IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C238/99

In the matter between :

GRAY SECURITY SERVICES (WESTERN CAPE) (PTY) LTD **Applicant**

And

N CLOETE N.O. **1st Respondent**

And

TRANSPORT & GENERAL WORKERS UNION ("the Union") **2nd Respondent**

JUDGMENT

MacROBERT A.J.

Appearances:

On behalf of Applicant: **Adv Andre Oosthuizen instructed by Mr Michael Murphy of Murphy Wallace Slabbert Inc**

On behalf of 2nd Respondent: **Adv Paul Farlam instructed by Mr Wayne Field of Bernadt Vukic Potash Abel & Getz**

Hearing in Cape Town on 17 September 1999

1. This is a review of an arbitration award handed down by senior part-time Commissioner N Cloete on 22 April 1999 after an arbitration hearing in the Northern Cape on 8 April 1999 in which he found the dismissal of five members of second respondent to be substantively and procedurally unfair and ordered their retrospective reinstatement.

2. The review has been brought in terms of s145 of the Labour Relations Act 66 of 1995 ("the Act") and is opposed by second respondent alone.

3. A point in limine raised by second respondent concerning the jurisdiction of the Labour Court in regard to this matter and in particular in regard to the place of hearing was abandoned (in my view correctly).

4. The background to the matter in brief is as follows:

4.1 Of the eight employees of applicant/members of second respondent originally involved in the matter giving rise to their dismissal, five pursued a claim for unfair dismissal, the remaining threes' position having been resolved one way or another. The five were employed by applicant, a security company which provides security services on contract to companies and concerns throughout the Western Cape (applicant employing some 2000 employees in the region at various locations).

4.2 They were employed and deployed at Alexkor Diamond Mine situated at Alexander Bay, a mine owned by Alexkor Ltd, with which applicant had contracted to provide security services at the mine.

4.3 Applicant's founding affidavit attested to by Ms Marilize Kingma, its Human Resources Director, picks up the story in paragraph 8 thereof as follows:

"Shortly before October 1998 certain talks were held between Applicant represented by CK van Rensburg, and the Security Manager at Alexkor Ltd, Andrew Smith. These talks related, inter alia, to certain theft and related security problems being experienced by Alexkor Ltd <u>*in relation to specific employees of applicant*</u> (my emphasis) *who were performing security duties at the premises of Alexkor Ltd. Alexkor Ltd expressed their concern at the possibility that certain of the applicant's employees might be assisting in acts of misappropriation and proposed as a solution to the problem that the particular employees be transferred to other premises. In the alternative, Alexkor Ltd required that the employees in question undergo polygraph tests.*

Following upon these discussions, two letters were addressed by Andrew Smith to applicant…… The letters requested the transfer of eight of applicant's employees who were performing security duties at Alexkor Ltd….."

4.4 It is common cause that there was no evidence of any complicity by any of the eight in regard to any misappropriation or dishonest dealings.

4.5 Applicant's case rested inter alia on the provisions of its contract with Alexkor, the relevant clause of which provided:

"1.3 The client (i.e. Alexkor) *shall be entitled to give reasonable instructions to security personnel while they are on the premises but the client shall not be entitled to dismiss such security personnel nor to demand that they leave the premises until such time as the company* (i.e. applicant*) has been given reasonable written notice of the* <u>*request*</u> (my emphasis) *for such dismissal or*

demand to leave the premises. Should the client be of the opinion that any security personnel is failing in, or incapable of, the proper performance of his/her duties to such an extent that the delay in providing written notice of the request for dismissal or demand to leave the premises could prejudice the proper maintenance of security at the premises and/or the safety of personnel, products and equipment at the premises it may by instruction to the company demand the immediate removal and replacement of such security personnel from the premises. If the client exercises its right in terms of the aforegoing proviso, it shall provide the company with written details of the reasons for its decision and <u>if the reasons provided are satisfactory</u> (my emphasis)*, afford the company 10 (ten) working days notice to replace such employees of whom the latter will be removed from site within 24 hours."*

4.6To be read with the aforegoing is the relevant clause in the individual contracts of employment between applicant and its employees (including second respondent's five members), taking into account also what applicant contends had taken place in practice as disclosed by the evidence at the arbitration.

The relevant clause in the contract reads as follows:

"Your specific duties are defined in the Site Procedures Manual, a copy of which is kept at any site where you may be deployed".

Read with this, it appears that clause 14 of the contract stipulates (although I did not have the document – what follows has been gleaned from the Commissioner's award) that the company policies and procedures will apply and in clause 8.2 of the latter document, the following is contained:

"*In addition, if the client requests the removal of an individual from a site for whatever reason, the management will endeavour to place the employee on another site at his/her substantive rank. If this is not possible, the rank of the employee may be reduced……."*

Applicant contends in its founding papers that the employment contracts "*therefore specifically state that employees may be deployed at various sites".* This contention will be addressed below.

It was contended by Ms Kingma that transfers take place on a regular basis and that all employees of applicant are aware of the fact that applicant may transfer them from one site to another. It was also submitted that it was in the employees' best interests and also good for operational reasons that regular transfers took place. The possibility of transfer from one site to another was conceded in argument at the arbitration by second respondent's representative, but it is clear that the concession was limited to a transfer within reasonable parameters – for example where no real inconvenience, hardship or dislocation was involved. An important aspect of the union's case at the arbitration was that the transfer proposed in this matter due to the hardship, family dislocation, costs, financial prejudice, travel etc, was qualitatively and quantitatively different from the norm and also based on misconceived grounds (i.e. the alleged dishonesty of the employees involved).

4.7 We pick up the thread of the story again from paragraph 11 of Ms Kingma's affidavit

"11. If a client requests the transfer of a particular employee, as such client is

entitled to do, it would be most inadvisable for applicant to refuse to carry out the request. Such a refusal would lead to a deterioration in the relationship between applicant and its client, and the possible termination of the contract between applicant and that client. Such contracts are terminable on one month's notice, and the continuation of the contract is therefore very much dependent on applicant maintaining sound relations with its clients.

12. *Given the aforegoing, applicant decided to transfer the eight employees in question from the Alexkor Ltd site to Cape Town, where they would be deployed at the sites of various of the applicant's customers operating in Cape Town. Applicant was quite entitled to decide on the transfer of the eight employees."* (my emphasis).

However, it is not clear from the record that applicant explored with Alexkor whether the reasons provided were reasonable or satisfactory. It seems that applicant simply accepted that the reasons given – i.e. unsubstantiated allegations of dishonesty, were good enough and was concerned about the possible loss of its contract.

4.8 It is common cause that the second respondent's members refused to take polygraph tests, questioning the necessity therefor and the reliability of such tests. Applicant then issued letters to the individual employees concerned advising them of their transfer to Cape Town. Applicant sent a letter to second respondent's shop stewards on 14 October 1998 headed "Redeployment" in which it referred to the wishes of the client, Alexkor and the individual employee's employment contracts and contended: "*….your terms of employment are not specific to one site i.e. Alexkor, but to Gray Security Services (Western Cape) (Pty) Ltd. It is a common operational request from clients that employees be rotated regularly and therefore the current request from the client is in no way unusual ……"*

Further on the letter provides: *"No action will be taken or decisions made until consultations have been exhausted* (my emphasis).

Where possible these employees will be deployed in Cape Town where vacancies exist, ….."

4.9 It is clear from Ms Kingma's opening statement at the CCMA arbitration and the evidence itself, that from the applicant company's point of view, consultation does not normally take place when applicant "moves people around" but that in this instance applicant felt it necessary to engage in consultations with these employees because of the distances involved (it is common cause that Alexkor is approximately 755 kms from Cape Town and that the five members of second respondent hailed variously from Springbok, Upington and O'Kiep (the closest of these towns to Cape Town being a significant distance away), together with the fact that the employees were housed at Alexkor with subsidised meals and the like.

However, it is clear from the evidence at the arbitration of Mr de Kock, applicant's Operations Manager for the Namaqualand region, that the purpose of the proposed consultation was "*to tell them* (i.e. the affected employees) *that we are transferring them, but we would also assist them with their transportation, we would give our assistance as far as their accommodation is concerned in Cape Town, and that was basically, is (*sic) *to inform them of the measures that the company would take to accommodate these people as far as possible".* In other words it was clear that the decision to transfer the employees to Cape Town was a *fait accompli* - it was only the implementation and logistics of that decision that was sought to be consulted on. Further it is clear that the reason for the transfer

was, as put by Ms Kingma to the arbitrator in her opening statement: *"….that the reason why the company did not place these particular individuals in a disciplinary hearing, is because we didn't have any evidence to do so. Because we had no concrete evidence of misconduct. Had we evidence of misconduct, we would have gone that route. And the only other alternative to us, was to therefore consider transferring them to a different contract".*

4.10 Mr Afrikaner, one of the five dismissed employees, testified that during the interview conducted with him preparatory to his being employed by applicant, he was advised that there was no possibility of a transfer whilst a contract was in place, but that possibility would arise only if the contract lapsed or terminated. This position was not put in cross-examination to any of the company (applicant's) witnesses by the union, nor did applicant ask for any of applicant's witnesses to be recalled at the arbitration to deal with this issue. Mr Afrikaner had however subsequently been transferred from Baken, one assumes with his consent although that does not appear from the record.

4.11 In argument at the arbitration Ms Kingma put the following to the Commissioner: *"We were sensitive to the fact that from the single quarter situation, a different shift situation, they* (i.e. the employees sought to be transferred) *would be coming to Cape Town. ……. that is in a sense a different condition of employment. It is for that reason that we wanted to consult with them. But we met up with this intransigent attitude, as I said previously, this unwillingness to talk and to resolve."*

4.12 It appears clear from the record that the union and the employees did exhibit an intransigent attitude both to the decision to transfer and to management's

proposed consultation on the issue, contending that if there were any suspicions they should rather be charged, and that in any event any such proposed transfers would be unfair.

5. In the result, and after second respondent's members refused to accept the transfer to Cape Town, applicant decided to charge these employees with misconduct. The charge preferred was:

"*refusal to obey a lawful and reasonable instruction in that you refused to be transferred from Alexkor to Cape Town due to an operational requirement*" (my emphasis).

6. The employees had been put on suspension when the charge was laid, and ultimately the inquiries proceeded in their absence The employees contended that they had not received notification as they had had to leave the premises to go to their homes as provision of food had been stopped at the mine at the instance of applicant. This was vehemently denied by applicant and as will be seen below, I am of the view that this aspect of the second respondent's members case was unsatisfactory as indeed was their evidence in regard to their view of the circumstances surrounding the convening of the disciplinary inquiry and the subsequent opportunity of an appeal.

7. After the disciplinary inquiry the decision was taken to dismiss the employees. An opportunity to appeal was proffered but again this was not pursued by the individual employees with evidence being tendered at the arbitration that certain notices of appeal had been lodged but apparently had not been received by the applicant company (which applicant denied). Again, I found this aspect of the second respondent's members case to be unsatisfactory. These issues relate in

particular to the issue of procedural fairness relating to the inquiry and proposed holding of an appeal (the Commissioner having found the dismissals to be both procedurally and substantively unfair) – I will embroider on this below.

8. Lying at the core of this case, and in particular in regard to the issue of substantive fairness, I believe the answer to this issue lies primarily in the following namely: the contract between applicant and Alexkor; the individual contracts between applicant and the five individual employees; the legitimacy or reasonableness of the instruction given to second respondent's members in the circumstances of this case; applicants undertaking to consult; whether applicant had an untrammelled right to transfer the employees in the circumstances in which it sought to do so, and finally, how the applicant categorised and approached the issue. (I note however that the arbitration was clouded by tangential allegations of victimisation, union-bashing etc which took the issue no further).

8.1 A proposition in regard to the contractual position is that if the contract itself precluded a transfer without the consent of the employees, then any such transfer would have had to be negotiated to agreement in which event applicant would have had no right to transfer the employees without their consent and any instruction to transfer would have been unlawful. As a consequence, any charge of misconduct brought as a result of failure to obey that instruction would have been unlawful and misconceived.

8.2 If however the interpretation of the contract falls short of requiring negotiation to agreement in regard to the question of transfer, then one must consider what the import of the contract is, taken with the evidence and coupled with this, one must consider whether the instruction to transfer amounts to a work practice rule, a la the Air Products decision (see below) with the attendant consequences found in that decision. One must also consider with reference to the requirements for

substantive fairness in dismissals for misconduct, set out in Schedule 7, item 7 of the Labour Relations Act, the existence of a rule relating to transfers and the employees' knowledge thereof.

8.3 An important aspect of this matter relates to applicant's undertaking to consult with the employees on the transfer and the effect thereof.

8.4 A further angle concerns the reasonableness/legitimacy of the instruction itself.

8.5 Another consideration, in the light of the above, is ultimately whether applicant had the power and prerogative to order the transfer in the manner in which it did and then discipline to dismissal the employees for their failure to heed the instruction.

8.6 The final consideration entails an examination as to how applicant approached the issue conceptually, and in particular the applicant's categorisation of the issue as one of misconduct as opposed to one of its operational requirements.

These aspects will be considered below.

9. On applicant's own version it conceded a responsibility to consult on the issue (in Ms Kingma's words, because the proposed move to Cape Town entailed a different condition of employment – see above), yet sought to consult only on the implementation or logistics of the transfer to Cape Town but not on the question of the transfer itself or on the question of a transfer to some other site in closer proximity to the individual employee's homes. As detailed above, the applicants sought at the arbitration to contend that in general it had no duty to consult with its employees in regard to transfers and redeployment but in this specific circumstance felt it ought to do so for the reasons given.

9.1 This approach, so it was contended by applicant, brought applicant's situation in line with the *ratio* of the decision of the Labour Appeal Court in Air Products (Pty) Ltd v CWIU & Another (1998) 1 BLLR (LAC) ("Air Products"), upon which it relied heavily both at the arbitration itself and at the review proceedings.

9.2 The Commissioner (first respondent) expressed some reservations about the majority decision (there being a dissenting judgment by Froneman DJP) but committed himself to following the majority decision. However, he distinguished it on various grounds which I will come to later (it being noted that second respondent conceded at the hearing that the first respondent Commissioner had misconstrued the decision in part).

9.3 It will be recalled that the facts of the Air Products case involved an employee who for some years worked dayshift one week followed by night shift the following week for some time at a high pressure (HP) fuel plant for some years, whereafter he was transferred to a similar test plant approximately 80 meters away, working the same shifts.

However, at a point, the workload at this plant decreased to the extent that it was no longer necessary for the employer to have a night shift and accordingly dropped the night shift.

After a period of two weeks the company decided that as the employee was the longest serving operator at that grade and because he had had previous experience at the HP plant he should be transferred back to that plant where he would again be required to work day and night shifts. The employee refused, his main complaint being that he wished to continue to work day shift only (which he had been doing for only two weeks).

He failed to obey the employer's instruction to report for work and failed to provide any reasons for doing so. He was ultimately given a notification to attend a disciplinary inquiry for failure to carry out a lawful instruction.

The union took the line that as his post at the one plant had been made redundant, the company ought to have consulted in accordance with the provisions of the Labour Relations Act relating to operational requirements but the court held (per Myburgh JP as he then was) that: "*The fact is that the company did not contemplate retrenching* (the employee)*; his services were no longer needed in one division of the company (the cylinder test plant) whereas they were needed at another division (the HP plant). Absent the forseeability of retrenchment, the company was under no obligation to consult the union prior to taking the decision to transfer* (the employee).

The transfer of the employee from the cylinder test plant to the HP plant did amount to a change in working conditions to his potential prejudice in the sense that he would be required to work night shift every second week at the HP plant whereas at the cylinder test plant he did not have to work nightshift at all.

What was required of the company in those circumstances, as a matter of fairness and sound industrial relations practice, was to attempt to persuade (the employee) *to cooperate and to accept the change in working conditions (the court* referring to the decision in Mauchle (Pty) Ltd t/a Precision Tools v NUMSA (1995) 4 BLLR 11 (LAC).)"

10. In the circumstances prevailing in the Air Products matter, there were no contractual obligations or requirements (or undertakings) existing which the company had failed to comply with. The court held that there was neither an express, tacit or implied term of the contract that he would work at only one plant. The Labour

Appeal Court was also influenced by the fact that the employee had worked for some 7 ½ years under the old regime at the old plant without demur and was "*unable to motivate his refusal to revert to that shift system. Had he done so satisfactorily, the company would have reconsidered its decision to transfer. At no time prior to his dismissal did (the employee) justify his refusal."* The court therefore found that the company had a valid reason to dismiss him.

11. This decision is not, in my view, authority for the proposition that a company may avoid its own contractual obligations or its own policies and procedures or its undertakings or that it may act unfairly (noting that what may be lawful may not necessarily be fair in the context of the law relating to unfair dismissal). It also deals inter alia with the difference between so-called "work practices" as opposed to contractual obligations and in its *ratio,* circumscribed the notion of work practices to fit within the boundaries of the facts of the case by referring to legal and equitable principles derived from the particular facts.

12. In approaching this case, one must therefore revert to a consideration of what the contractual obligations amounted to; what undertakings may have been made; and what policies or procedures are of relevance, and also a consideration of whether the applicant, as employer, had the unbridled power to order the transfer of employees in the circumstances, as it sought to do (including a consideration of the legitimacy/reasonableness of the instruction). In this regard, the following are relevant:

12.1 The relevant clause in the contract itself is not particularly helpful.

12.2 The clause in the policy and procedures of the company (above) appears to foreshadow the transfer of an employee at the instance of a client, but the circumstances under which this may take place are not spelled out.

12.3 The contract between applicant and Alexkor (above) provides for an examination by applicant of the client's reasons for requesting a dismissal or transfer from the premises and the reasonableness thereof – in this matter Alexkor's reasons were taken at face value. There is no evidence on record to the contrary.

12.4 Applicant itself conceded at the arbitration in the prevailing circumstances a necessity to consult, not in the Air Products fashion, but more substantively. In this regard the wording of its memo to the second respondent's shop stewards referred to above is important: *"No action will be taken or decisions made until consultations have been exhausted".* This evidence as well as that detailed above reflects this intention, as did Ms Kingma's argument to the Commissioner which I have also set out above. The aforegoing notwithstanding, applicant sought in fact only to consult after a *fait accompli* decision, about the details and logistics of the transfer(s) and nothing else.

13. I have no doubt that second respondent's members were intransigent and not co-operative. However, in the circumstances in which they found themselves, namely that they had been accused of dishonesty and that was the motivation for the transfer, this was not surprising. In this regard Ms Kingma's submission to the Commissioner set out in paragraph4.9 above is important, namely:

"*….the reason why the company did not place these particular individuals in a disciplinary hearing, is because we didn't have any evidence to do so. Because we had no concrete evidence of misconduct. Had we had evidence of misconduct, we would have gone that route. And the only other alternative to us, was to therefore considering transferring them to a different contract."*

As will be seen below I am not persuaded that that was the only alternative or option available to the company. A further cause of the intransigence was the applicant's expressed intention to transfer the employees to Cape Town which was put as a *fait accompli* and the only items upon which consultation was proffered were in regard to the implementation or logistics of the decision.

14. An important issue here also, spawned by the particular facts of this matter, lies in my view with the applicant company's misconception of the issue and its misconceived approach to what was clearly and understandably, a problem confronted by it. I deal with this below.

15. I turn now to the Commissioner's award and the grounds of review in relation to his findings against the background given above. In short the grounds of review submitted on behalf of Applicant were as follows:

15.1 that the Commissioner failed correctly to appreciate and apply the principles laid down in the Air Products decision.

15.2 that the Commissioner made an incorrect finding of the facts having misunderstood the evidence of applicant's witness Mr van Rensburg (whose evidence in chief was not recorded and hence not transcribed) when the Commissioner found that "*the idea of a transfer actually originated with Gray (i.e. applicant) and not with Alexkor as claimed."* This finding also clearly influenced the Commissioner's decision to make an adverse order of costs against applicant.

15.3 Second respondent has conceded this point and has abandoned the costs order.

15.4 That the Commissioner found that it was a term of the agreement with each

of the individual employees that they would or could not be transferred without their consent. This was based on the evidence of Mr Afrikaner which I have detailed above. It was contended that it was misconceived and unfair for the Commissioner to find that this evidence was not challenged inasmuch as these contentions had not been put to the applicant's witnesses and further that it was illogical to imply that term into the contracts of employment of the other dismissed employees.

15.5 That the commissioner also based his finding on the difficulties which the employees raised at the arbitration proceedings regarding travel arrangements as a result of being transferred to Cape Town, concomitant costs involved, housing accommodation and travel etc. It was submitted that the employees had refused to participate in the consultations to address these sorts of issues and as a result, and having failed to avail themselves thereof, they cannot now be heard to raise the complaint (I was referred in this regard to the decisions in Benjamin v Plessey Tellumat SA Ltd (1998) 3 BLLR 72 (LC) and CWIU of SA v Lennox Ltd (1994) 15 ILJ 103C (LAC))

15.6 The Commissioner was also challenged in regard to findings he made as to the disciplinary hearing where no evidence was led in relation thereto and no opportunity was afforded the applicant to present evidence or address the first respondent in relation to such findings. In particular, Ms Kingma had specifically addressed second respondent prior to the arbitration as to whether the union intended challenging any aspect of the inquiry and this was not responded to.

16. The Commissioner in his award held for the five employees, essentially on five grounds which may be summarised as follows:

16.1 That the individual contracts of employment prohibited the transfer of the employees without their consent and the decision to transfer thus constituted a unilateral variation of their conditions of employment and was therefore unlawful and that the employees' refusal to accept such a transfer could not therefore constitute a ground for dismissal.

16.2 The applicant had decided to consult with the employees before transferring them due to "the unique situation" but it proceeded not to consult on the question of transfer itself but only as to the implementation thereof and that this was therefore unfair. This also took place in the context of unsubstantiated allegations of dishonesty.

16.3 The applicant had required the transfer of the employees to Cape Town without any proof that they had been involved in any dishonest activities and that therefore the proposed transfer was not a lawful and reasonable instruction and that failure to comply therewith could not constitute insubordination;

16.4 The employees had legitimate reasons for refusing to comply with the applicant's decision to transfer them to Cape Town on the grounds of their personal circumstances and the hardship that that would occasion.

16.5 Finally, that the decision to dismiss the employees was procedurally unfair on certain grounds pertaining to the disciplinary inquiry and the proposed holding of an appeal.

17. Second respondent contended that each of the five reasons or grounds set out above was viewed by the Commissioner as a separate ground for finding the dismissal of the employees to have been unfair and that they were not considered cumulatively to result in the dismissal but rather that each of the grounds would have been sufficient for the Commissioner to have reached the decision that he did. In support of this contention is a reference to the award in which the Commissioner stated: "*On this (i.e. the third ground alone) and there are others – the employer party must fail".*

18. An important contention put up by second respondent was that even if one or more of the reasons of the Commissioner's decision is found to have been flawed, the whole decision is not vitiated, either under the traditional principles of administrative law or in terms of the constitutional requirement that an award be "justifiable in relation to the reasons given for it."

In this regard a passage from Baxter: "Administrative Law" at 520 – 521 was relied on. In this passage Baxter considers in the administrative law context the situation where there are mixed reasons for acting and where a public authority bases its decisions upon a variety of factors rather than on one alone. He poses the question: "*Does the presence of one or more impermissible reasons for its action render the action invalid even if these are also accompanied by permissible* reasons?" Baxter considers the question, reviews the authorities, and then postulates as a test to be adopted the following: "*It is submitted that the test might be better formulated in the following way: would the authority, had it not been actuated by the bad reason or reasons, have reached – and been legally able to*

reach – the same decision upon the basis of the remaining, permissible reasons? The question is hypothetical and its answer involves some speculation. Nevertheless, by characterising it in this way the public authority is not penalised for insignificant errors when it would have reached the same decision anyway. If permissible reasons for the decision exist, and they would still have dictated the decision, no prejudice has been suffered."

He does mention two qualifications to his test however, namely that where one or more of the impermissible reasons was of a dishonest nature, the courts should be slow to accept the existence of alternative permissible reasons and secondly, the inquiry is "would (his emphasis) *the authority have still reached the same decision*", not *"could* (his emphasis) *it have done so*". The first qualification has no application to this matter as the *bona fides* of the Commissioner are not in dispute.

19. When one reverts to the award of the Commissioner which was lengthy and detailed (unlike a number of other awards of the CCMA that this Court has come across), it is apparent that there are certainly some impermissible/misconceived findings including that in relation to the evidence of Mr van Rensburg mentioned in paragraph 15.2 above (which findings have been abandoned by second respondent); the finding that what may have been a term of Mr Afrikaner's contract was necessarily a term of the other employees' contracts (the evidence not bearing out such a construction in the absence of the importation of such a term into the contracts), and also the finding in regard to procedural unfairness pertaining to the disciplinary inquiry and proposed appeal. I do not particularly wish to dwell on this aspect as it is clear from the record that a significant degree of dissembling on the part of second respondent's members took place in regard to their denial of the receipt of the disciplinary inquiry notification and in regard to the alleged filing and despatching of an appeal. The Commissioner also complained

about a line in the disciplinary inquiry record indicating that the chairman had entered a plea of guilty in the absence of the employees, which line had been scratched out with a felt pen. However, he came to this finding without this aspect being raised in evidence at all and without any opportunity for cross-examination or explanation being afforded. Moreover, applicant had sent a letter to second respondent prior to the arbitration inquiring whether it was persisting in its claim of procedural fairness to which it received no response. In the result no evidence was led on this issue and in the absence of such evidence and in the absence of such a case being made out, the Commissioner erred in finding procedural unfairness on these grounds.

20. When one analyses the Commissioner's findings the following is apparent, whether expressed directly or by necessary inference:

20.1 He found the rule – i.e. the instruction to transfer, to be unreasonable in the circumstances;

20.2 He held that the applicant had not consulted as it had undertaken to do;

20.3 He found that the Air Products decision was distinguishable from the facts of this matter both qualitatively and quantitatively;

20.4 He held that it was procedurally unfair for applicant to transfer the employees without consultation. (I note however his error in the interpretation of an aspect of the Air Products decision on page 13 of his judgment – page 65 of the record).

20.5 In the result he decided that in regard to substantive unfairness, no good grounds justifying the dismissal existed;

20.6 Finally, he found that it was procedurally unfair for the applicant not to have followed any recognised way of establishing the veracity of Alexkor's claims in regard to dishonesty.

21. Yes, the first respondent did misconceive some of the evidence and did make some errors of law in certain of his findings as indicated. In this regard, the decisions in Farias (Pty) Ltd & Another v Regional Land Claims Commissioner Kwazulu Natal 1998 (2) SA900 (LCC), Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1998 (3) SA 132 (A), Hira & Another v Booysen & Another 1992 (4) SA 69 (A) and finally Commissioner of Customs & Excise v Container Logistics (Pty) Ltd, Commissioner of Customs & Excise v Rennies Group Ltd t/a Renfreight 1999 (3) SA 771 (SCA) have been considered by me in relation to the question of error of law made by a Commissioner or someone in an equivalent position and also in regard to the common law, statutory and constitutional tests for review.

Yet, in applying the Baxter test set out above which I believe to be entirely consonant with the review jurisdiction of this court in relation to a CCMA Commissioner's findings in this context and also not inconsonant with either the LRA or the Constitution, I find that there were good grounds for the Commissioner coming to the decision that he did:

21.1 His findings in regard to the rule, namely the instruction to transfer under those circumstances to be unreasonable was in my view sound (in this regard, Schedule 7 item 7(b)(i) dealing with grounds for substantive fairness is relevant);

21.2 His finding that applicant breached its undertaking to consult, was sound on the facts;

21.3 His finding that the Air Products decision (notwithstanding a misconceived

interpretation of the finding on another ground) was distinguishable from the facts of this matter was cogent and rationally justifiable and also fell within the parameters of the now well known test laid down in the decision in Carephone (Pty) Ltd v Marcus NO & Others (1998) 19 ILJ 1425 (LAC) (as were the other findings set out in this section, in line with the Carephone test);

21.4 His finding that the employees' refusal to obey the instruction was not unreasonable, was also well founded. An unarticulated premise of this finding relates to whether a rule that applicant had the unbridled right to transfer in those circumstances existed, and also whether the employees had knowledge (or ought to have had knowledge) of that rule, was established (in this regard the grounds of substantive fairness detailed in schedule 7, item 7(i) of the Act are also important). It is clear that the first respondent's sense of equities was offended on the facts of this matter. (I deal with the equities in a little more detail below). It is one thing to have the right to transfer the employees from a site in Bellville, Cape Town to one in Brackenfell, Cape Town, but quite another to transfer employees from a site in Alexkor to another in Cape Town some 755 kms away and on very dubious grounds of unsubstantiated allegations of dishonesty – a very different situation from that in the Air Products matter. The difference was recognised by Ms Kingma to the extent of terming it a different condition of employment.

21.5 His finding that applicant did not explore or examine sufficiently with the client the proposed reasons for the transfer is also well grounded.

22. It is important to note that the court must consider this matter within its review jurisdiction and must be careful not to step outside the boundaries of that jurisdiction albeit that the boundaries have become extended as is evident from the decisions cited above.

23.I am also influenced by a passage from the decision of the Chief Justice in Hira & Another v Booysen & Another (above) where he states at 93A – 94A:

"Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute, and that as a result its decision should be set aside on review."

On the basis of my findings set out above, there are facts upon which the decision of the Commissioner can reasonably be justified and despite the odd misconceived finding and the occasional error of law as indicated, if one applies the Baxter test which I am inclined to do for the reasons given, and in regard to error of law, if one applies the Hira v Booysen test (above), then I am satisfied that the Commissioner would (my emphasis – this satisfies the second proviso to the Baxter test detailed above) nonetheless have come to the same finding.

In coming to this conclusion I have also taken into account the decisions in Purefresh Food (Pty) Ltd v Dayal & Another (1999) 20 ILJ 1590 (LC), in particular at page 1595D to 1596C, the relevant passage beginning with the following words of Jammy J: *"That the conclusion reached by an arbitrator in compulsory arbitration*

proceedings under the Act may not, on one or another assessment, be correct, will not necessarily render it not justifiable….." and also the decision of Mlambo J in Ellerine Holdings Ltd v CCMA & Others (1999) 7 BLLR 676 (LC) and in particular at page 681F to 682A in which he held that the award of the Commissioner "*viewed as a whole is capable of substantive justification warranting no interference by this court."*

24. I would however have taken the findings one step further and would have held that, put simply, the applicant miscategorised the issue as one of misconduct when clearly it was one of its operational requirements – the very charge put to the employees at the disciplinary inquiry reveals this (see paragraph 5 above). The facts and circumstances in this matter differ vastly (as mentioned above both qualitatively and quantitatively) from the Air Products decision.

25. Having so miscategorised the issue, the applicant proceeded on an incorrect course of a disciplinary inquiry as opposed to following a process of consultation in terms of its operational requirements. If the problem had been put to the employees within the correct categorisation and conceptual approach, the termination of the employees' employment on the grounds of operational requirements would have been contemplated if they had refused the transfer (and provided that the reasons for the proposed transfer given by the client were cogent). In my view, the correct course of action that the applicant ought to have embarked upon was therefore the consultative process as envisaged by s189 of the Labour Relations Act and the NEDLAC Code of Good Practice. To this extent applicant's case did not address this crucial distinction. As mentioned, the Air Products case does not assist applicant in this regard inter alia as on the facts of this matter, applicant did not have untrammelled power to transfer without consultation (for the reasons given above) and transfer as an alternative to retrenchment would only have been necessary if applicant's contract with Alexkor

was truly in jeopardy and no other alternatives presented – this was not fully explored by applicant. The equities in this matter are also much different to those that presented in the Air Products matter for the reasons given.

26. Having incorrectly categorised the issue as one of misconduct and thereby having followed the incorrect procedures, applicant in a sense compounded the problem and cemented the suspicion of dishonest conduct in respect of which no evidence existed, despite applicant's statements to the contrary.

27. A notable point was put by Ms Kingma in cross-examination to one of the union's witnesses namely the proposition as to what would have been the case if the contract with Alexkor had been lost by other reasons or means (one example may, for example, be where a rival company comes in at a lower price and with equal service and wrests the contract from the incumbent contractor). This illustrates the point precisely. If that had in fact taken place, misconduct would never have been an issue. The issue would rather have been one of the operational requirements of the company which would have required a consultative process as suggested.

It may also be of use to note that had the Alexkor contract been terminated for one or other reason unrelated to the misconduct of applicant's employees and had the applicant been confronted by the possible redundancy of their employees and embarked upon consultations pertinent to their possible retrenchment and during the course thereof had offered the employees a transfer to Cape Town in the manner proposed in this matter, I have little doubt that had they turned down the offer of a job in Cape Town on the grounds of family dislocation, family responsibility, travel, benefits etc (in other words the grounds put up at the arbitration) such refusal would not have been found to have been unreasonable within the meaning of s196(3) of the Labour Relations Act. Although they may have been retrenched, they would nonetheless have been entitled to a severance

package.

28. Alternatively, even if I am wrong on the miscategorisation issue, the Commissioner had ample grounds within the framework of the misconduct categorisation to find the dismissals unfair as I have spelled out in detail above.

29. I was certainly concerned by the possible tainting of the Commissioner's approach to his findings by his misconceived finding in regard to the evidence of Mr van Rensburg that the decision to transfer emanated from applicant and not Alexkor. However, having read his reasons, and in applying the tests set out above, I am satisfied that amongst his other reasons as mentioned were cogent reasons which would (not could) have led to the same result.

30. On the issue of procedural fairness I am satisfied that the Commissioner's findings in regard to the disciplinary inquiry and proposed appeal were misconceived and that in any event, if one properly categorises this issue as one of operational requirements and not misconduct, the true issue and inquiry is one of substantive fairness because by definition, having miscategorised the issue as one of misconduct, there must necessarily, be a want of procedural fairness but not for the reasons given by the Commissioner nor conceptualised by him. Alternatively, if the route to be followed was properly one of misconduct, substantive unfairness was correctly found as was procedural unfairness in the failure by applicant to honour its own undertakings in regard to consulting with the second applicant's members.

31. In regard to costs, both parties were *ad idem* that no order of costs should be made which I believe was an appropriate and responsible approach in the light of

the principles applicable to costs and also the inherent difficulties and complexities involved in this matter.

32. In the premises I order as follows:

32.1 The application is refused;

32.2 The first respondent's findings and reasons for his decision are upheld to the extent indicated in the body of the judgment;

32.3 There is no order as to costs

J MacRobert
Acting-Judge of the Labour Court of South Africa
Date of Hearing: 17 September 1999
Date of Judgment: 3 December 1999