to proceed with an investigation. Bearing in mind the employment context I am of the view that the Council's lack of attention to that sort of detail is particularly relevant and adds to the unfairness of the process.

65. Further, on the facts, Fisher and Albertus made a number of attempts before Beukes and Dollie succumbed to their request to be supplied with cable. Their persistence was supported by a story regarding the reason why they required the cable which not only constituted a misrepresentation of the true state of affairs but was likely (if not designed) to elicit the sympathy and therefore the co-operation of Beukes and Dollie. In my view it could be said, in all the circumstances, that the average person *in the position of Beukes or Dollie* (my emphasis) would probably have been similarly induced.
66. Fisher and Albertus were clearly themselves guilty of an offence/(s). Not only that, but their conduct was characterised by subterfuge (for example, they used aliases; Fisher dressed in a particular and, in the context, deceptive, manner; they lied about the purpose for which they wanted the cable). They appear to have acted in bad faith, in the sense that they were focussed on personal gain and were probably additionally dishonest in enriching themselves at the expense of the Council (by claiming that they had paid Beukes and Dollie more than they had in fact done).
67. If I were applying the provisions of section 252A of the CPA I would, in such circumstances, move on to considering whether or not I should nevertheless exercise my discretion to allow the evidence with reference to the factors set out in section 252A(3)(b). Mr Arendse, who appeared for the Council sought to argue that the methods used were in the circumstances reasonable, necessary and justified given the “massive” pilferage and shrinkage experienced by the Council. The argument was also that this was not just a case of theft from an employer but, as the Council is funded by levies, taxes and rates imposed on the ratepayers of the City of Cape Town, indirectly also theft of the property of the people of Cape Town. It was further suggested that theft or pilferage of the nature with which we are concerned in this case is not something easily detected nor is it usually combated by reason of information supplied by either members of the public or co-employees.
68. To the extent that the Council wishes me to have reliance on these submissions I consider that there was at the very least an evidentiary burden on the Council to establish the facts in support of the submissions. I am

not convinced that the Council has done so, certainly not to a satisfactory degree. The evidence of Van Der Westhuizen consisted of a bald statement to the effect that the losses experienced by the Council ran to hundreds of thousands of rands. There was no specific evidence as to how the extent of those losses had been arrived at or as to how much of that loss could be attributed to pilferage within the Electricity Department. Nor, in my view, was there sufficient evidence to establish the inability or difficulty that the Council allegedly experienced in preventing losses through other means. What I do accept is that theft is inherently a very serious offence and that theft from an employer undoubtedly constitutes a breach of trust. In exercising a judicial discretion, however, and in applying considerations of fairness in the context of a Constitutional dispensation I am required to balance the interests of the respective parties, in this instance the Council, as the employer, and Beukes and Dollie, as the employees. In my view if Beukes and Dollie were indeed “innocents” who were lured into committing an offence by the conduct of the investigators then they have been significantly prejudiced by the use of the trapping method in this case. Furthermore, no attempt was made by the Council to either control or circumscribe the manner in which the SA Management employees conducted their investigation, a factor to which I have already alluded above. Even after the event and once the video footage had been obtained it is apparent from the evidence that the Council proceeded on the basis that it was dealing with guilty employees and failed to take what I would have considered to be reasonable steps to verify the version of Beukes and Dollie where it was within its power and entirely possible to do so. I refer in this regard to the issue of the tacograph records which would undoubtedly have been available at the time.

69. In all the circumstances I am not satisfied on the facts of this case that it would be appropriate for me to exercise my discretion in favour of allowing the evidence obtained from SA Management. In short I am satisfied that the evidence was obtained in an improper, or at the very least unfair, manner. Although the Council is entitled to take steps to protect its property from theft by its employees I am not satisfied that it has in this case gone about things in a fair manner and thus that the disciplinary process has been fair. Therefore, although it is common cause that Beukes and Dollie did (as a result of their entrapment) steal

from their employer (to which they admitted), to permit the evidence and to “convict” them (uphold their dismissals) as a result thereof would be detrimental to the interests of justice, in the context of an employment relationship, and would be unduly unfair to the employees. In deciding the matter thus I have not failed to consider the interests of the employer. I am, however, satisfied that there were (and still are) adequate remedies available to the Council as employer to protect its interests without unfairly prejudicing its employees. The Council could have conducted itself differently (or directed the operations of, or mandate it supplied to, its agents) in a manner that would not have caused this Court to conclude that the interests of justice had been unduly affected.

70. In regard to the issue of relief the respondents seek in the first instance the reinstatement of Beukes and Dollie with full benefits, retrospective to the date of their dismissal, alternatively, compensation equivalent to twelve months’ salary. Under the provisions of section 193 of the Act I have a discretion to order reinstatement, re-employment or the payment of compensation. However, the exercise of that discretion is constrained by virtue of the provisions of section 193(2). The clear intention of the Legislature is that reinstatement is the primary remedy. I would not reinstate if I found either that the employee or employees concerned did not wish to be reinstated, the circumstances surrounding the dismissal was such that a continued employment relationship would be intolerable, if it were not reasonably practicable for the employer to reinstate or if the dismissal was unfair only because the employer did not follow a fair procedure.

71. It seems to me in the circumstances of this case that the only factor which could possibly be present would be that referred to in section 193(2)(b), namely, that “*the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.*” There were no facts put before me to suggest that reinstatement would be intolerable were I to find in favour of the respondents, indeed, it is apparent from the evidence before me that both Beukes and Dollie remained in active service from the time that their “offence” was discovered and throughout the disciplinary process which took not much less than six months to complete. It does not appear, therefore, that it can be said that the trust relationship has been

irreparably destroyed. In the circumstances there seems no good reason in either law or fairness why reinstatement should not be granted.

72. Beukes and Dollie were dismissed in April 1997, more than three years ago. It is also apparent, however, that the delay which transpired before the matter came to trial before this Court was in no way due to the fault of either Beukes or Dollie. The Council took nearly a year to refer the dispute to this Court after the Director of the CCMA made a determination in terms of section 191(6) of the Act. None of the further delays came about as a result of anything other than the normal constraints associated with litigation in this Court. There appears therefore also no reason why the reinstatement order should not be made retrospective to the date of the dismissal.
73. On the basis of the findings and reasoning set out above I therefore determine that the dismissals of Beukes and Dollie were substantively unfair. There was no complaint about procedural fairness in the proceedings before me insofar as the conduct of the disciplinary enquiry and the appeal hearing were concerned. However, insofar as the methods used by the Council in order to substantiate the substantive reason for dismissal have been found to be unfair it may be said, in that sense at least, that the dismissals were also procedurally unfair.
74. As far as the issue of costs is concerned I have taken into consideration the fact that this matter came before me by way of a test case. It was clearly in the interests of both the Council and SAMWU that an authoritative ruling be obtained on the principles involved in the matter. It is also so that the Council and SAMWU have an ongoing relationship. I am persuaded therefore that this is an appropriate case in which to depart from the normal rule that costs follow the cause and to provide that each party pay its own costs.
75. In the circumstances I make the following order:
 - 75.1 The dismissals of Beukes and Dollie (the second and third respondents) were both procedurally and substantively unfair.

75.2 The second and third respondents are reinstated on full benefits with retrospective effect to the date of their dismissals.

75.3 Each party is to bear its own costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 14,15,16,17,18 February 2000; 14,15 and 23 August 2000

DATE OF JUDGMENT: 22 September 2000

APPEARANCE	FOR	Mr N Arendse SC instructed by Mr D Visagie
APPLICANT:		of Mallinicks Inc

APPEARANCE FOR FIRST,
SECOND AND THIRD
RESPONDENTS: