IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO JR 953/04

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES	**Applicant**
And	
JB MTEMBU N.O.	**1st Respondent**
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**2nd Respondent**
W GROVES	**3rd Respondent**

JUDGMENT

D VAN ZYL J:

[1] The third respondent is employed by the applicant as a prison warder and is stationed at the Grootvlei Prison. During December 2002 the applicant charged the third respondent with two counts of misconduct. The first count relates to a contravention of paragraph 2.1 (b) of the applicant's disciplinary code, in that the third respondent performed unsatisfactorily by withdrawing five

hundred rand cash from a bank account of a prisoner and handing it over to the prisoner well knowing that it was against departmental policy to do so.

[2] Count 2 relates to a contravention of clause 6.4 (a) of the said disciplinary code, in that the third respondent permitted prisoners to use alcohol in his presence without taking disciplinary action or confiscating the alcohol. The third respondent admitted his guilt at the disciplinary inquiry. The sanction of dismissal was imposed in respect of both counts. The third respondent's internal appeal failed and the dispute with regard to his dismissal was referred to the first respondent for arbitration in terms of section 191 of the Labour Relations Act 66 of 1995 ("the Act"). The first respondent issued an award to the effect that the sanction of dismissal was unfair and imposed a sanction involving his re-employment.

[3] The evidence placed before the first respondent consisted of the record of the disciplinary proceedings, the record of the appeal proceedings, an extract from the applicant's disciplinary register and the record of disciplinary proceedings of a co-employee, one Esterhuizen, who was also charged with and found guilty of misconduct relating to a failure to act upon having found prisoners in possession of alcohol. It is common cause that the third respondent's case before the first respondent was limited to the issue of consistency in the disciplining of employees of the applicant and the question whether or not the sanction imposed was excessive. On the evidence placed before him, the first respondent

made the following findings:

" **<u>Consistency</u>**

It is indeed so that from the cases cited by Mr Venter there are transgressions that are more serious than in the case i*n casu* but, however, the transgressors got away with far more lenient sanctions. While I agree with Mrs Gounden that consistency is not a rule unto itself but where the differentiation is so glaring that it induces a sense of shock, and the employer has not provided or has failed to provide reasons for the differentiation, then the dismissal is unfair as held by the Court in the Early Bird case above. In this case the respondent has failed to provide reasons for the differentiation in sanctions regarding this case and those cited by Mr Venter. Mrs Gounden only argues that Mr Venter does not mention the facts of each case and merely provides outcomes. I would then have expected the respondent to provide the facts; however, be that as it may there is the case of Esterhuizen. The first charge for which the applicant was dismissed for is akin to that of Esterhuizen. In the latter's case, the chairperson's findings were that Esterhuizen had pleaded not guilty and fabricated evidence which is not the case with the applicant. It would then appear that the applicant was punished more severely for playing open cards with the respondent.

Even though the facts of the other cases cited by Mr Venter are unknown, I submit that the charges and the sanctions are sufficient for one to make an informed comparison with the case *in casu*. In Country Fair Foods (Pty) Ltd v CCMA & Others (1999) 11 BLLR 1117 (LAC) the Court held that interference with a sanction is justified if the employer's decision is unreasonable and unfair. *In casu* the employer has failed to provide

reasons for the differentiation in sanctions and I submit that this renders the applicant's dismissal unreasonable and unfair.

Harshness

In Korsten v McSteel (Pty) Ltd & Another (1996) 8 BLLR 1015 (IC) the Court held that a dismissal is justified when the misconduct of an employee has harmed the employment relationship. Given the serious nature of the cases cited by Mr Venter, I cannot agree that it is the case here.

In Nyembezi v NEHAWU (1997) 1 BLLR 94 (IC), the Court held that if the employer has not lead evidence that the employment relationship has been rendered intolerable, the dismissal is unfair. How can this argument hold water against the applicant when e.g. employees who have sold keys to prisoners, committed theft, brought dagga to the prison etc, have been treated much more leniently and are still in the respondent's employment when their transgressions go to the core of the nature of the respondent's enterprise?

I submit that he applicant's sanction of dismissal was indeed harsh.

On the second charge against the applicant, even the chairperson of the disciplinary hearing remarked that had it not been for the first charge she would have given the applicant a final written warning as this charge is not serious. Need I say more when a person who borrows money from a prisoner is treated lightly? In the premise I find that the sanction of dismissal is harsh and inappropriate and has to be substituted with an appropriate sanction."

[4] Having found the imposition of the sanction of dismissal to be unfair, the first respondent substituted it with a final written warning. The applicant now seeks to review and set aside the arbitration award. The applicant's grounds of review are that the arbitrator misdirected himself by failing to apply his mind to the facts placed before him and further of having committed an irregularity in the conduct of the proceedings by ignoring or misinterpreting the facts. The arbitration was conducted under the auspices of the second respondent. It is not in dispute that the second respondent is a bargaining council, accredited in terms of the Act. The first respondent was accordingly performing functions in terms of the Act when he conducted the arbitration and issued the award. The review application is consequently regulated by section 158 (1)(d) of the Act. (See **Reddy v KZN Department of Education and Culture and Others** (2003) 7 BLLR 661 (LAC) at 667H-668A) This section gives this Court the power "**to review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act or any grounds that are permissible in law."** A review under this section is what is referred to as a common law review (See **Toyota SA Motors Ltd v Radebe & Others** [2000] 3 BLLR 243 (LAC); **Stocks Civil Engineering (Pty) Ltd v Rip NO & Another** [2002] BLLR 189 (LAC) and **Coin Security (Pty) Ltd v CCMA & Others** [2005] 7 BLLR 672 (LC)). The grounds of review where the power or function is a decision-making one were set out in **Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another** 1988 (3) SA 132 (A) at

152A-E:

> "**Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' …Such failure may be shown by proof, *inter alia,* that the decision was arrived at arbitrarily or capriciously or *male fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore-stated …. Some of these grounds tend to overlap."**

[5] The powers and functions of the first respondent are found ~~with~~in the provisions of the Act (sections 191 and 193). Because he exercised a public power or performed a public function in terms of an empowering section, the grounds of review would also incorporate the constitutional requirement of lawfulness and that the decision is rationally related to the purpose for which the power was given, failing which it would be arbitrary. (See **Pharmaceuticals Manufactures Association of South Africa: In re Ex parte President of the Republic of South Africa & Others** 2000 (2) SA 674 (CC) at paras [85] and [90]). The approach to be adopted by a Court of review exercising its powers in terms of

section 158 (1)(g) of the Act was extensively dealt with by Francis J in the **Coin Security Case (supra)** and I do not find it necessary to repeat it**.**

[6] The question that must be determined is whether the decision of the first respondent to substitute a lesser penalty for the penalties imposed by the employer is reviewable on any of the grounds referred to above. To answer this question it is necessary, as a point of departure, to have regard to the nature of the duty or function of an arbitrator in relation to the sanction imposed by an employer. The Code of Good Conduct: Dismissals, states that the functionary who determines whether a dismissal for misconduct is unfair should consider the following:

"**(a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and**

(b) if a rule or standard was contravened, whether or not -

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

iii) the rule or standard has been consistently applied by the employer; and

iv) dismissal wi~~th~~as an appropriate sanction for the contravention of the rule or standard."

[7] Section 193(1)(a) of the Labour Relations Act provides that if an arbitrator finds that a dismissal is unfair he or she may order the employer to reinstate the employee. This, according to Willis JA in **De Beers Consolidated Mines Ltd v CCMA & Others** (2000)

21 ILJ 1051 (LAC) at 1062G-1063A means that the arbitrator's function is to decide whether the dismissal was unfair and not to impose what he or she viewed as the correct sanction. (See further **County Fair Foods (Pty) Ltd v CCMA & Others** (1999) 20 ILJ 1701 (LAC) at 1707G-I and 1713D-F and **Nampak Corrugated Wadeville v Khoza** (1999) 20 ILJ 578 (LAC) at 584A-B.) The arbitrator is therefore not exercising an independent discretion. His function is limited to assessing the reasonableness and fairness of the decision to dismiss and can only interfere with the employer's decision if its found to fall outside a "**band of reasonableness"**, the parameters of which are determined by general principles of fairness. (See **Nampak Corrogated Wadeville v Khoza** (**supra)** at 584B-C and Grogan **Dismissal Discrimination & Unfair Labour Practices** at page 226.) The result is that the arbitrator must show a degree of deference towards an employer's decision to dismiss an employee. (See **De Beers Consolidated Mines Ltd v CCMA & Others (supra)** at 1063A; **County Fair Foods v CCMA (supra)** at 1713A-E and Grogan **op cit** at page 226). The decision of the arbitrator on the fairness or unfairness of the sanction imposed is reached, not only with reference to the evidential material before the employer, but on the basis of an assessment of all the evidence placed before the arbitrator. To that extent the proceedings are a hearing **de novo.** (See **County Fair Foods (Pty) Ltd v CCMA & Others (supra)** at 1707H-I). The principle that emerges from these decisions was correctly stated as follows by Cohen "**The Reasonable Employer Test - Creeping in**

Through the Back Door" SAMLJ (2003) Vol 15 No 2 at page 196:

> "…**the arbitrating commissioner, although deciding the matter afresh on the evidence presented, is required to assess whether the sanction imposed by the employer is reasonable and fair. This assessment entails the arbitrator passing a value judgment that considers the individual circumstances of the matter, the objectives of the legislation, and societal and workplace norms. In passing this judgment the arbitrator is bound to defer to an employer's discretion to impose standards of conduct at the workplace and appropriate penalties for transgressing these standards. Provided that these are reasonable and fair, the arbitrator is not at liberty to substitute a different sanction for the employer's. To do so would be to usurp the role of management and exceed the mandate given to arbitrators".**

[8] The consideration of consistency or equality of treatment (the so-called "parity principle") is an element of disciplinary fairness, and it is really "**the perception of bias inherent in selective discipline that makes it unfair**." (See **Early Bird Farms (Pty) Ltd v S Mlambo** [1997] 5 BLLR 540 (LAC) at 545H-I; **SA Commercial Catering And Allied Workers Union & Others v Irvine & Johnson Ltd** [1999] 20 ILJ 2302 (LAC) at 2313D-E; **Cape Town City Council v Masitho and Others** [2000] 21 ILJ 1957 (LAC) at 1960F-1961F **and National Union MetalWorkers of SA v Henred Fruehauf Trailers** 1995 (4) SA 456(A) at 463G-I.) When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific sanction for contravention of a specific

disciplinary rule, unfairness flows from the employee's state of mind, i.e. the employees concerned were unaware that they would be dismissed for the offence in question. When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined, or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike. However, as stated by Conradie JA in the **Irvine & Johnson case (supra)** at 2313C-J, the principle of consistency should not be applied rigidly and that **"…some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong."**

[9] This statement was qualified by the Labour Appeal Court in the case of **Cape Town City Council v Masitho & Others (supra)** where Nugent AJA stated the following at 1961 E-F:

> "**While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency (751D), in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where**

two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees all inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias".

Consistency is therefore not a rule unto itself but rather an element of fairness that must be determined in the circumstances of each case. (See also **SRV Mills Services (Pty) Ltd v CCMA & Others** [2004] 25 ILJ 135 (LC) at 143 B-C.)

[10] The assessment of the fairness of a dismissal is a moral or value judgment. (See **National Union of Metal Workers of SA v Vetsak Co-operative Ltd & Others** (1996) 17 ILJ 455 (A); **Media Workers Association of South Africa & Others v Press Corporation of south Africa & Others** 1992 (4) SA 791 (A) at 798I and 802A and **Cape Town City Council v Masitho & Others (supra)**.) What is unreasonable and unfair would depend on the facts and circumstances of each particular case. A dismissal can be said to be unreasonable "…**when you look at the sentence and you say to yourself, this sentence is so excessive (or so lenient) that I cannot in all good conscience allow it to stand; it is open to interference."** (Per Conradie AJ in the **Country Fair Foods** case at 1716C-D. The use of the word "sentence" is unfortunate as the purpose of imposing a sanction is not to punish an employee.) In **Toyota**

SA Motors (Pty) Ltd v Radebe & Others (supra) at 355A-E Nicholson JA also suggested that the basis for interference with a sanction was a "**yawning chasm between the sanction which the court would have imposed and the sanction imposed by the commissioner.** In **SACCAWU obo Johnson / Clover SA (Pty) Ltd,** [2000] 4 BALR 397 (CCMA) at 403**"** Grogan C noted that **"a commissioner acting as arbitrator must ask himself or herself whether there is such an alarming disparity between the penalty that was imposed by the employer and that which the commissioner would have been inclined to impose as to justify interference".**

[11] When assessing whether the sanction imposed by the employer is so excessive or grossly inappropriate that it justifies a finding of unreasonableness, regard may be had to the circumstances surrounding the commission of the misconduct, the employee's moral blameworthiness, the manner in which like cases were handled in the past (the element of consistency), the employee's disciplinary record, his length of service, the gravity of the misconduct and whether the employer may reasonably be expected to continue with the employment relationship. (See **Early Bird Farms (Pty) Ltd v Mlambo (supra)** at 545H-I; **Toyota SA Motors (Pty) Ltd v Radebe & Others (supra)** at 258G-I and Grogan **Dismissal**~~op cit~~ at 98-106 and the case law referred to). The list is not intended to be exhaustive.

[12] It is clear from a reading of the award that the first respondent's finding that the sanction imposed by the applicant was unreasonable and unfair was primarily based on the inconsistent

treatment of employees. The extract from the applicant's disciplinary register reveals that employees who, in the past, and subsequent to the third respondent's case, were found guilty of far more serious misconduct, were not dismissed by the applicant. It indicates that the applicant consistently treated employees who were guilty of conduct such as theft, gross negligence and corruption very leniently. By comparison the third respondent's misconduct was found to be of a less serious nature and the penalty imposed was inconsistent with the treatment of employees in the past. The first respondent further found that it follows from this that it did not lie in the mouth of the applicant to state that the third respondent's conduct had irreparably damaged the employment relationship.

[13] It was submitted on behalf of the applicant that the first respondent misdirected himself in finding that on the information placed before him, the applicant acted inconsistently in dismissing the third respondent. The applicant's case was not that the first respondent could not make a finding on the issue of consistency by having regard to the treatment and discipline meted out to employees who were engaged in misconduct that was not similar to that of the third respondent in the present case. The fact that those employees received more lenient treatment may similarly result in unfairness. The reason is that other employees may be unaware that dismissal would follow in respect of less serious misconduct. The applicant's submission was rather that without further information relating to the facts and the surrounding circumstances

of the incidents of misconduct reflected in the disciplinary register, the first respondent could not make a finding on the issue of consistency. The disciplinary register produced by the third respondent reflects particulars of the names of employees, the nature of the misconduct, the sanction imposed and the year during which it occurred. As stated, it is clear having regard to the said register that most of the misconduct reflected therein are of a far more serious nature compared to present matter. For instance, an employee found guilty of selling a key to a prisoner and other employees who were grossly negligent in instances where inmates escaped were given final written warnings. **Prima facie** this evidence, which was undisputed, points to inconsistency in the sanctions imposed and is likely to produce in the minds of interested and impartial observers alike a perception of unfairness and, possibly, one of bias or ulterior purpose. I say **prima facie** because there may have been justification in differentiating between those employees and the third respondent, such as their personal circumstances or the merits. The third respondent placed in issue the fairness of the decision to dismiss him and pertinently raised the issue of consistency. He established a basis therefor by presenting evidence with sufficient particularity in order to have enabled the applicant to deal therewith. Faced with a challenge to the consistency of the applicant's treatment of employees, the applicant, who bore the **onus** of proving the fairness of the dismissal (section 192(2) of the Act), elected not to place any evidence before the first respondent demonstrating that there was no inconsistent disciplining of employees. (See **SACCAWU &**

Others v Irvin & Johnson Ltd (supra) at 2314C and **SRV Mill Services (Pty)ltd v CCMA & Others (supra)** at 143E). I accordingly do not find any fault with the reasoning of the first respondent in this regard.

[14] It was submitted further that the first respondent erred in drawing a parallel between the case of the employee Esterhuizen and the case of the third respondent. As stated earlier, the said Esterhuizen was similarly charged with, and found guilty of, failing to take action whilst aware of the fact that prisoners were in possession of alcohol. Esterhuizen was given a final written warning. The differences between the two cases put forward by the applicant are more apparent than real. While the third respondent had told the prisoners to put away the alcohol they had in their possession, Esterhuizen, on the other hand, even though fully aware of the alcohol, walked away without confiscating it. He similarly failed in his duties in this regard and also indirectly colluded with the prisoners as the third respondent was found to have done. As in the case of the third respondent, the chairman of the disciplinary hearing in the Esterhuizen case came to the conclusion and took into account that Esterhuizen must have made himself guilty of similar conduct in the past. Although Esterhuizen was not also charged with unsatisfactory performance as the third respondent was, it is quite clear from the disciplinary record that this was a less serious charge and was treated as such by the chairman of the disciplinary enquiry. It may further be correct, as argued by the applicant, that in the case of the third respondent there were

aggravating features that were not present in the case of Esterhuizen. On the other hand, there were mitigating factors such as the fact that the third respondent did not deny his guilt and expressed remorse for his actions. As stated earlier, the imposition of an appropriate sanction is a value judgment and, assuming the sanction imposed on Esterhuizen was fair, the distinguishing features between the two cases are not such that it can be said that in respect of the third respondent a different sanction on the charge in question was justified.

[15] The applicant submitted that the first respondent wrongly applied the consistency principle, suggesting that he slavishly adhered thereto. Reliance was in this regard placed on the word of caution sounded by Conradie J in the **Irvine & Johnson** case **(supra)** at page 2313C-J of the judgment (See para.[9] above). However, by stating in his reasons for the award that "…**consistency is not a rule onto itself…"**the third respondent was in my view quite alive to the fact that the consideration of consistency is simply an element of the general principle of fairness and should not be applied rigidly.

[16] The applicant also relied in support of this submission on two subsequent awards made by the first respondent wherein he upheld the decision of the applicant to dismiss the employees concerned. Save to the extent that these awards may be used as authority in support of the applicant's submissions relating to the approach to be adopted in cases where the issue of consistency is raised, I am

not convinced that it could be used as evidence of a ground of review. The present award must be adjudicated on the evidence before the first respondent when he made the award and the reasons furnished in support thereof. Copies of the subsequent awards were handed in and it is clear the employees concerned, namely Boucher and Van Heerden, were charged with and found guilty of allowing prisoners to have alcohol in their possession and not confiscating it as well as taking money from a prisoner (Boucher) and trading in and using alcohol whilst on duty (van Heerden). These cases are therefore distinguishable from the present matter.

[17] The question, in my view, rather is whether, in the words of Nugent AJA in the **Cape Town City Council case (supra)**, the applicant in advance clearly advised employees that the earlier more lenient application of disciplinary measures could not be expected to continue in the future. What the position was in this regard must be determined within the context of what transpired during March to May 2002 when the third respondent transgressed the applicant's disciplinary code. At the third respondent's disciplinary hearing one of the applicant's witnesses, who testified with regard to the imposition of an appropriate sanction, alluded to the policy of the Department of Correctional Services to stamp out corruption. He referred to what appears to have been an article by a Commissioner Matthee (in a departmental publication "**Nexus")** wherein reference was made to corruption in prisons that had to be dealt with, that there will be no tolerance for

transgressions, a merciless disciplining of those who assist prisoners to escapes and a ruthless approach to combating crime in prisons. There is no indication that any of the parties relied on this evidence at the arbitration hearing. From the record of the disciplinary enquiry there appear to have been a dispute whether or not this policy statement was generally brought to the attention of employees. Whether this can be interpreted as having constituted an advice to employees that any form of misconduct will be treated harsher than in the past, is not clear. It may explain why no reliance was placed thereon at the arbitration hearing. More significantly however are the following remarks, by the same chairman who presided over the third respondent's disciplinary hearing, in her reasons for imposing the sanction of a final warning in respect of the employee Esterhuizen:

"This is the only case where the proof of inconsistency in this Department is shown in a disciplinary hearing. I am aware that we cannot be stuck with wrong decisions that had been made by other managers or by other chairpersons. I am almost certain that the Commissioner himself or the Minister and/or the President would not believe or would be more surprised to learn that after all their endeavours that they have tried to uproot acts of corruption and maladministration in prisons, we still have cases in 2003 where members who bring dagga to prison are actually issued with a final warning.

It is clear from the evidence of Mrs Dooling, Setlai himself, Vorster and Mr Damons that circumstances prevailed in Grootvlei at the time where members and managers contravened the policy almost as a custom or practice. Other members simply decided not to adhere to policy."

It would appear from this that the applicant did not implement its own policy, at least to the extend that it would have been clear to the applicant that past disciplining practices would no longer be adhered to.

[18] The applicant's final submission was that the first respondent misdirected himself in finding that the employment relationship between the applicant and the third respondent had not been harmed. The first respondent based his finding in this regard on the fact that the applicant in the past, when employees were convicted of more serious forms of misconduct, did not deem it necessary to discontinue the employment relationship. An employer relying on irreparable damage to the employment relationship to justify dismissal should lead evidence in that regard, unless it is apparent from the nature of the misconduct that the employees conduct had rendered the employment relationship intolerable. (See Grogan op cit at page 230). I agree with the first respondent's conclusion that at least **prima facie,** and in the absence of any other evidence, it cannot be concluded that the employment relationship had been harmed. Although the conduct of the third respondent cannot be described as constituting minor misconduct, it is not of such a nature that it can **per se** be said to have rendered the employment relationship intolerable. Both counts did not contain an element of dishonesty but rather constituted a failure on the part of the third respondent to perform his duties satisfactorily. I agree with third respondent's counsel that it appears to have been the approach of the applicant, and that

of the chairman of the disciplinary enquiry, that any form of misconduct would result in the employee no longer being worthy of trust. Such an approach is clearly incorrect. Whether or not the relationship of trust between employer and employee has been broken would depend on the nature of the misconduct concerned and on the facts and circumstances of each particular case.

[19] It is common cause that the disciplinary steps taken against the third respondent and other employees arose from the Jali commission appointed to investigate corruption in prisons. It would appear that the said commission exposed malpractices in prisons including the Grootvlei prison and this led to charge of misconduct against the third respondent. I am left with the distinct impression that the dismissal of the third respondent was in response to revelations at the Commission that errant employees were not being disciplined, resulting in a knee jeck reaction on the part of the applicant. There is continuous reference to corruption in the disciplinary record. Unsatisfactory work performance can hardly be said to constitute corruption. As stated earlier, there was no suggestion of dishonesty in the conduct of the third respondent or that he personally received any benefit from his conduct or his failure to act.

[20] On a conspectus of all the evidence, I am satisfied that the first respondent's award was properly based on the evidence before him and reflects an application of his mind to all the relevant facts and considerations. The conclusion reached by the first respondent, in

my view, cannot be said to be irrational or unjustifiable. He also clearly understood his function as being limited to one of having to determine the fairness or unfairness of the sanction imposed.

[21] Turning to the sanction imposed by the first respondent, namely that of a final warning, it cannot, in all the circumstance be said to be "**so out of kilter with what this Court would have imposed, that it constitutes a gross irregularity."** (Per Nicholson JA in **Toyota SA Motors (Pty) Ltd v Radebe & Others (supra)** at 258J.) As stated, the determination of an appropriate sanction is a value judgment based on fairness and upon a consideration of all the relevant circumstances. When the gravity of the third respondent's misconduct is weighed against considerations such as his long service (25 years), his clean disciplinary record, the fact that he showed remorse, confessed and pleaded guilty, and that he did not derive any benefit from his conduct, I am satisfied that the sanction imposed by the first respondent is reasonable and fair. The mitigating factors are such that they serve to indicate that the third respondent is unlikely to repeat the offences in question.

[22] For the aforegoing reasons the application falls to be dismissed. There is no reason, and none has been suggested, why costs should not follow the result.

[23] I therefore make the following order:

"The application is dismissed with costs."

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D VAN ZYL J

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	PRETORIA
Counsel for the third Respondent	**: Adv F J Van Der Merwe**

Date of judgment: 24 March 2006