IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C218/2003

AMERICAN LEISURE CORPORATION,
DURBANVILLE CC t/a PLANET FITNESS Applicant

and

JOHAN VAN WYK First Respondent

WILLEM CONNAN N.O. Second Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION Third Respondent

JUDGMENT

MURPHY AJ,

1. The applicant seeks an order in terms of section 145 of the Labour Relations Act of 1995 ("the LRA") setting aside the award of the second respondent ("the commissioner") under case number WE 10339-02 on 27 March 2003 in which he held that the first respondent (van Wyk) was dismissed in a manner which was procedurally and substantively unfair, and in respect of which he ordered the

payment of compensation in the amount of R79286, 66.

2. The applicant has raised a number of grounds of review alleging irregularities of one kind or another on the part of the commissioner. In addition, disputes have arisen regarding the late filing of papers at various points in the process resulting in opposed applications for condonation and an application for dismissal of the main review application. I propose to return to these applications after consideration of the merits of the review application.

3. The applicant's various grounds of review challenge the justifiability and rationality of the award, and in particular some of the commissioner's evidentiary findings and legal conclusions. The applicant's case is that the commissioner in making his determination failed properly to consider and evaluate the evidence and thus committed a gross irregularity because there is no rational connection between the evidence and the findings in the award. In short, the argument is that the award is not justifiable. However, throughout the papers it is clear that the applicant is of the view that van Wyk was not dismissed, and, although not cogently argued in such terms, it is accordingly intimated that the commissioner erred in assuming jurisdiction. An erroneous assumption of jurisdiction normally would constitute an error of law resulting in the commissioner exceeding his or her powers, a defect in terms of section 145(2)(a)(iii) of the LRA, rather than a gross irregularity in terms of section 145(2)(a)(ii).

4. A commissioner's power to arbitrate unfair dismissal cases is conferred by section 191(5)(a) read with section 136(1) of the LRA. The jurisdictional pre-condition to the exercise of that power is the requirement that there be a dispute about the fairness of a *dismissal* as defined. Section 186 defines a dismissal to mean:

> (a) an employer has terminated a contract of employment with or without notice;
>
> (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
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> (c) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;
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> (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another;
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> (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee; or
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> (f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

5. In paragraph 5.5 of the founding affidavit, Ms Lynda Niethammer, the applicant's

Industrial Relations Manager, states correctly that the gist of the dispute between the parties is whether van Wyk was dismissed and avers further that applicant never dismissed van Wyk as he alleges. In paragraph 6.7.3 she makes the general allegation that the commissioner has exceeded his powers. Taking these averments together, and notwithstanding counsel for the applicant not formulating his submissions quite in this way, I am of the opinion that the primary issue for determination is whether the commissioner had jurisdiction to make the award. This, to state the obvious, necessitates consideration of whether or not a dismissal occurred, in fact and in law. If indeed there was no dismissal the matter ends there. If, on the other hand, there was a dismissal, the other grounds of review going to the justifiability of the findings of unfairness and the award of compensation will come into play.

6. Van Wyk commenced employment with the applicant as a sales representative on 13 May 2002. His function was to sell membership of the Planet Fitness club in Durbanville to users of its facilities. The last day on which he put in an appearance at work was 28 August 2002. Van Wyk says he was dismissed. The applicant claims he absconded or resigned. Whatever the case, his employment endured for a total period of about three and a half months. By all accounts van Wyk proved to be a good sales consultant and performed well. His immediate superior was Mauritz Fensham, the applicant's sales manager at Planet Fitness Durbanville. The relationship between van Wyk and Fensham became troubled after the latter

issued a warning to all the sales consultants under him for not meeting their targets, which van Wyk considered unjustified in the circumstances. He took the matter up with the club manager, Smuts, but since he did not formally lodge a grievance his complaint went no further, but seems to have left a lingering sense of injustice.

7. On 28 August 2002 van Wyk began to show the symptoms of flu and a throat infection. Early on the morning of 29 August 2002 he came to work with the purpose of informing Fensham that he was ill. Fensham was not there at the time. He returned to the club the following day, 30 August 2002, again with the intention of speaking to Fensham who was once more not present. However, on both occasions he communicated to other employees that he would be absent on account of his ill health.

8. After 30 August 2002, van Wyk had no direct contact with Fensham until he spoke to him on the telephone on 11 September 2002 and never returned to work thereafter. Van Wyk alleges he was dismissed somewhere between 30 August and 11 September 2002, and, as already stated, the applicant claims to the contrary never to have dismissed him.

9. Van Wyk's version of what transpired was presented at the arbitration as follows. He began to feel sick on 27 August 2002 and mentioned this fact to Fensham who

suggested he use certain medication. When he reported to work early on 29 August 2002 he did so with the intention of informing Fensham of his ill health. He lived in close proximity to the club and thus presumably did not see it as too great an inconvenience to report ill in person rather than by phone. On arrival he discovered that Fensham was not there. Only Corlia Eykelenboom (a receptionist) and Vernon Smuts (the club manager) were present. He spoke to Smuts who told him to inform Fensham of his illness, when he failed to find Fensham he went to the reception to enquire where he might be. On being told that he had not come in, he left a message for him with a colleague, Jakes, that he had gone home on account of his illness. He then visited his doctor who put him on a course of anti-biotics and booked him off sick for the period 29 August - 7 September 2002. However, the next day, in response to an SMS from a colleague indicating that there might be a problem, he returned to the club, again early in the morning. On arrival he went to his desk and saw that his desk had been cleared and that another consultant's diary was on his desk. He looked around the office for his correspondence but was unable to find it. He than spoke to Eykelenboom who he claimed warned him that she believed Fensham wanted to get rid of him and drew his attention to the fact that his name had been removed from the white board on which the consultants' sale targets and performance were recorded. Normally, so he testified, a consultant's name would be removed from the board only on leaving the applicant's employ.

10. When asked why he had not returned to work at the expiry of his sick leave on 7 September 2002, van Wyk claimed that Fensham had issued an instruction to one of the receptionists that he was to be barred entry to the club. Van Wyk called Mr. Graeme Lilley, a receptionist, to corroborate this. Lilley confirmed that he had received an instruction from Fensham but had some difficulty in remembering its precise content. Initially he testified that the instruction was "to that effect don't let him in under any circumstances, if he wants to speak to Mauritz (Fensham) then call Mauritz". However, under cross-examination he conceded that the instruction could merely have been one to hold van Wyk at reception so that Fensham could speak to him as he came in. The book kept at reception for recording messages and instructions for the relevant period has disappeared.

11. Despite not having spoken to either Fensham or Smuts about his position, van Wyk, on the basis of his cleared desk, his name not appearing on the white board, Eykelenboom's warning and the alleged instruction (which he never saw recorded in the reception book), concluded that the had been dismissed on 30 August 2002.

12. The applicant saw things in a different light. When van Wyk failed to make direct contact with him in the days after 28 August 2002, Fensham, so he said, directed three written communications to van Wyk in early September 2002 calling upon him to report to work. The first is a letter dated 2 September

2002 which reads:

> Hi Johan would you be so kind as to give me a call or let me know what is going on, because we have not seen you since Tuesday 27th August 2002.

11. The second letter dated 3 September 2002 reads:

> We refer to the above matter and your absence from work on 27 August 2002 until to date 3rd of September. You have made no attempt to contact your employer.

Kindly note that your aforesaid actions are without permission and constitute absconsion.

> In the circumstances, you are hereby instructed to report to the company by no later than the 4th of September at 12 am sharp in order to investigate your actions.

Further note that should you fail to report for duty on the above mentioned date and time your actions and / or omissions will be construed to be that of absconsion, without the intention to return to work, and your contract of employment will terminate automatically.

12. The third written communication was in the form of a telegram sent on 4 September 2002, notably in a less formal tone than the letter of the preceding day, which said:

> Johan laat weet my asb wat gebeur , ek het vir jou al ‘n brief gestuur saam met Jakes op die 2de September”.

What is conspicuous about the telegram, in addition to its friendlier and less formal tone, is the absence of any reference to the formal, legalistic letter of the preceding day. Van Wyk denied ever having received the letters of 2 or 3 September 2002, but admitted to receiving the telegram on 6 September 2002. The first time he saw the two letters, he claims, was at the conciliation proceedings of the CCMA in December 2002.

On receiving the telegram on 6 September 2002, van Wyk did not contact Fensham as requested. His explanation in this regard was that he had lost trust in Fensham on account of his desk having been cleared and his name not appearing on the consultants' board. In response to a somewhat leading question he claimed that he was under the impression that he had been dismissed. The interchange with his attorney on this score is revealing:

> **Attorney**: Nou hoekom het u hom nie gekontak nie?
>
> **Van Wyk**: Omdat ek alreeds gerreet het op daardie stadium en dit gesien het dat mnr Fensham my lessenaar ontruim het, dat my naam van die konsultantebord gehaal is, dat ek nie n die klub mag kom nie. Op daardie stadium het ek al my vertroue in mnr Fensham verloor.

Attorney: Was u indruk dat u nog in diens was van die werknemer op daardie stadium?
Van Wyk: Ek het nie hierdie brief, hierdie telegram het ek nie - ek nie begryp waaroor hierdie telegram gaan nie want op daardie stadium was ek onder die indruk dat ek my werk verloor het by Planet Fitness.

13. Van Wyk in his testimony defended his presumption that he had been dismissed with reference to subsequent events. In particular, on 6 September 2002 he was contacted by one of his clients, Mr. Chris van der Merwe, who told him that on 2 September he (van der Merwe) had been told by one of the consultants and the receptionist at Planet Fitness that van Wyk no longer worked there. Despite van Wyk indicating during his testimony that van der Merwe would be called as a witness to corroborate this, van der Merwe did not in fact testify and hence the

hearsay evidence regarding the content of the conversation between van der Merwe and the staff should be regarded with caution. Nonetheless, according to van Wyk, it further influenced his impression that he had been dismissed, even though, as he reported it, the staff members merely informed van der Merwe that he no longer worked there. As van Wyk put it:

> ”Hy was by een van die ontvangsdames en hy was by een van die konsultante wat hom meegedeel het *dat ek nie meer werksaam* is by Planet Fitness nie”.

14. Because he had lost trust in Fensham, van Wyk felt justified in not contacting him. Instead he sent an SMS to Mr. E van der Berg, the person in charge of all the receptionists in the applicants’ clubs nationally. When he did so, is not evident. Nor is it clear what he said in the SMS, or why he considered it necessary to contact her at all. When he received no response from her, he contacted Ms Louette Robertson, the Human Resources Manager, based in Johannesburg. Again it is not clear when he made contact with Ms Robertson or what the purpose of his call was. It would seem that he phoned her sometime after receiving the telegram on 6 September 2002 at which stage, according to his earlier testimony, he was under the impression that he had already been dismissed, However, his testimony on the point is slightly at odds with that conclusion. In response to a question asking what they had discussed, he said:

> ‘‘Ek het haar genoem wat besig is om by, wat plaasgevind het by Planet Fitness in Durbanville. Ek het ook vir haar gese dat ek nie graag sou wou gehad het dat - dit was nie my eerste keuse gewees om haar te kontak nie omdat mnr Fenshan nie daarvan gehou het dat ons senior personeellede in Johannesburg moet kontak oor gebeure op plaaslike vlak wat in Durbanville self aangaan nie”

15. Robertson told him to contact Fensham, which he did shortly thereafter on 11 September 2002 by telephone and proposed that they meet outside the club, off the work premises. His unsolicited explanation for wanting to meet off the premises was that he was convinced that he had been barred from the club. Fensham refused to meet him off the premises, but according to van Wyk said he was welcome to come to the club to meet and discuss his “personal affairs”. Van Wyk claims to have indicated during this conversation that he wished to return to work, to which Fensham allegedly said that under no circumstances would he be allowed to return, as he did not wish to create a precedent. This was van Wyk’s only contact with Fensham after taking sick leave. He interpreted the conversation as confirming what had gone before, namely that he had been dismissed.

16. Van Wyk thereafter again spoke to Robertson and relayed to her the content of his telephonic conversation with Fensham. According to him she was surprised and enquired about what he proposed to do next. He appears to have reserved his rights and shortly afterwards referred a dispute to the CCMA.

17. Under cross-examination van Wyk initially tried to justify his failure to communicate with Fensham between 28 August and 11 September on the grounds that he did

not have his cell phone number, but could offer no convincing explanation for failing to contact him on the club's land line, limiting himself to a claim (somewhat at variance with his earlier stated assumption that he had been dismissed) that he assumed Fensham would have heard via Smuts that he was sick at home. Later in his testimony he sought to excuse his failure to communicate with Fensham on the basis that his desk had been cleared. He could not explain why he had chosen not to challenge Fensham about this. Nor could he convincingly clarify why he had not approached Smuts, the club manager, something he had done readily in the past, in particular when he felt aggrieved by the warning given to all the consultants in July 2002. His specific response to this was to say that he had lost trust in Fensham. Such a non-responsive answer sheds little light on his failure to approach the next level of management at the club. He could also offer no satisfactory answer for why he had not come back to the club to clear things up between 28 August and 11 September 2002, despite living in close proximity and having left his sick bed during that time to visit his doctor on more than one occasion.

18. Furthermore, he admitted that neither Smuts nor Robertson had informed him that he had been dismissed and that he had relied solely on his own perceptions, which he felt were confirmed in the telephone conversation with Fensham on 11 September 2002. Somewhat illogically he maintained that he did not respond to Fensham's invitation to meet at the club, because he had previously been barred

(by Fensham) from entering the club, and also because Fensham sought to limit the proposed discussion to his personal affairs rather than work related matters. And finally he explained that his failure to take the matter up with Smuts was on account of his having assumed by 30 August 2002 that he had already had been dismissed. He could offer no persuasive reason for relying on the say so of junior employees such as Eykelenboom without seeking to verify the position with Smuts.

19. Van Wyk further acknowledged that during the CCMA conciliation proceedings in December 2002 he had declined to accept the applicant's offer of reinstatement or re-employment on the grounds that the offer did not include payment of back pay for the period he had not worked, being 3 months, and also because the offer was to work in Claremont, while he preferred to work in Table View.

20. Besides calling Lilley (the receptionist), van Wyk called Vernon Smuts, Jeanette van der Westhuizen and Corlia Eykelenboom as witnesses. Smuts' evidence was aimed at supporting certain factual aspects of van Wyk's testimony. In relation to the issue of whether a dismissal occurred, one or two points proved to be of considerable relevance. Firstly, Smuts confirmed that van Wyk had been unhappy about the verbal warning issued to all the sales consultants in July 2002. Secondly, he testified that as club manager all disciplinary action fell within the scope of his responsibility. Normally any dismissal effected by Fensham would have to have been done in conjunction with him (Smuts) and the regional manager, Neil

Strangelman. He stated that he had not dismissed van Wyk but that in conjunction with Fensham had tried to sort the problem out. Under re-examination by van Wyk's attorney he explained the course of action he took as follows:

> **Attorney**: And what was this action that you took?
>
> **Smuts**: Sending out, we tried to get hold of Johan, (van Wyk), phone calls and then we just formalized it by giving a telegram.
> **Attorney**: And that was that, you left it at that?
> **Smuts**: Ja. The thing is the ball is put into his court that he got, we opened the door saying Johan come in, lets listen what's wrong, sort the whole thing out and we can just put it to bed. As far as I know he never contacted the club at all.

21. Ms van der Westhuizen, the applicants' administration manager, testified that she had received an instruction from Fensham at the end of August 2002, to remove van Wyk's name from the white board, that he was removed from the financial statements (recording consultants' performance) at the end of September and that Fensham had told her that van Wyk no longer worked for the applicant. While her evidence was clear that the instruction to remove his name from the board was given on 30 August 2002 and that he was removed from the statements at the end of September, it is not clear from her evidence precisely when Fensham told her van Wyk no longer worked for the applicant.

22. Ms Eykelenboom confirmed that on 29 August 2002 she noticed that van Wyk's desk had been cleared and that his name had been removed from the white board, and that Jakes, a fellow consultant, was working at van Wyk's desk. She qualified her testimony by conceding that she could not say unequivocally that van Wyk's

correspondence and belongings were not on his desk. She could also not contradict that there were at that stage 13 consultants in employment and only 11 available desks, thus justifying the use by Jakes of van Wyk's desk during the latter's absence. She said nothing at all, and was not questioned by either party, about the warning van Wyk said she had given him about Fensham's alleged intentions to get rid of him.

23. Three witnesses testified on behalf of the applicant at the CCMA arbitration proceedings, namely Fensham, Smith and Pienaar.

24. Fensham testified he was aware on 27 August 2002 that van Wyk had flu, but, as he saw it, van Wyk simply disappeared. When he failed to hear from van Wyk he tried to contact him telephonically without success and later addressed the three written communications to him. He also instructed other staff members to contact van Wyk by phone, who reported that his phone was switched off. Certain employees did report seeing him in the evening at the local supermarket. When van Wyk persisted in not reporting for work he sent Jakes with the letter dated 1 September 2002 to van Wyk's home. Jakes reported to him that he had delivered the letter by hand and placed it in van Wyk's letterbox. When there was no response to the letter it was decided to resort to the telegram.

25. Fensham confirmed that the first contact he had with van Wyk after 28 August

2002 was when van Wyk phoned him on 11 September. Fensham's version of the phone call differs materially from that of van Wyk. He acknowledged that he had invited van Wyk to come see him at the club and had mentioned that he did not want to create a precedent. However, because of van Wyk's exceptional sales performance he was prepared to give him a second chance. In explaining what he meant by not wanting to set a precedent, he said:

> "Want daar moet eers regstappe geneem word sodat ek nie presedent skep by my personeel nie, anderster gaan dit n "ongoing" ding word en dan kan elke tweede personeellid vir my dit gebruik as n voorbeeld en dieselfde met hulle, hulle kan dieselfde doen en daar sal geen aksie geneem word, dis nie net van terugkom nie, ons gaan stappe neem, ek gaan daarvandaan af kyk"

26. By this one understands Fensham to have communicated that his intention was not to dismiss but to institute disciplinary action against van Wyk for his absence and refusal to contact him immediately upon receiving the telegram. However, Fensham pointed out that he had a self-interest in van Wyk's continued employment, since his own salary was determined by the performance of his sales consultants, of which van Wyk appears to have been one of the top performers. He denied dismissing van Wyk and claimed he told him to come back to work, but reiterated the fact that he would have to face discipline. The conversation ended on that note and that was their last contact until the CCMA proceedings. Fensham at that point remained under the impression and the hope that van Wyk would

return. He further denied that he intended to restrict the discussion at the proposed meeting to van Wyk's personal affairs, saying he had no interest in such matters being concerned only about the work situation.

27. When Fensham was asked if he had cleared van Wyk's desk on 29 August 2002, he replied strongly that the accusation was absolute rubbish. He explained that there were 13 consultants and not enough desks and he had accordingly instructed Jakes to use van Wyk's desk during his absence. Van Wyk's possessions on top of the desk were moved behind the computer while others were left untouched in the desk drawer. When asked why this had not been put to van Wyk in cross-examination, Fensham claimed to have re-called the situation on the evening prior to giving testimony. Basically, his testimony was to the effect that during van Wyk's absence Jakes had used his desk and had moved his possessions aside for that purpose.

28. As for the removal of van Wyk's name from the white board, Fensham explained:

> "Dis baie eenvoudig. Ons aktiwiteite goed en wel, dit word op n weeklikse sowel as n maandelikse sowel as n daaglikse basis word dit verander op die wit bord, dis hoekom dit met koki wat afgevee kan word gedoen word. Johan was op daardie stadium drie of vier dae nie by die werk nie, haal sy naam af, as hy terugkom sit maar net sy naam weer by. Daar is n 13de persoon of n 12de persoon wat se naam op die bord geskryf kan word"

29. He elaborated further that the information on the board could change daily or more frequently depending on what needed to be reflected. There is no policy or procedure regarding what has to be reflected on the board. The board is used as a management tool to be applied entirely within his discretion to monitor the performance of the sales consultants on a daily basis. In the nature of things, if a consultant was absent for a period, his name would not be reflected on the board.

30. He justified the instruction he gave van der Westhuizen to remove van Wyk's name from the financial statements on the grounds that van Wyk's not writing business during his absence would have reflected poorly on the performance of his team of consultants as a whole, which he wished to avoid because this might create the perception with management that he was under-performing.

31. Finally, he also admitted giving the receptionist an instruction regarding van Wyk's entry on return to the club. However, here again, his explanation differs materially from the inference van Wyk drew from the instruction. When asked if he had given the instruction, he replied:

> "Nee dis 100% korrek, dit was my instruksie, maar ek het gese ek wil, hulle mag nie Johan nie in die klub toelaat nie alvorens hulle my roep nie,mits hulle my roep nie, die eenvoudige rede, niemand kan met Johan kontak maak nie na aanleiding van my drie oproepe wat ek hom in die hande probeer kry het, die briewe was uitgestuur was en dan natuurlik geen terugvoering van sy kant af na my toe nie, geen kommunikasie nie……..

> Maar nietemin na aanleiding van dit, omdat ek persoonlik nie self kontak kon maak met Johan nie en omdat hy kee sewe-uur, agt uur in die oggend in die klub inkom en hy weet goed ek begin kwart voor nege werk hoekom het my nie kwart voor nege genader nie. So die enigste (onduidelik) wat ek met hom kontak kan maak is wanneer hulle my roep, en dis hoekom my instruksie was wat hy was, dis ook my reg om dit te doen"

32. He elaborated that it was necessary to make such an instruction in the interests of securing his disciplinary authority.

33. Lastly Fensham expressed disquiet and frustration at the fact that van Wyk had not at first approached him directly about whether he had been dismissed but had instead chosen to rely on a conversation he had held with other staff members. He also testified that he had never dismissed any of his sales consultants since being employed by the applicant.

34. Under cross-examination Fensham was unable to remember precisely when van Wyk's name had been removed from the white board. In his evidence in chief he had remarked that this had been done only after van Wyk had been absent for 3-4 days. He failed however to effectively counter the testimony of Eykelenboom and van Wyk that it was in fact removed on 29 August, a day after van Wyk took sick leave. He felt in any event that it was a matter within his discretion and that no negative inference could be drawn from his conduct in that regard.

35. Also under cross-examination Fensham made it clear that head office would have to have got involved in dismissing van Wyk, and hence he would not have had the authority to effect a dismissal during the telephone call of 11 September 2002.

36. The applicant called Jacques Smith, its assistant sales manager at Durbanville, as its second witness at the arbitration hearing. His testimony corroborated the evidence of Fensham in a number of respects, namely that van Wyk's desk had not been cleared but rather that his few possessions had been removed behind the computer, that the purpose of the white board was to record the daily statistics, that he understood the instruction to the receptionist to be intended to keep van Wyk at reception so that Fensham could talk to him, that attempts had been made to contact van Wyk telephonically and that normally the club manager and the regional manager would be involved in meting out disciplinary action. He also re-called the letter of 1 September and seeing Jakes taking it to van Wyk, though he did not accompany him to deliver it.

37. On the question of the white board, Smith testified under cross-examination initially that the consultants' names as a rule remained on the board and only the figures or statistics would be altered on a daily basis. He subsequently sought to qualify this with a somewhat unclear explanation suggesting that there were occasions where a consultant's name might be taken off the board.

38. The last witness called by the applicant at the arbitration was PJ Pienaar, a sale consultant. His testimony was directed at showing the difficulty experienced in making contact with van Wyk. Pienaar had lent van Wyk a television set which he wanted back. When he encountered van Wyk by chance on a public road in early September 2002, the latter informed him that he would return the television once he had found alternative accommodation. Pienaar corroborated Fensham's version regarding the alleged clearing of the desk, the dispatch of the letter with Jakes and the instruction to the receptionist.

39. Turning now to the award. In it the commissioner accurately and conscientiously summarized the evidence, and correctly defined the issue to be whether a dismissal had taken place. Section 192(1) of the LRA requires that the employer must establish the existence of the dismissal, meaning that the onus was on van Wyk to establish on a balance of probabilities that he had been dismissed. The commissioner proceeded to determine whether there had been a dismissal within the meaning of section 186(a) of the LRA, namely a termination of the contract of employment at the instance of the employer with or without notice. Again he was correct to assume (though he did not explicitly say as much) that the species of dismissals falling within subsections 186(b)-(f) were of no application, because of the circumstances, and particularly insofar as a constructive dismissal (section 186(e)) might have been relevant, on account of such not having been pleaded.

40. The commissioner concluded that there had indeed been a dismissal in the meaning of section 186(a). He reasoned as follows. Firstly, he rejected van Wyk's version that he had been dismissed when he discovered his desk had been cleared and his name removed from the board. He held properly that there was a duty on van Wyk at that stage to clarify the issue with the employer and to give the employer an opportunity to rectify Fensham's actions, by raising the matter with Smuts. He could also have lodged an internal grievance. In effect, the commissioner ruled that van Wyk was wrong to rely on these two events to assume that he had been dismissed. Therefore he concluded that van Wyk had not been dismissed on 30 August 2002.

41. However, he then went on to examine aspects of the evidence and attached particular importance to the letter of 3 September 2002 (which had hardly been canvassed in evidence). He noted that the telegram of 4 September 2002 made no reference to this letter but only to the letter of 1 September 2002. On this basis he concluded that the letter of 3 September 2002 was an *ex post facto* fabrication. Having so found, he then somewhat boldly leapt to the conclusion that "if the employer could fabricate one letter they(sic) could fabricate their entire testimony". He accordingly, for all intents and purposes, made an adverse credibility finding against Fensham and rejected most (but not all) of his testimony. On that basis he believed the evidence of van Wyk regarding the content of the telephone discussion of 11 September 2002, accepting in particular that Fensham had told van Wyk that he would not allow him

to return to work. This, in the commissioner's assessment, was sufficient to constitute a dismissal at the instance of the employer. He went on to find the dismissal to have been both procedurally and substantively unfair and awarded compensation.

42. As indicated at the outset, the applicant has raised various grounds of review attacking the rationality and justifiability of the award. For present purposes it is sufficient to consider those pertaining to the finding that Fensham dismissed van Wyk during the course of the telephone conversation of 11 September 2002. The first is that the absence of any mention of the letter of 3 September 2002 in the telegram was not raised in evidence or argument before the commissioner and hence, it was argued, his finding in that regard was untenable. Secondly, the commissioner, while accepting certain aspects of Fensham evidence as credible, erred in rejecting the balance of his testimony on the basis of the fabricated letter of 3 September. Thirdly, the commissioner failed to explain why he rejected the evidence of Fensham inviting van Wyk to return to work. And finally, the commissioner ignored or failed to consider key evidence and certain contradictions in the evidence.

43. As I indicated at the outset, my approach to the issues in dispute differs in an important respect from that pursued by counsel. The primary question is whether there was in fact and in law a dismissal. If not, the commissioner lacked jurisdiction

and the award should be set aside because he exceeded his powers, or acted *ultra vires*.

44. With the exception of certain material facts, many of the *facta probantia* in this matter are not in dispute. Some of the differences that do exist, boil down to disputes of interpretation about the proper inferences to be drawn from certain facts. Nevertheless in order to determine whether a dismissal did or did not occur these differences require resolution and it is necessary to make a clear pronouncement of the proven or accepted facts.

45. To start with there is no dispute that van Wyk absented himself from work from 29 August 2002 and that he had no direct contact with his immediate superior Fensham until he phoned him on 11 September 2002. It is also common cause that van Wyk returned to work briefly on 30 August 2002 and noticed his desk had been cleared and that his name was not on the white board. Furthermore there is agreement that Fensham did in fact issue an instruction to Graeme Lilley at reception regarding van Wyk's admission to the club, though there is some dispute about the scope and purpose of that instruction.

46. Perhaps more controversially, van Wyk testified that Corlia Eykelenboom had warned him that she believed Fensham wanted to get rid of him. This testimony was not pertinently challenged in cross-examination. Additionally, Eykelenboom

was called as a witness on behalf of van Wyk and made no mention of any such plan either in her evidence in chief or under cross-examination. Accordingly, little weight can be attached to this unsubstantiated reported statement of a person specifically called as a witness who then failed to confirm the statement attributed her. Indeed, more legitimately, one may draw an adverse inference from the failure to substantiate the statement and conclude in fact that Eykelenboom issued no such warning on the common sense basis that had it been true she would have been prompted to say so in evidence.

47. The three written communications sent to van Wyk in early September 2002 pose their own evidentiary challenges. Firstly, it is common cause that van Wyk received the telegram on 6 September 2002. The applicants three witnesses all testified to the fact that Jakes, a fellow employee, was dispatched to deliver the letter of 1 September 2002 and that he placed it in van Wyk's letter box. Van Wyk denied ever having received this letter. For reasons not immediately obvious from the record, Jakes was not called as a witness to confirm his delivery of the letter. Without any evidence regarding the availability of Jakes as a witness, I hesitate to draw any adverse conclusion from his failure to testify. Moreover, the reference to this letter in the telegram is a strong indication that it was in fact dispatched. However, proof of dispatch does not equate to proof of delivery. As the applicant sought to rely on the delivery of the letter of 1 September 2002 to further its case, it bore the evidentiary burden to prove that the letter was in fact delivered. Without

the direct testimony of Jakes that he did indeed deliver the letter, the only evidence of delivery is the hearsay evidence of the applicant's witnesses that Jakes told them he had delivered it. In terms of section 3(1) of the Law of Evidence Amendment Act 1988, absent an agreement between the parties, courts have a discretion to admit such evidence in the interests of justice. Normally, given the dangers, such should only be done when a clear explanation is given for the failure to call the witness upon whose credibility the probative value of such evidence depends. Without any explanation of the kind I am unwilling to make a finding that the letter of 1 September 2002 was in fact delivered to or received by van Wyk.

48. This brings me to the letter of 3 September 2002. Fensham said little about this letter in his testimony, other than that he had written and sent it. I have serious doubts about the truth of that statement. The tone of the letter is legalistic, formal and adversarial. It differs markedly from the letter written two days before and the telegram written the day after. It is the kind of letter a lawyer would write, commencing with the formal prescription routinely resorted to by lawyers, namely: "We refer to the above matter…."; whereas the letter of 1 September begins "Hi Johan" and the telegram "Johan laat weet my asb". Moreover, it threatens legal consequences warning that "your action and/or omissions will be construed to be that of absconsion", leading to the automatic termination of the contract of employment. As such, it stands in stark contrast to the more amicable, pleading tone of the telegram dispatched on the following day. Add to that the fact that the

telegram makes no reference to this letter, but only to the “brief gestuur saam met Jakes op 2de September”. Had it indeed been sent by registered post the day before, given its tone and import it arguably would have been uppermost in Fensham’s mind, and having chosen to refer to previous correspondence in the telegram he most likely would have made reference to it too. Consequently, I share the commissioner’s suspicion that this letter was possibly a fabrication put together by a less than ethical adviser some time after van Wyk brought suit, reflecting, as it does, poor insight into the merits of the dispute.

49. The letter of 3 September 2002 adds little to the applicant’s case. If anything it potentially causes some damage. Had this aspect been explored in cross-examination, it could justifiably have led to an adverse finding about Fensham’s credibility. Unfortunately the inconsistency was not picked up and Fensham was not questioned about it. Other equally plausible inferences may be drawn regarding its tone and the failure to mention it in the telegram. For instance, an adviser may well have dictated the letter to Fensham, or written it on his behalf. The reason for not mentioning it in the telegram may have been because, unlike the letter of 1 September 2002 that had been delivered by hand, it had been dispatched by post and would not have reached van Wyk before he received the telegram. As the commissioner’s interpretation was not put to Fensham during his testimony, there was no occasion to consider alternative explanations or to observe Fensham’s demeanour in tendering them. It follows that no adverse

finding can legitimately be made regarding Fensham's credibility on this basis. Accordingly, the commissioner erred in doing so, and especially in rejecting his testimony about the telephone conversation of 11 September 2002 on this basis. Nevertheless, there is also no evidence proving that the letter was delivered to van Wyk, who denied ever having received it. Consequently, it too must be left out of account.

50. In the final analysis, therefore, I am constrained to accept van Wyk's evidence that he only received the one written communication, namely the telegram, on 6 September 2002.

51. At this point I pause to reflect upon the critical issue of van Wyk's state of mind on the day he received the telegram. At repeated intervals throughout his testimony van Wyk defended not making contact with Fensham or Smuts in the period after 30 August 2002 on the ground that he had lost trust in Fensham. The factual bases upon which he relied to rationalize that loss of trust, we have seen, was the clearing of his desk, the removal of his name from the white board, the warning he allegedly received from Eykelenboom, his comprehension of the instruction regarding his admission to the premises and the hearsay relayed to him telephonically by his customer Chris van der Merwe. These facts and circumstances, van Wyk maintained, not only vindicated his loss of trust in Fensham but also led him to believe that he had in fact been dismissed. Here

again I find myself in agreement with the commissioner that van Wyk's assumptions in that regard were neither rational nor reasonable.

52. The clearing of van Wyk's desk and the removal of his name from the white board both have innocent explanations as accounted for by all three of the applicant's witnesses, and which stood up under cross-examination. Even if one were to accept that Fensham was acting spitefully, unfairly or heavy-handedly, his conduct did not justify van Wyk's inert stance and assumption that he had been dismissed. As the commissioner correctly pointed out, it was incumbent upon van Wyk to challenge Fensham's conduct by lodging a grievance with Smuts or someone higher up in the organization. By all accounts, van Wyk is an extremely successful sales consultant and thus likely to be no easy pushover. Moreover, in the past, he experienced no difficulty in complaining to Smuts about the verbal warning given by Fensham to the sales consultants in July 2002.

53. Similar considerations attend the instruction given by Fensham to Lilley regarding van Wyk's admission to the premises. Van Wyk's interpretation that he was barred from the premises under any circumstances strikes me as self-serving and not entirely consistent with the objective facts, in particular the request made in the telegram. If Fensham had intended to bar van Wyk from the premises for all time and under any circumstances it is unlikely that he would have requested him to contact him, as he did in the letter of 1 September 2002 and in the telegram. Nor

would he have invited him to come to the club as he did on 11 September 2002 during their telephone conversation. I find Fensham's explanation that he instructed Lilley to keep him at reception on his arrival more plausible. He wanted to confront him and to perhaps institute disciplinary action. His intention was to assert his authority, not to ratify a dismissal. Moreover, Lilley, who was called on behalf of van Wyk, confirmed that the instruction could be interpreted in the manner suggested by Fensham. Thus in his evidence in chief he said: " I can't remember exactly what the exact words were, but to that effect don't let him in under any circumstances, if he wants to speak to Mauritz then call Mauritz".

54. In effect, the instruction was not intended as an absolute bar to van Wyk's admission from which an inference of dismissal could be drawn, rather, as I have said, Fensham was asserting his authority by ensuring that van Wyk was referred to him on arrival at the club for the purpose of investigating or discussing his absence and the possibility of discipline. Taking into account the fact that on two previous days i.e. 29 and 30 August 2002, van Wyk had tried and failed to see Fensham, the instruction was appropriate and reasonable in the circumstances.

55. For the reasons already explained, little reliance can be placed on van Wyk's testimony that Eykelenboom had warned him of Fensham's intention to get rid of him. In spite of testifying she did not substantiate that assertion. Moreover, I incline to accept Fensham's contrary contention that he had considerable self-interest in

retaining the services of van Wyk because he had proved to be something of a money-spinner. More than once Fensham emphasized that his salary was directly determined by the performance of his sales consultants. Keeping van Wyk on board was in Fensham's personal interest in earning more remuneration for himself.

56. Finally, van Wyk's reliance on van der Merwe's hearsay that he was no longer employed also lacks credibility. First of all, as reported by van Wyk, van der Merwe did not specifically state that he was told van Wyk had been dismissed. He said that he had heard van Wyk no longer worked at the club. Moreover, and more importantly, van Wyk spoke to van der Merwe on 6 September 2002, the same day he received the telegram. His assumption that he had been dismissed is not consistent with the request made in the telegram. Both in tone and content the telegram is seeking clarification of van Wyk's intentions and extends on invitation to discuss matters. Nothing in it evokes a signal of any intention to terminate van Wyk's employment. Accordingly, there can be no good reason for relying on what van der Merwe might have said in contrast to what was communicated in the telegram by Fensham.

57. In the premises, van Wyk's assertion that by 6 September 2002 he had lost trust in Fensham and accordingly was entitled to assume that he had been dismissed at that point is doubtful. He had no reasonable, legitimate or plausible reason to

reach that conclusion. Had he received the letter of 3 September 2002 his case may have been stronger, but, as I have already held, that letter was not in his possession at the time.

58. Van Wyk's explanation for not responding to the telegram by phoning Fensham as requested is also not convincing and reflects upon his state of mind, in my view, by this stage tending in the direction of repudiation. There is no evidence that he tendered his services during his telephone conversation with Robertson, the Human Resources Manager in Johannesburg. When he eventually phoned Fensham on 11 September 2002, his opening gambit was to request a meeting off the premises, intimating a desire not to return. Had he wanted to go back to work, he surely would have gone when invited to do so. Nor had Fensham's conduct reached the standard of intolerability that might have permitted resignation and supported a claim of constructive dismissal. Van Wyk's explanation that he preferred to meet off the premise because Fensham had barred him from the club makes no sense. Fensham was inviting him to come discuss his situation. Had the bar indeed been imposed, once Fensham extended an invitation to meet, by any logical standard, it could be considered lifted. Van Wyk's weak and irrational excuse, taken together with the delay in responding to the telegram, tellingly reveals a reluctance on his part to tender his services and return to work. In my assessment, at that point, van Wyk was repudiating his obligations.

59. Similarly, van Wyk's claim that Fensham's invitation was limited to a discussion about his personal affairs and not his work circumstances is also not believable. The issue at hand was van Wyk's work situation. The invitation, extended initially in writing and then telephonically, was in the nature of the situation aimed at resolving van Wyk's employment issues. But whatever the case, the invitation was there and van Wyk refused to take it up, nor did he pursue the matter with Smuts, the club manager, or Robertson, the Human Resources Manager. Instead, without tendering his services in writing, (although he claims to have done so verbally during the telephone conversation, a contention seemingly unlikely in the face of his refusal to report to the club), he referred a dispute to the CCMA alleging unfair dismissal seeking 12 months compensation, but not reinstatement, an offer of which he later refused.

60. To sum up: there is no clear evidence supporting the contention that the applicant dismissed van Wyk at any point between 30 August and 11 September 2002. First, it has not been shown that Fensham was possessed of the necessary authority to effect a dismissal. Smuts' testimony that the authority to dismiss had to be exercised in conjunction with the regional manager, Strangelman, is supported by the fact that Fensham has never dismissed any employee previously or since. Secondly, Smuts' evidence that the door remained open to van Wyk stands unchallenged. Thirdly, it is common cause that Fensham invited van Wyk to return to the club. Thereby he created an opportunity for van Wyk to take the matter up

with Smuts. Van Wyk's explanation for refusing to meet on the premises is spurious, if not disingenuous, and smacks of pique and an intention to repudiate. Fourth, there is no unequivocal evidence that Robertson considered van Wyk as having been dismissed. On the contrary she wanted conciliation. Finally, the fact that van Wyk only sought compensation in his referral to the CCMA is a clear sign that he preferred not to return to work. Although he was within his rights to limit his claim in this way, for reasons already explained his supposed loss of trust in Fensham rested on a questionable foundation and was hardly justified. Nevertheless, his rejection of the offer at the CCMA bears out his reluctance to return to work and his intention to repudiate his obligations. Additionally, Fensham's invitation, Smuts' claim that the door remained open, Robertson 's encouragement of conciliation and the offer made at the CCMA all point to the employer not being quick to accept the repudiation in order to cancel the contract of employment.

61. For these reasons I do not accept that Fensham told van Wyk that he would not take him back under any circumstances. Fensham readily admitted that he said he did not want to set a precedent and intended to impose discipline. Such may have added to van Wyk's resolve to repudiate. Clearly van Wyk had taken umbrage at the events of the preceding two weeks. But no specific facts, taken alone or cumulatively, point to an intention by any duly authorized agent of the applicant to terminate van Wyk's employment. Rather, it would seem, van Wyk (perhaps

legitimately offended) presumptively and without good cause assumed he was being unfairly treated and repudiated his obligations. There is no unambiguous evidence that the applicant accepted van Wyk's repudiation, leading in contractual terms to the cancellation of the contract. The contract was therefore not terminated at the instance of the employer within the meaning of section 186(a) of the LRA. In the end result, van Wyk has failed to discharge the onus upon him to establish on a balance of probabilities that the applicant terminated his contract of employment.

62. Absent a dismissal, the commissioner lacked jurisdiction and acted *ultra vires*. His award must therefore be set aside on that ground. Accordingly there is no need to deal further with counsels' different submissions regarding the justifiability of the commissioner's other findings.

63. The conduct of this review application did not proceed smoothly. As a result there are four interlocutory applications. The first is an application by van Wyk for orders dismissing the review application and making the arbitration award an order of court in terms of section 158(1)(c). The applicant in turn seeks condonation for the late filing of documents contemplated in terms of rules 7A(6) and 7A(8), and van Wyk has applied for condonation of the late filing of his answering affidavit. All these applications are opposed.

64. To avoid unnecessary prolixity in this judgment I propose not to canvass the

applications for condonation fully. I am satisfied that good cause exists to condone the lapses on both sides and will provide fuller reasons at a later stage should that prove necessary.

65. Regarding the application for dismissal, I accept the proposition that this court has jurisdiction to dismiss an application for review where the applicant delays unduly in prosecuting a review in terms of rule 7A. However, considering the drastic nature of imposing a bar of this kind, respondents seeking to impose a bar should in the spirit of rule 30A of the Uniform Rules of the High Court first give the erring party an opportunity to rectify the error. Although I am unimpressed by the lackadaisical approach taken by the applicant in conducting these proceedings, I accept that absent service of a definite notice for rectification in this instance, the application for dismissal was premature and should be dismissed.

66. Both parties seek costs awards in respect of all five opposed applications. Although, I am persuaded that van Wyk's prosecution of his unfair dismissal suit comes perilously close to being unreasonable to a degree sufficient to attract an adverse costs award, the applicant's unsatisfactory conduct in progressing the review leaves me with less sympathy for it. In the circumstances, I prefer to make no costs award in any of the applications.

67. In the premises, I make the following orders:

64.1. The first respondent's application for an order making the second respondent's award an order of court in terms of section 158(1)(c) is dismissed.

64.2. The first respondent's application for the dismissal of the applicant's application to review and set aside the second respondent's award is dismissed.

64.3. The late filing of the first respondent's answering affidavit is condoned.

64.4. The late filing of the applicant's notice in terms of rule 7A(8) is condoned.

64.5. The late filing of the record in terms of rule 7A(6) is condoned.

64.6. The award of the second respondent under case number WE 10339-02 made on 27 March 2003 is hereby set aside.

64.7. It is declared that the first respondent was not unfairly dismissed.

64.8. There is no order as to costs.

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Murphy AJ,

Date of hearing: 3 December 2004

Date of judgment: 21 June 2005
Applicant's representative: Adv M Lennox instructed by Moni Attorneys.
Respondent's representative: Adv E Spamer instructed by De Klerk and van Gend.