IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2279/07

In the matter between:

MICHAEL MATHEWS **Applicant**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **1st Respondent**

COMMISSIONER HENDRIK OLIFANT **2nd Respondent**

PIONEER FOODS (PTY) LTD T/A
SASKO MILLING AND BAKING **3rd Respondent**

JUDGMENT

LAGRANGE, AJ

Introduction

1. This is a review application in which the applicant seeks to set aside an arbitration award by a CCMA commissioner. The commissioner had found the applicant's

dismissal by the respondent on 14 November 2006 to have been substantively and procedurally fair.

Preliminary Issues

2. Both parties filed condonation applications. The applicant filed a condonation application in respect of the late filing of his review application and the third respondent filed a condonation application in respect of the late filing of its answering affidavit. Both applications were unopposed and were granted. It is not necessary to go into the merits of these applications in this judgment.

3. The record of the proceedings was incomplete. This was a major factor contributing to the third respondent's delay in filing its answering affidavit. Had the applicant persisted with some of its grounds of review it might well have been impossible to determine them on the record available. The applicant in review proceedings does have an obligation to attempt the reconstruction of a record and his conduct in failing to co-operate with the third respondent in this regard is to be deprecated. However, the more limited grounds of review which were pursued at the hearing of the review application, could be addressed, despite the patchy quality of the record.

Background

4. At the time of his dismissal the applicant was a sales representative and had been working for the third respondent ('Sasko') for twenty-one years. The applicant was also a shop steward.

5. The applicant was dismissed on 8 August 2006. He had been accused and found guilty of two charges arising from his use of a car hired by Sasko to allow him to fulfil his union responsibilities relating to wage negotiations. The main charge against him was the "unauthorised driving or handling of company vehicles or equipment by driving excessive kilometres and not returning the hired vehicle on the date as authorised." He was also charged with "deliberate damage to company property or another employee or any other person, while on duty". The second

charge related to damage done to a lid to a storage compartment in the car's console, that had to be repaired. The applicant was issued with a final warning for this misconduct. It was the finding of guilt on the first charge which led to the applicant's dismissal.

6. The applicant had been permitted to use the car hired by the company for the purpose of attending wage negotiations that were conducted in Johannesburg, and for reporting back to members, who were located at premises of the employer in Aliwal North, Jan Kempdorp, Bloemfontein and Kimberley. The vehicle had been hired from 5 to 12 August 2006, but the applicant only returned it to the car hire company on 13 August 2006.

7. When the car was returned, the odometer readings recorded by the car hire company showed it had travelled a total of 2409 kilometres. Mr Grobbelaar, who had investigated the matter on behalf of the company, testified that he had compared the distance travelled with the shortest routes between places using a Geostar program provided by Shell. Grobbelaar said the comparison showed that the actual kilometres travelled exceeded the kilometres that ought to have been travelled if the shortest routes had been used, by 509 kilometres. He made an adjustment of 120 odd kilometres to allow for the fact that the applicant said he got lost in Johannesburg.

8. At the appeal hearing, allowance was made by the chairperson of the appeal hearing, Mr Florence, for additional kilometres the applicant claimed he had travelled in the course of performing the above duties. After this adjustment, 199 kilometres travelled were still unaccounted for on the company's calculation.

9. During his testimony at the arbitration hearing the applicant said that on his way to Johannesburg from Kimberley, he had discovered when he stopped in Warrenton that he had left his needles for his diabetic medication at home and had to return to fetch them. According to him the distance between Kimberley and Warrenton was 75 kilometres. Consequently, on the applicant's version, the

return trip between Kimberley and Warrenton could account for some 150 kilometres of the 199 additional kilometres travelled. However, this evidence was only tendered for the first time at the arbitration hearing and no satisfactory explanation was given by the applicant why it was not raised at the disciplinary enquiry or appeal hearing.

10. The applicant said he returned the car a day late because the airport car hire depot was closed on the previous day. The employer did not accept this as a good reason for the late return of the car because the applicant could have dropped the keys in a drop-safe for depositing keys at the airport. The employee did not trust this procedure.

The Arbitrator's findings

11. The arbitrator was only concerned with the misconduct for which the applicant was dismissed, namely the unauthorised use of the hired vehicle. The crux of the arbitrator's analysis on the question of whether the applicant was guilty of the charge reads thus:

> "Excessive kilometres were the main issue during the arbitration. It was the Employee's contention that he was not guilty as excessive was not defined. It also showed in the evidence because of what transpired in the disciplinary and appeal hearing. The appeal chairperson adjusted the kilometres that were accepted in the disciplinary hearing. It was also clear that the Employee had not kept a record of kilometres travelled. The Employer relied on a road map to claim excessive kilometres were being used. Clearly excessive kilometres in that sense are a grey area. However, it was part of the charge that the employee did not return the car on the date authorised. From the Employee's own evidence it is clear that he returned the car a day later. Clearly the day he returned the car he was also not authorised to drive it. It goes without saying that he was driving the car between the days. It is also logical to expect that those kilometres travelled were not authorised and could be termed excessive. From the fact that the Employee was willing to drive the car without authorisation I draw the inference that he could have used it for private travel. In that sense excessive kilometres could imply any kilometres he had no authorisation to travel. Based on the above I am of the view that the Employer had proved on a balance of probabilities that the Employee was guilty as charged."

12. After dealing with the unauthorised use of the vehicle, the arbitrator concluded his award, after briefly considering and dismissing a claim of inconsistent treatment by the applicant. In the concluding paragraph of his analysis he considers the appropriate sanction in these terms:

> "Was the sanction appropriate?
> (17) It was the Respondent's argument and evidence that this was a dismissable offence as it breached the trust relationship. The Employee also conceded during cross-examination that the company code made provision for a final written warning or dismissal in breach of this rule. Thus it is obvious that the Employee's 21 years service cannot allow him to escape dismissal as this is a dismissable offence. The Employer had proved that dismissal is a fair sanction and I have no reason to interfere."

Grounds of Review

13. The applicant attacks aspects of the arbitrator's reasoning relating to his findings on both the substantive and procedural fairness of the dismissal, which he claims rendered the award one that no reasonable arbitrator could have come to. The applicant did not persist with all the grounds of review set out in his founding affidavit, and accordingly only those pursued at the review application hearing are considered.

The arbitrator's finding that the applicant was guilty of misconduct

14. The first ground of review, which the applicant pursued at the hearing of the matter was that the arbitrator committed a gross irregularity in finding that he had breached a rule relating to the alleged excessive kilometres travelled when no such rule existed. In reaching this conclusion the applicant claimed the commissioner had failed to have regard to item 7 of Schedule 8 (the Code of Good Practice for dismissals) of the LRA, which *inter alia* required him to determine whether or not a rule of the workplace had been contravened. Having determined that the question of travelling 'excessive kilometres' was a 'grey area', it was absurd for the arbitrator to find the applicant guilty of breaching a rule of travelling excessive kilometres, according to the applicant.

15. The applicant further contends that the absence of a rule requiring the applicant to record kilometres travelled was acknowledged by the employer.

16. The applicant also attacks the arbitrator's reliance on the fact that he had no authority to use the vehicle after the date it was supposed to be returned, as evidence of the applicant having travelled excessive kilometres, whereas the focus of the charge relating to excessive travel concerned the travelling the applicant did from 5 to 12 August when he was fulfilling his functions as a union representative. In focussing on the kilometres travelled between the time he should have dropped the car off on 12 August and when he returned it the following day, the arbitrator failed to apply his mind to the relevant issue according to the applicant.

17. The applicant makes much of the fact that in the charge the unauthorised driving of the vehicle was related to the driving of "excessive kilometres" and that there is no misconduct described in the employer's disciplinary code which consists of driving excessive kilometres, hence no findings could be made that the offence for which the applicant was dismissed existed, nor could any findings consequent to such a conclusion be made.

18. This ground of review confuses part of the evidence of unauthorised use with the charge of unauthorised use itself. Essentially, the charge against the applicant consisted of his unauthorised use of the vehicle. One factual basis for the charge was that the distance travelled by the vehicle could not be fully accounted for by the applicant's legitimate use of the vehicle for the purpose of conducting his activities as a union representative in wage negotiations and report back meetings. The second sense in which his used of the vehicle was unauthorised is that he retained the car until the day after he should have returned it.

19. Mr Deysel, who chaired the disciplinary enquiry testified on the policy that drivers of company vehicles were expected to adhere to, namely that when using a company vehicle the shortest routes should be used. He also confirmed that the

applicant, as a driver, would have been aware of that policy. The regional HR manager, Mr Van Rensburg testified that he had personally explained the rule regarding the use of company equipment and vehicles to the shop stewards. Van Rensburg's version about the rule being conveyed to the shop stewards, was not directly challenged in cross-examination, though the applicant's own testimony was to the effect that code was explained to but the rule was not explained in relation to hired vehicles.

20. It is true that the arbitrator sought support for his conclusion that excessive kilometres were travelled based on the late return of the vehicle, and I agree with the applicant that the issue of excessive kilometres being travelled was really evaluated in relation to the aggregate mileage the applicant ought to have travelled in the course of performing his union duties and was not evaluated in terms of unauthorised mileage travelled during the short period when he still retained the car after the due date for return.

21. Because the applicant was not allowed to retain the vehicle until 13 August, his continued use of it on that day was not authorised in any event. Accordingly, the second factual basis for the charge of unauthorised use was established. This is the initial conclusion drawn by the arbitrator. He then, quite unnecessarily, went on to add that the kilometres travelled on the 13th were not authorised and therefore could be termed 'excessive'. This superfluous observation about mileage travelled on that day, does not detract from his conclusion that the applicant's retention of the vehicle until 13 August was unauthorised. This latter conclusion the arbitrator reached quite independently of his consideration of the mileage question.

22. What is apparent is that the arbitrator equivocated about whether or not the employer had established the excessive mileage travelled by the applicant in relation to the mileage he ought to have travelled in performing his duties as a union representative. Stripped of the redundant conclusions he drew about excessive mileage being travelled between 12 and 13 August, the commissioner's finding of unauthorised use of the vehicle was really based on the fact that the vehicle was not returned on 12 August 2006. His reasoning in this respect cannot be criticised.

23. Regarding the first ground of review, it is therefore not correct that the arbitrator found the applicant guilty of some undefined offence of travelling excessive kilometres. He found the applicant guilty of unauthorised use of the vehicle based on the failure to return the vehicle on the due date. The additional complaint raised by the applicant that the arbitrator failed to consider the fact that it was conceded in evidence that there was no rule that the applicant had to record the mileage travelled, does not detract from the validity of the charge of unauthorised use of a vehicle, which the employer sought to prove in two ways, firstly in relation to the mileage travelled relative to the duties performed and, secondly, on account of not returning the car on the due date. It was not unreasonable for the arbitrator to have accepted that the employer had a policy that drivers were expected to use the shortest route to a destination and that such a policy applied equally to the use of company vehicles and vehicles hired by the company.

24. The applicant never disputed the existence of such a practice nor did he contend that it was legitimate to use other routes to reach a destination even if they were longer. His main defence was that the apparently excessive use could be explained by unavoidable events like getting lost, or returning home for his medication, or travelling to his accommodation during negotiations. By advancing this defence, the applicant was not disputing the legitimacy of the principle that use of the vehicle for purposes other than the ones he was supposed to use if for, was not permitted.

The arbitrator's finding of the applicant's knowledge of the procedure for returning the vehicle

25. The applicant contends that Sasko failed to show that he was advised of what he should have done regarding the return of the vehicle in the event that the rental company offices were closed. Accordingly, the arbitrator failed to have regard to whether or not it was established that such a rule existed or that the applicant was aware of it. The applicant further contends that evidence that he was unaware of the drop-off procedure in such circumstances was not contradicted by the

employer, so there was no evidence to support a contrary inference that he ought to have known what to do.

26. From the patchy record, which the applicant's attorneys' decided not to attempt to reconstruct despite being invited to do so by the Sasko's attorneys, it materialises that the applicant did not dispute the existence of the signboard at the rental car drop-off at the airport stating that keys of vehicles were to be deposited in the drop-safe when vehicles were returned after hours. Two interrelated reasons were advanced by the applicant as to why he did not leave the keys in the safe. Firstly, the car rental office was closed and secondly, he did not trust the procedure. From this alone, it can be inferred that he was aware of the car rental firm's procedure for returning a vehicle after hours, and he decided for his own reasons not to comply with it. Accordingly, there was an evidentiary basis for the arbitrator's conclusion that the applicant knew about the procedure and his conclusions in this regard were not unreasonable. It is also noteworthy that the applicant did not dispute that he had the telephone number of Ms Bosh of the car rental agency, whom he could have phoned if he was doubtful about the procedure.

The arbitrator's consideration of the applicant's claim of inconsistent treatment

27. Another ground of review which was pursued at the hearing was the claim that the commissioner ought to have found that there was inconsistent treatment between the treatment of the applicant and other employees. This claim concerned employees who had apparently not been dismissed for causing damage to other cars hired by the company.

28. It is sufficient to note that the comparative cases cited by the applicant were not similar enough to provide a meaningful basis of comparison for a claim of inconsistent treatment. They involved instances in which vehicles had been damaged by employees, which did not result in their dismissal. The issue which led to the applicant's dismissal concerned unauthorised use of a vehicle, which is a different kind of charge. Apart from noting that the applicant complained that cases in which employees had caused 'more damage' were not dismissed, the commissioner complained that specific cases were not put before him to gauge

inconsistency. The commissioner dismissed the claim of inconsistent treatment on the basis of insufficient information. Given the absence of any obvious similarity between charges relating to damage to a vehicle, which might have been based on negligence and a charge relating to unauthorised use of a vehicle, as well as the lack of other details of those cases, the commissioner's failure to find that the applicant was inconsistently treated was not unreasonable.

Procedural findings

29. The applicants attack on the arbitrator's findings on questions of procedural fairness is two pronged. Firstly, the applicant contends the arbitrator failed to have regard to the bias admitted by the presiding officer in the disciplinary enquiry who argued that he had a right to caucus on the issue of the sanction to be imposed.

30. Secondly, the applicant submits that the arbitrator committed an error of law which makes his award reviewable insofar as he concluded that the employer's failure to allow the applicant to re-examine witnesses during the disciplinary enquiry did not render that enquiry procedurally unfair.

31. In assessing the procedural fairness of the employer not advising the union of its intention to discipline the applicant and of re-examination of witnesses not being permitted in the internal enquiry, the arbitrator approached the matter from the perspective of the prejudice suffered. He found that the hearing had been postponed and applicant did have representation and an adequate opportunity to prepare. Implicit in the commissioner's reasoning is that Sasko's failure to notify the union that it intended to take disciplinary action did not cause any identifiable prejudice to the applicant. He found that the applicant was given an opportunity to state his case in terms of Schedule 8 and had also been permitted an appeal which was not a requirement of the LRA.

32. No specific grounds have been advanced on review as to how the applicant was prejudiced as a result of the failure to permit re-examination in the internal enquiry, and I am disinclined in the absence of more detailed motivation to consider that such an omission adversely affected the applicant's ability to

advance his case in this instance. That is not to say that chairpersons of enquiries can simply dispense with the re-examination of witnesses. When new issues have been canvassed in cross-examination which need to be re-examined, or for any other legitimate reason that a witness might normally to be re-examined then the opportunity to re-examine a witness ought not to be denied. However, merely identifying the omission without making the slightest attempt to identify how it hampered the applicant's ability to prosecute his defence, is insufficient to make a finding that the commissioner committed a reviewable error by failing to find the omission was procedurally unfair.

The appropriateness of the sanction of dismissal

33. The applicant alleges the arbitrator committed a gross irregularity and misconducted himself in finding that travelling excess kilometres was an offence warranting the sanction of dismissal. This ground of attack relates to the ground of review discussed in paragraphs [14] to [24] concerning the fact that no offence of this kind existed in the employer's code of conduct, and correspondingly no recommended sanction existed for it either. For the same reasons mentioned in relation to that ground of review, this ground is also misconceived and must fail.

34. The applicant also submitted that the sanction of dismissal imposed on the applicant notwithstanding his 21 years service with a clean record, induced a sense of shock and the arbitrator should have interfered with the sanction. The rationale for this ground of review is based on the principle of applying a deferential approach to the employer's choice of sanction. It was enunciated in the decision in ***County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*** **(1999) 20 ILJ 1701 (LAC),** at 1716 par [43]. This principle has been superceded by the decision of the Constitutional Court in ***Sidumo & Another v Rustenburg Platinum Mines Ltd & others*** **(2007) 28 ILJ 2405 (CC)**, in terms of which the commissioner must determine whether a dismissal is fair or not, without undue deference to the employer's choice of an appropriate sanction.[1]

[1] At 2462-2463, paras [179] to [184], of the judgment.

35. Further, the applicant contends there was no factual or legal basis for the arbitrator to conclude that a sanction of dismissal was justified, and the arbitrator failed to have regard to the factors mentioned in Item 3(5) of the Schedule 8 of the Labour Relations Act 66 of 1995 ('the LRA'), when considering whether the sanction of dismissal imposed by the employer was appropriate.

36. Did the arbitrator have regard to all the factors he should have considered when deciding that the sanction of dismissal was fair? In terms of the employer's code of conduct the arbitrator found that the offence of unauthorised use of a vehicle could attract either the sanction of a final written warning or a dismissal. He found that dismissal was the 'obvious' sanction despite the employee's 21 years service, and a clean disciplinary record. The commissioner concluded that the employer had 'proved that dismissal is a fair sanction and I have no reason to interfere'. In reaching this conclusion, it seems that the arbitrator adopted the view that because the employer's code sanctioned dismissal as a possible outcome, it was a potentially legitimate one and the employer had justified it as an appropriate sanction taking into account the evidence of a breakdown in the trust relationship.

37. Items 3(4) to 3 (6) of Schedule 8 of the LRA set out factors that should be considered by an employer, when contemplating dismissals for misconduct. Items 3(4) and 3(5) read as follows:

> "(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.
>
> (5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."

38. In *Sidumo*, Navsa AJ, put the duty of a commissioner when considering the fairness of a dismissal thus:

> "[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."[2]

39. In his assessment of the applicant's conduct, it is plain that the arbitrator was ambivalent about whether or not the evidence relating to the number of excessive kilometres allegedly travelled was clear enough to establish that the applicant had made unauthorised used of the vehicle on that basis and effectively decided not to rely on this factual leg of the charge. The arbitrator's finding of unauthorised use of the vehicle rested rather on the fact that the applicant still had the use of the vehicle after he should have returned it. The extent to which the applicant actually used it for his own purposes on 13 August 2006 is not clear.

40. However, relying on the fact that the applicant had the car the day after it should have been returned the commissioner then inferred that excess kilometres had been travelled. It seems he felt compelled to reach this conclusion based on the importance attached by Sasko to the excessive kilometres travelled in order to demonstrate that the applicant did make unauthorised use of the vehicle and to what extent he had done so. In the evidence of Mr Florence, the chairperson of the internal appeal hearing, the issue of the excessive kilometres travelled is mentioned time and again as being the main issue that pre-occupied him. Clearly, it featured pre-eminently in his evaluation of the unauthorised use made of the vehicle.

[2] At 2432-3 of the judgment.

41. As mentioned already, the commissioner's reasoning in concluding that the applicant was guilty of the misconduct charged, at least insofar as it was based on the applicant retaining the vehicle longer than he should have, is correct. However, in evaluating the sanction the commissioner appears not to have considered that when the employer imposed the sanction of dismissal on the applicant it did so against the backdrop of also having found the applicant guilty of the misconduct because of the excessive kilometres it determined he had travelled, and on which it placed so much emphasis. By contrast, the commissioner's finding rested on the narrower basis mentioned. Essentially the commissioner's finding was that the applicant was guilty of unauthorised use of the vehicle because he did not return it on the due date, when the car rental office was closed, but only did so the following day.

42. There is no evidence the commissioner reflected on the relative gravity of the actual misconduct on which he made his finding of guilt compared with that on which the employer originally made its finding, and whether or not this ought to have affected the appropriate sanction. Nowhere in his very brief explanation for the appropriateness of the sanction of dismissal does the commissioner indicate that he gave any thought to the circumstances of the infringement or the gravity of the particular misconduct on which he actually relied to find the applicant guilty on the charge. In the circumstances, I cannot be confident the commissioner considered the intrinsic seriousness of the type of misconduct or the gravity of the particular transgression before him when he evaluated the fairness of the dismissal, and implicitly found that a final written warning would not have been sufficient.

43. In considering the apparent factual basis which informed the commissioner's decision, the evidence available to the commissioner, on which a breakdown of the trust relationship might have been based, requires closer scrutiny. The evidence on this issue appears to have been that of Mr Grobbelaar and Mr Deysel. In Grobbelaar's testimony at the arbitration hearing, after stating the trust relationship had broken down he is asked by the employer's representative why he says this. His answer to this on page 58 of the transcript is recorded as 'indistinct'.

The transcript of the employer representative's notes, provided courtesy of the employer's attorneys, does not shed any more light on what Grobbelaar's explanation was.

44. Other evidence on the status of the trust relationship was provided by the chairperson of the disciplinary enquiry, Mr Deysel. He was asked during cross-examination whether or not he had looked at the applicant's file before deciding on the sanction. The pertinent part of his answer is recorded at page 111 of the transcript as follows:

> "Mr Commissioner, I did not compare this with his file, as I stated, I did not look at Michael's file, but I did take into consideration …(indistinct)…what Joe said to me, 21 years and six dependants. However, being in a senior position and a trusted shop steward that must lead people, he broke the rules, he broke the trust relationship of the company."

45. In answer to further questioning, Deysel repeats his view that the trust relationship between the company and the shop steward had broken down but the transcript suggests no further details were provided. Whatever Deysel intended to convey and whatever the merits of such a proposition, the difficulty with this kind of evidence is that it was provided by the chairperson of the enquiry, which is the type of testimony that the Supreme Court of Appeal has found to be unsatisfactory evidence of a breakdown in the trust relationship.[3] Similarly, whatever Grobbelaar said about the trust relationship, this would also be an unsatisfactory basis for deciding the issue, by virtue of his role as an investigator.

46. Accordingly, to the extent that the commissioner relied heavily on a breakdown of the trust relationship to determine the fairness of the dismissal, the commissioner's finding rests on a questionable evidentiary basis, which a reasonable commissioner would not have relied on.

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[3] See ***Edcon Ltd v Pillemer N.O. & others*** **(2009) 30 ILJ 2642 (SCA)** at 2651-2, paras [19] to [21] in which Mlambo JA held that the management view of the impact of the employee's conduct on the state of the trust relationship could not be derived from the evidence of the chairpersons of internal enquiries nor the investigator of the misconduct, but from the managers to whom the employee reported.

47. Accordingly, I cannot accept that the arbitrator gave proper consideration to the question whether the actual misconduct of the applicant was so serious and of such gravity that it had a completely destructive impact on the employment relationship which justified the applicant's dismissal. Moreover, it appears that an important factual component of his reasoning rested on a problematic evidentiary basis, the value of which he failed to consider.

48. Although the applicant has been successful to a limited degree, as a mark of the court's disapproval of his failure to co-operate with the third respondent's attorneys in reconstructing the record I am not making any award of costs in his favour.

49. Had the record been better, it might have been possible for the court to substitute its own decision for the arbitrator, but as there may be parts of the record the parties would need to try and reconstruct for the purposes of the reconsideration of the sanction, in the circumstances it would be better if the commissioner who presided in the matter dealt with this.

Order

50. Accordingly, the following order is made:

    50.1. the second respondent's finding in his award of 2 May 2007 that the dismissal of the applicant was fair is set aside;

    50.2. the matter is remitted to the first respondent for the second respondent to reconsider whether or not, in all the circumstances, the applicant's dismissal was fair given the misconduct which he found the applicant committed;

    50.3. the first respondent must convene a hearing before the second respondent for the parties to make further submissions on the issue of an appropriate sanction, and to present argument on the appropriate remedy to be granted in the event that the second respondent might

find that it was unfair to dismiss the applicant for the misconduct which he found the applicant guilty of,

50.4. prior to the hearing the applicant and the second respondent shall attempt to reconstruct those parts of the record which they intend to rely on in the hearing, and failing agreement thereon, they shall present their respective versions of those portions of the record to the second respondent;

50.5. no order is made as to costs.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 2 February 2010
Date of judgment: 5 May 2010

Appearances:

For the applicant: Mr M J Ponoane of Ponoane Attorneys

For the respondent: Adv M Van As
Instructed by Deneys Reitz Attorneys Inc.