EDITED JUDGMENT

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

CASE NO: P334/04

In the matter between:

TIGER BRAND FIELD SERVICES

(A division of Tiger Diversified

Field Services (Pty) Limited) **APPLICANT**

and

COMMISSION FOR CONCILAITION,

MEDIATION AND ARBITRATION **1ST RESPONDENT**

COMMISSIONER ADRIAAN VAN DER WALT **2ND RESPONDENT**

STEVEN BELGROVE **3RD RESPONDENT**

JUDGMENT

CELE AJ

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995, (the Act) to review and set aside an arbitration award which the second respondent issued on 10 June 2004 while he was acting under the auspices of the first respondent. The application is opposed.

Background facts

[2] The applicant is a company which operates nationally. In this country, it has various regions where it operates. The regions are themselves divided into areas.

[3] In its hierarchical structure in the Eastern Cape it has Ms Groenewald as the Human Resources Manager for one division and Ms jenny de Villiers for another division, Mr Dunlop as the Regional Operations Manager, and Ms Vijay Naicker as Human Resources Manager of the Coastal Region, various Regional Managers and various Field Managers.

[4] On 2 January 2001 the third respondent commenced employment with the applicant as a Regional Manager in the Eastern Cape, based in Port Elizabeth. He reported to a channel Manager, who at the time he commenced employment was a Mr Kroon. One Mr Skelem was a field Manager for Umtata and East London areas and he reported to the third respondent.

[5] As part of their duties, Regional Managers were in charge of organising end of the year functions in their operational areas. The system in place was that Regional Managers would submit a list of the head count of the staff under them to Ms Groenewald who in turn would submit such information to the financial Department.

[6] Payment would then be generated and once ready, an allocated sum of money would be deposited into the banking account of the relevant Regional Manager. The Regional Manager would then liaise with the Field Manager who in turn would consult with his staff on dates and venues for such a function.

[7] Where all agreed in an area and the Regional Manager approved it, the end of the year function would not be held but rather, payment vouchers would be arranged for by the Regional Manager and these

would then be distributed to the staff.

[8] Soon after the end of year function shall have been held or vouchers having been given to the staff, the Regional Manager had to reconcile his or her financial books and submit a report with accompanying documentation such as bank deposit slips, if some monies remained and had then been banked, invoices or receipt to Ms Groenewald who in turn would reconcile all of that information and forward it to the financial Department of the applicant.

[9] In the process of executing his duties, the Regional Manager would be acting in consultation with his Channel Manager.

[10] In 2001 Mr Dunlop was a Regional Manager in Cape Town. In November 2001 he telephoned Ms Groenewald to enquire from her when money for the end of the year function would be made available. He was, to his surprise, told that such money had already been deposited into his banking account. Neither Ms Groenewald nor his Channel Manager had alerted him to that fact. Upon investigating the matter, he found that money allocated for the function had indeed been transferred into his banking account even though the summary on the bank statement did not state where the money had come from.

[11] In the areas falling under the third respondent, the end of the year functions were never held in 2001 and 2002. There was an amount of money which Ms Groenewald had deposited into a bank account of the third respondent for the end of year function in his area. This was R 1925 = 00 which was paid on 25 October 2001.

[12] In 2001 and due to financial constrains, the applicant decided that the end of the year function was to be made to coincide with a cycle meeting. This it said, would help obviate extra travelling and accommodation expenses which the Regional Managers would have catered for, from their budgets for the cycle meeting. This information was then sent out to all Regional Managers. When the communiqué came through to the third respondent, they had already held their cycle meeting. For the end of 2002 he said that he discussed with Mr Skelem and they agreed that the end of the year function, in their area was to be held on 7 December 2002. Mr Skelem passed the message on to his team. Mr Skelem and the third respondent discussed the matter again, a little later, and the date was postponed to 14 December 2002.There were further discussions between them which culminated in the date being again postponed to January 2003.

[13] In January 2003 Mr Skelem went on leave for some weeks. When

he came back, the third respondent also went on his leave and returned in February 2003. On his return he then went to Johannesburg for some business related issues. While the two company officials were on leave, no end of the year function was held in their area.

[14] There was then a meeting attended to by Mr Skelem, the third respondent and Ms Vijay at the end of February 2003. They referred to it as a performance meeting. Mr Skelem then mentioned that Umtata staff were unhappy for there not having been an end of the year function in their area. A grievance letter was also produced pertaining to the non–holding of the party. The third respondent said that he would organise vouchers sometime in March for the staff. There was subsequently a day when Mr Skelem, upon instructions by the third respondent, went to collect the vouchers and distributed them to his staff.

[15] The applicant investigated a complaint by the staff under the third respondent and then charged him with two acts of misconduct. The charges read:

Count 1:

> "Misconduct: misappropriation of company fund in that you failed to account for R 1925, 00 that was paid into your bank account on the 25th October 2001 for the purpose of the Christmas function which was supposed to have been held and arranged by you during the month of November and or December 2001, which you failed to do.

Count 2:

> "Misappropriation of company funds in that you failed to return an amount of R 3618.30 that was left after all Christmas function were held in your area of responsibility during the month of December 2002".

[16] Consequently upon an internal disciplinary hearing which had been convened on 3 July 2003, the third respondent was found to have committed those acts of misconduct with which he had been charged. On 5 July 2003 he was then dismissed. His internal appeal against the finding and sanction was not successful. A dismissal

dispute then arose between him and the applicant. He referred the dispute for conciliation. The dispute was not capable of resolution and so he referred it for arbitration.

Arbitration proceedings

[17] The third respondent challenged both the substantive and procedural fairness of the finding and sanction.

[18] The applicant called seven witnesses and handed in an affidavit of one of its employees. The third respondent testified but called no witnesses.

1. Applicant's version

[19] Ms Groenewald was placed in charge of arrangements for the end of the year functions for 2001 and 2002. The undisputed evidence of the applicant was that Ms Groenewald sent out e-mail message to all Regional Managers and requested them to supply her with the number of staff in their regions (headcount). Once this information was given to her, she generated a spreadsheet with the information she had received from the Regional Managers. She then sent the spreadsheet by e-mail to the Regional Managers who had to carefully check if the data therein contained was correct. She had given an ultimatum in relation to which the Regional Managers had to respond and once any information was given to her, she submitted the spreadsheet to the finance section. At the same time she sent out e-mail messages to inform Regional Managers how much to expect to be transferred into their bank accounts. The finance section would then transfer an amount corresponding to the number of the staff times R 25, 00, into the bank account of the Regional Manager. It was then expected of the Regional Managers to submit receipts to Ms Groenewald of monies they would have received.

[20] A Regional Manager who would have decided not to hold an end of the year function had a number of opportunities to convey such decision to her. None of the Regional Managers communicated such information to her. Money allocated for a Christmas party could not be used for another purpose.

[21] In all various stages the channel Managers were to work in conjunction with the Regional Managers.

[22] Once the end of the year function would have been held or vouchers given to the staff, the Regional Managers would wind up their accounting books. Where there would be cash surplus, left after the party, this had to be deposited into the company's bank account. When the reconciliation has been done, a report in relation thereto was to be sent by Regional Managers to Ms Groenewald who would take the same and forward it to the finance section, for them to balance their books.

[23] The evidence of the applicant was that the third respondent must have sent the head count of his staff to Ms Groenewald as she had the number of staff of his region. The further evidence of the applicant was that the third respondent did not tell Ms Groenewald that he would not organise the end of the year function.

[24] In his evidence, the third respondent did not challenge much of the evidence of the applicant in relation to the generation and processing of payments towards the end of the year function.

[25] It was his evidence that he would receive e-mail messages from Ms Groenewald pertaining to the end of the year function. In relation to **count 1**, he said that the head count of his staff was submitted to Ms Groenewald but he could not remember if he himself did so. He said that he then expected money for the function to be deposited or transmitted to his bank account by 9 October 2001. Upon checking his bank statements, he said, he ascertained that the party money had not been deposited. His channel Manager who was to have alerted him of the monetary deposit did not communicate with him.

[26] He said that his group had already had their cycle meeting and could not therefore mitigate party expenses by holding both the cycle meeting and the end of the year function. R 25 per head, he said, was insufficient to cater for transport, accommodation and party expenses. He said that he held a meeting with Messrs Paine, Koekermoer and McKenzie and a decision based on a costing exercise was taken that there would be no such function held at the end of 2001. He then communicated that decision to Ms De Villiers who was his Group Human Resources Manager. He said that she had informed him to do as he saw

fit.

[27] He said that, as he was not warned that money would be deposited into his account the question about reconciliation of books, numbers or slips did not arise as no one also requested that information.

[28] He said that he only came to know that 2001 money for the end of the year function had been deposited into his account in May 2003 when Mr Kooker telephone him. He said that he then drew a statement and he offered to pay that money back with interest.

[29] It was his evidence that the use of his bank account had repercussions for him. As Regional Managers, he said they would sometimes be reimbursed by the applicant after 3 months after they would have spent the money. He said that they had even had to use their credit cards.

[30] His further evidence was that he never deliberately took money for 77 staff members. He said taking it would result in an outcry from the staff such that the matter would not be able to be swept under the carpet.

[31] As regards **count 2**, he said that R 18 000 was for the end of the year function and for staff functions. He said that he had no facility at the office where he could safely keep that money and so he took it home and kept it in a safe. He said that in the office they only kept petty cash as there had been theft from the office.

[32] He said that he had discussed the holding of the function on 7 December 2002, with Mr Skelem but it was decided to hold it on 14 December 2002 so that Mr Skelem would go to East London on the 7th and assist staff in the function which was held there.

[33] He said that the company was extremely busy on 14 December 2002 which was a long weekend and there was a consideration to hold the function on 21 December 2002. He denied that he had told Mr Skelem that there was no money for the function and he said money was handed over on 6 December 2002. He said he had used money for a previous party and had not been refunded for sometime and that after he had submitted slips to head office in Johannesburg, he was then refunded on 6

December 2002.

[34] He said that it was incorrect that on 14 December 2002 he had no money for the function, as suggested by Mr Skelem.

[35] He said that after he had considered holding the staff function on 21 December 2002, there was a problem with the venue and there were holidays. He said that he had decided to hold the function in the New Year. In the New Year Mr Skelem went on leave and he himself also went on leave.

[36] He said that he had not said to Mr Skelem that party time was over when the function could not be held on 4 February 2003. Nor had he said to Mr Skelem that there were no vouchers and that everything was returned to Johannesburg.

[37] He did say that on 17 February 2003 there was a meeting which was attended by Mr Skelem, Ms Vijay and himself. It was at the end of that meeting that Mr Skelem said that there were staff members who were concerned that their group did not have the end of year function. He said that, in that meeting, he had acknowledged that he would organise vouchers for the staff.

[38] He said that the reconciliation had been done by one Ms Benjamin who was an administration assistant and who would regularly manage petty cash and reconciliations. In the reconciliation there was R 3318 cash on hand which he said was marked for "Easter function". He referred to it as savings from Christmas functions. He said that it had earlier on been resolved that there would be a follow up team building function, to one which they had already held in October 2002, and in the subsequent, wives who had previously been excluded, would be invited. He said that the team had agreed to have a weekend away and said he had no intentions of misappropriating funds; otherwise he would not have created expectations that a party would be held.

The arbitration award

Advocate P Kroon, instructed by Mr Wilcock represented the third respondent while Mr F. Thirion; an employee of the applicant represented it.

1. **Substantive fairness**

1.1 **Count one:**

[39] The second respondent found it to have been common cause that –

- On 26 October 2001 an amount of R 1925 was deposited into the third respondent's bank account by the applicant by way of a cheque.
- These monies were not used for any Christmas party.
- The third respondent did not inform his line Manager that no Christmas party was to be held in 2001.

[40] The second respondent accepted the evidence of the third respondent that he told Ms De Villiers that there would be no Christmas party. The reason for there not being a party was that the R 25 per head was inadequate as the cycle meeting had already been held by the third respondent's staff.

[41] The second respondent found that, on the evidence adduced at the hearing it could not be concluded on a balance of probability that the third respondent had deliberately failed to hold the Christmas party with a view to pocketing the monies. He said that the evidence was that the decision not to hold the Christmas party was not done secretly or in a clandestine manner.

[42] The second respondent accepted the third respondent's evidence that he (third respondent) had not submitted the headcount and that he had not realised that the money had been deposited into his bank account. He found that the deposit of the money had not been done

in an ordinary manner. He found that there was a *bona fide* reason for a decision not to hold a Christmas party.

[43] The second respondent accepted that as there was a reconciliation procedure required, it was improbable that the third respondent would fail to hold parties and fail to submit the reconciliation with the intention to keep the money for himself. He found that if the employees had expected a Christmas party, they would have complained and the applicant's scam would have become known and yet there was only a complaint from six employees in Umtata more than a year later, when the main complaint related to the party for 2002.

[44] He concluded that the probabilities overwhelmingly indicated that the third respondent was not guilty of Count 1.

1.2 **Count two**

[45] The second respondent found it as common cause that the amount of R 3618.30 was the surplus of an amount of R 18170.00 that was transferred to the third respondent by way of a telegraphic transfer. He found that R 3618.30 was not returned to head office.

[46] The second respondent found that the third respondent's unchallenged evidence was that he had intended to hold a function during Easter. He found that Mr Payne and Mr Koekermoer's statements corroborated that view and that Mr Skelem testified that the third respondent had informed him that there would be a weekend away.

[47] It was the second respondent's finding that the third respondent had declared the monies in a reconciliation statement submitted to the finance officer. That, he said, was contrary to an objective to keep monies for himself. He found that the third respondent did not hide the facts that the surplus was kept and when he was asked by Mr De Kooker and Mr Haasbroek about surplus monies during the investigations, he offered to take them to the safe in his house and to give them the money.

[48] That the third respondent intended to hold a staff function with the surplus money, was accepted by the second respondent. He found that third respondent's job description provided that he was bound to

reallocate funds to categories where needs existed and to ensure that spending remained within the allocated budged. He accepted that Regional Managers were entitled to incur expenses up to an amount of R 10 000.

[49] The second respondent found the probabilities on the evidence before him to have been that the third respondent had not intended to misappropriate the R 3618.30. He found that R 3618.30 was generally known to have been kept for another party. He examined the statement of one Ms Benjamin, who had not come to give her *viva voce* evidence, and he noted that the third respondent had shown her a reconciliation sheet which had the reconciled slips for the Transkei party and was dated 14 December 2002. He said that he could not conclude that the third respondent had intended to take R 3618.30 for himself

2. **Procedural fairness**

[50] At the commencement of the arbitration proceedings Mr Thirion opposed legal representation of the third respondent. Mr Kroon submitted that his instructing attorney, Mr Wilcock had reached an agreement with Mr Byron Xypteras, the Industrial Relations Officer of the applicant that there would be legal representation for the third respondent. Mr Thirion pointed out that the applicant had not agreed to any such legal representation and that he made the position clear to those representing the third respondent on the day proceeding that of the arbitration hearing. Mr Kroon said that the agreement reached was verbal even though a letter had subsequently been sent to the applicant to confirm such agreement.

[51] The second respondent assumed that there was such agreement and embarked on an investigation whether such was verbal or in writing. He

made a finding that there was no legal provision that the agreement to legal representation had to be in writing and accepted that a verbal agreement sufficed. He directed the parties to proceed with the presentation of their cases.

[52] In his award, the second respondent found no evidence of procedural unfairness.

Grounds for review

[53] The basis upon which the applicant seeks to have the award reviewed is that the second respondent committed gross irregularities in relation to the conduct of the proceedings and that he did not properly apply his mind to the issues and facts which were pertinent before him and that the conclusions which he sought to draw were not justified.

Analysis

[54] The first attack on the award by the applicant relates to the second respondent having allowed the third respondent to be legally represented during the arbitration hearing. This challenge is on the basis that the second respondent failed properly to apply his mind to the question before him, alternatively, acted *ultra vires* his powers, further alternatively, that the decision to allow the legal representation cannot be justified in relation to the reasons given therefor.

[55] Indeed it is clear that at the commencement of the arbitration proceedings Mr Thirion objected to legal representation. It was incumbent upon the second respondent to apply his mind to the question of whether or not legal representation ought to have been permitted, taking into account the relevant statutory provisions. Rule 25 (1) of the Rules for the conduct of Proceedings before the CCMA is the relevant

statutory provision. Rule 25 (1) (c) permits legal representations under two circumstances-

> "(1) the commissioner and all the other parties consent;
>
> 2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering:-
>
> (a) the nature of the questions of law raised by the dispute;
>
> (b) the complexity of the dispute;
>
> (c) the public interest and
>
> (d) the comparative ability of the opposing parties or their representatives to deal with the dispute".

[56] It is clear from the record of the proceedings that the second respondent adjourned the proceedings to get the rule herein above referred to and on ressumption, he read rule 25 (1) (1) (i) in to the record. He then granted his consent on the basis that there was an agreement between the parties.

[57] The objection by Mr Thirion was against legal representation and not only that the agreement reached between the parties was only a verbal one, and therefore not binding, as submitted by Mr Kroon, for the third respondent. The second respondent took the view that Mr Thirion was not entitled to object to legal representation as Mr Wilcock and Mr Xypteras had already reached an agreement on legal representation. To this extent, the second respondent committed a misconduct. Had he executed his duties appropriately, he would have included, in the inquiry, the investigation, without any assumption, whether there was an agreement at all and if so, then move to the nature thereof. The nature of the inquiry he chose to embark on, limited him only to rule 25 (1) (c) (1). If he had not committed the misconduct in the performance of his duties, he would have realised that the proper inquiry called on him to look at rule 25 (1) (c) (1) instead.

[58] The next investigation before me is whether the misconduct by the second respondent is of such serious a nature that it denied the applicant a right to a fair trial of the issues and consequently amounts to a gross irregularity.

[59] In **Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naiker and others (1997) 18 ILJ 1393 (LC)** at 1395 Landman J dealt with ten circumstances under which it could be said that an arbitrator has committed a misconduct justifying a review. In one of the ten circumstances he said-

> "For there to be misconduct there must have been some wrongful or improper conduct on the part of the commissioner…"

[60] In **Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A)** Goldstone JA held that misconduct does not extend to *bona fide* mistake by the arbitrator as to fact or law. He held that it would only be in case where misconduct is so gross or manifest as to evidence misconduct or partiality that the court might move to vacate the award. He held further that even gross mistake was insufficient to warrant the interference unless it established *mala fides*.

[61] In **PPWAWU and another v Commissioner: CCMA (Port Elizabeth) and another 1998 5 BLLR (CC),** Mlambo J held that for the court to set the award aside, the court had to find that the irregularity complained of rendered the arbitration proceedings of no force and effect in that, no hearing of the issue took place at all.

[62] The dispute in this matter did not involved complex issues. It was a case of no public interest. It was a matter in respect of which Mr Thirion had comparative ability to deal with the dispute. In the main, the facts were common cause. The applicant is even asking this court to dispose of the matter without remitting it and submits that the court has a full record. It is not suggested therefore that some evidential material was not properly made available before

the commissioner as a result of the granting of legal representation to the third respondent. In my view therefore, the error committed by the second respondent was not of so material a nature as to amount to gross irregularity.

[63] I now need to examine the second ground for review. Firstly, the applicant complains of the incorrect recordal of the dates for the arbitration hearing and those on which the written heads of arguments were submitted by parties to the second respondent. The further complaint relates to perceived impropriety of the conduct between the second respondent and Mr Kroon. There is a day when Mr Kroon arrived late for the arbitration proceedings and the second responded waited for him and even accommodated him to be briefed on the evidence which had then been led before his arrival. The second incident relates to another occasion when the second respondent did not arrive at the hearing and Mr Willcock telephoned him to remind him of the hearing. He later arrived. Mr Thirion was not consulted by Mr Willcock in making that telephone call. It was appropriate for the parties to jointly consult and communicate with the second respondent. Undesirable as these incidents were, nothing really turns on them and therefore, I need say no more.

[64] The second complaint of the applicant concerns the characterization of the charges against the third respondent. The submission is that the second respondent's portrayal of the charges reveals either a fundamental misunderstanding of the nature of the charges or a deliberate construing of the charges in a manner so as to favour the third respondent.

[65] The portions of the award which concern the applicant are:

(1) In relation to the first change (being the failure to account charge): -

> "On the evidence adduced at the hearing it cannot be concluded on balance of probabilities that the (Employee) had deliberately failed to hold a Christmas party with a view to pocketing the monies. The evidence was that the decision not to hold the Christmas parties was not done secretly or in a clandestine manner."
>
> and

"There was a reconciliation procedure required, and it is improbable that the (Employee) would fail to submit the reconciliation with the intention to keep the money for himself."

2) In relation to the second charge (being the misappropriation of company funds in the form of the failure to return funds):-

> "It is the (applicant's) case that the (Employee) deliberately did not inform his line manager about the failure to hold the second Christmas party. Only once the grievance was raised by the employees who did not enjoy a Christmas party did the (Employee) hand over the monies which the (Employee) intended to keep for himself. When the (Employee) was in possession of the funds he lied to Lennox Skelem about having insufficient funds for the party."

and

"The (Applicant) suggested that the (Employee) had deliberately failed to inform the line manager about the failure to have a Christmas party with a view to keep the money to himself. Mr Kroon (on behalf of the Employee) pointed out that there was no line manager to inform at the time."

[66] The applicant submitted that the first charge did not address the question of:

1. a deliberate failure on the part of the third respondent to hold a Christmas party,

2. with the view to pocket the money for himself or otherwise,

3. coupled with secret or clandestine behaviour pertaining to the decision not to hold the Christmas party.

[67] The applicant's further submission with the second charge was that it was not concerned with:

1. a deliberate failure to inform the line manager about the absence of a Christmas party,

2. or lying about having insufficient funds to host the party,
3. with a view to keeping the money for himself.

[68] Mr Kroon's submission in this respect is that it was the applicant's case through the evidence of Mr De Kooker that:

1. The third respondent deliberately failed to hold the Christmas party with a view to pocketing the said monies; and

2. once the monies were deposited into his bank account, the third respondent failed to disclose this fact to the applicant because the he wished to keep the monies for himself.

[69] He further submitted that the decision not to hold the first Christmas party was taken in consultation with Ms de Villiers, Mr Mackenzie as well as the relevant field managers.

[70] The applicant is responsible for the formulation of the two charges which the third respondent was charged with. Both are, "misappropriation of company funds" in two described manners. The meaning of "misappropriate" as taken from The New Shorter Oxford English Dictionary Volume 1 by Lesley Brown is: - "apply (money belonging to another) dishonestly to one's own use"

[71] A reading of the two charges together with the evidence of the applicant, that of the third respondent, in so far as has not been

disputed and the meaning of misappropriation, indicates very clearly that the second respondent applied his mind correctly to the issues at hand.

[72] The applicant has made reference to the decision of Zondo JP in **Department of Justice v Commission for Conciliation, Mediation and Arbitration & others (2004) 25 ILJ (LAC)** at para 75-76. That case concerned the reviews and setting aside of an arbitration award in circumstances where the commissioner had misconstrued the nature of the dispute. The legal principles which are very aptly articulated in that case, find no applicability in a case such as the present, where the commissioner acquitted himself well in the execution of his duties as an arbitrator.

[73] A proper conspectus of all the evidential material properly available before the second respondent indicates to me that there is a rational objective basis which justifies the connection he made between such evidence and the conclusion he eventually arrived at.

Order:

The application is dismissed with costs.

CELE AJ

Date of hearing: 22 November 2005
Date of Judgment: 15 March 2006

Appearances

For the Applicant: **ADV. B. LEECH**

Instructed by: **BRIAN BLIZARD ATTORNEYS**
For the Respondent: **ADV. P. KROON**

Instructed by: **JOUBERT GALPIN SEARLE**