

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO. JR 978/07

In the matter between:-

FRIDAY ISAAC SIWELA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER V V TLHAPI

Second Respondent

**NORTH WEST DEVELOPMENT
CORPORATION**

Third Respondent

JUDGMENT

A VAN NIEKERK AJ

Introduction

1. This is an application to review and set aside an arbitration award made by the Second Respondent (the commissioner). In her award, the commissioner concluded

that the Applicant's dismissal on account of sexual assault and harassment and common assault was substantively fair. The commissioner found that the Applicant's dismissal was procedurally unfair, and ordered that the Third Respondent (the NWDC) pay the Applicant compensation in the amount of R40 000, being the equivalent of one month's remuneration.

Background

2. The following factual background gives the context to this application. Much of this factual backdrop is drawn from the comprehensive heads of argument drafted by Advocate Hitge, who represented the NWDC. I am indebted to him for the thoroughness of his preparation.

3. The NWDC was placed under final judicial management in terms of an order issued in the Bophuthatswana Provincial Division of the High Court on 10 August 1999. Three final joint judicial managers were appointed by the Master of the High Court.

4. The Applicant was appointed by the judicial managers with effect from 1 February 2002, initially as an accountant. The judicial managers promoted the Applicant to the rank of Chief Financial Officer from 28 January 2004, when his remuneration increased from R18 000,00 to R40 000,00 per month. The Applicant reported directly to the judicial managers, and was the most senior employee in the employ of the NWDC, both during the period of the judicial management and thereafter.

5. The Applicant was also in charge of the Human Resources Division of the NWDC and was the direct supervisor of Ms Kgomotso Pele, the Human Resources Officer. The Applicant was also the direct supervisor of a Ms Bonolo Marungoana, who was employed by the NWDC as the Applicant's personal assistant.

6. During February 2005, and shortly prior to the upliftment of the judicial management order of the NWDC, a group of NWDC employees submitted a written grievance to the MEC for Finance, North West Province, complaining primarily about their treatment at the hands of the Applicant.

7. With effect from 1 June 2005, Mr Hein Prinsloo was appointed by the MEC for Finance as the Acting Managing Director of the NWDC, following the upliftment of the judicial management order.

8. On 16 November 2005, a meeting was held at the behest of the MEC: Finance between the staff members of the NWDC and the MEC. The meeting was attended by approximately 100 employees. At the meeting, specific complaints were tabled regarding the Applicant's conduct. Mr Meshack Kolopang complained that he had been assaulted by the Applicant. Mr David Mogape (legal services division) stated that the Applicant had punched a gardener, Mr O Setshwantsho, during the tenure of the judicial managers. It was also said that the Applicant had often referred to people as "useless; inefficient; idiots" and the like, and also did this in respect of the Managing Director, Mr Prinsloo. The meeting resolved to investigate these complaints.

9. The Applicant also addressed the meeting, and stated that his unpopularity ought to be seen in the context of his authority under the judicial managers, but that he only carried out instructions.

10. Pursuant to the meeting of 16 November 2005, the managing director requested the assistance of the Office of the Premier, North West Province, to appoint an independent investigating officer in respect of the various allegations of misconduct raised by the staff members of the NWDC at the meeting. The Office of the Premier nominated one of the investigating officers attached to the Misconduct Unit, a Mr J S van Wyk, to assist the NWDC in the investigation. Mr van Wyk was duly appointed by the managing director on 30 November 2005.

11. The investigating officer duly recommended that formal charges of misconduct be brought against the Applicant, and that the Applicant be suspended from duty. The Applicant was suspended with effect from 5 December 2005. The notice of the disciplinary hearing, containing the charges against the Applicant, was served on him by the investigating officer on 17 February 2006.

12. The chairperson of the disciplinary hearing convened thereafter was Mr Eric Louw, an attorney and senior commissioner of the CCMA.

13. After an enquiry lasting approximately 6 days, the chairperson delivered his findings of fact and guilt in respect of the charges on 7 April 2006. In terms of the chairperson's

findings:

- 13.1. the Applicant was guilty of having assaulted Mr M Kolopang;
- 13.2. the Applicant was guilty of having assaulted Mr O Setshwantsho;
- 13.3. the Applicant was guilty of having sexually assaulted and harassed Mrs Bonolo Marungwana; and
- 13.4. the Applicant was not guilty of having sexually harassed Mrs Erica Thomas.

14. On 7 April 2006 the chairperson afforded the parties an opportunity to present argument and evidence in mitigation and aggravation respectively. The chairperson handed down his written findings of fact and sanction in terms of which the Applicant was summarily dismissed on 11 April 2006.

Arbitration proceedings

15. The Applicant referred an unfair dismissal dispute to the CCMA. The dispute remained unresolved and was referred to arbitration before the commissioner.

16. Both parties were afforded the right to legal representation by the commissioner, but only the NWDC made use of a legal representative. The Applicant elected to represent himself in the arbitration proceedings.

17. Seven witnesses testified on behalf of the Applicant, whilst the Respondent testified personally, and in addition called four witnesses.

18. Mr Setshwantso testified at the arbitration that:

18.1. he was an employee of the NWDC, and had been employed as a gardener;

18.2. the Applicant had, at the time, been residing in one of the NWDC's flats, at which Mr Setshwantso had been working in the garden on 3 March 2003;

18.3. the water from a sprinkler used by Mr Setshwantso entered under the door of the Applicant's flat, and the carpet became dampened;

18.4. the Applicant, who was very angry, called Mr Setshwantso and struck him with a clenched (right) fist on his left jaw, whereafter the Applicant left the flat;

18.5. Mr Setshwantso reported the incident to Kgomotso Pele, the Human Resources Officer on the same day, who told him that she could do nothing about the matter as the Applicant was her manager;

18.6. Ms Setshwantso then approached a shopsteward and his senior, Mrs Gloria Neyepetse, who assisted him with the drafting of a written complaint;

18.7. some time later, Mr Setshwantso was called into the boardroom, where he found the three judicial managers, Jan Nel, Kgomotso Pele and the Applicant;

18.8. the Applicant and Mr Setshwantso, at the instruction of one of the judicial managers, Mr Brian Cooper, shook hands and apologised to each other; and

18.9. Mr Setshwantso alleged that the only reason that he shook hands with the Applicant, was out of fear for losing his job, noting the protective attitude of the judicial managers towards the Applicant.

19. Mr Meshack Kolopang, employed by the NWDC as a handyman (artisan) in the maintenance department, testified as follows:

19.1. on 3 October 2005, he was sent by his superior to the residence of the Applicant on routine maintenance, where the Applicant's wife requested him to also fix additional items, which he declined to do;

19.2. the reason for Mr Kolopang declining to do additional work for the Applicant's wife, was because of the NWDC's decision not to effect maintenance in respect of tenants houses any longer;

19.3. the following day, on 4 October 2005, Mr Kolopang encountered the Applicant who summoned him to his office;

19.4. the Applicant opened the door to the Applicant's secretary's office which adjoined that of the Applicant's office and entered first;

19.5. Mr Kolopang followed the Applicant into the office, where he was grabbed by the Applicant on his clothes;

19.6. the Applicant tried to hit Mr Kolopang several times, but he warded off the blows to his face by ducking and at the same time continually apologised for having given offence to the Applicant's wife;

19.7. the assault took place in the presence of the Applicant's personal assistant, Ms Bonolo Marungwana, who intervened by begging the Applicant to stop;

19.8. the Applicant did thereafter loosen his grip on Mr Kolopang, but threatened to send his "hitmen" to sort him out; and

19.9. Mr Kolopang mentioned the assault to the said shop steward, Ms Gloria Neyapetse in the property division, and later reported the matter at the meeting of 16 November 2005, where employees were invited to voice their grievances to the MEC.

20. Ms Marungwana, the personal assistant of the Applicant who joined the NWDC from January 2003 to end October 2005, and whose office adjoined that of the Applicant testified as follows:

20.1. the sexual harassment by the Applicant commenced during the very first week of her employment as his personal assistant;

20.2. at the commencement of her employment she did not have her own computer and printer and had to use that of the Applicant;

20.3. during January 2003, when Ms Marungwana was waiting for print-outs from his printer, the Applicant entered his office and sat on the chair next to where Ms Marungwana was standing;

20.4. when the Applicant placed his hand between her thighs, she could not believe what was happening and was too afraid to report the matter;

20.5. Ms Marungwana, at this point during her evidence, become overcome with grief, and had to make use of an adjournment to compose herself;

20.6. the sexual harassment continued, in the form of the Applicant squeezing her buttocks on several occasions, and he refused to heed to her requests to stop;

20.7. on various other occasions the Applicant would grab Ms Marungwana, pin her against the wall and forcibly kiss her;

20.8. Ms Marungwana was afraid of the Applicant because he was her direct supervisor, and also the most senior official in the NWDC, reporting directly to the judicial managers, with whom he had an entrenched relationship;

20.9. Ms Marungwana reported to *inter alia* Poppy Lenyatse, Gloria Tsogang and Kgomotso Pele that the Applicant was "ill-treating" her, but did not have the courage at the time to expressly mention that the Applicant was sexually harassing her and called it "ill-treatment" instead;

20.10. Ms Marungwana also asked the divisional accountant, Mr Frans Motshegwa, whenever the Applicant asked her to work late, also to remain behind, in order to have some protection available to the sexual advances of the Applicant;

20.11. Ms Marungwana further asked Mr Motshegwa to deliver a written request during 2003 to the Applicant in which she voiced her disapproval and asked him to desist;

20.12. despite the various requests to stop the harassment, the Applicant continued with his unwelcome attentions, during 2003 to 2005;

20.13. during 2003, Ms Marungwana went for counselling and was attended to by a

psychologist, Dr Direko in Mafikeng, and was thereafter treated by a Dr Moloto in Rustenburg (Peglerae Clinic);

20.14. Ms Marungwana went to consult with Dr Moloto in Rustenburg on 3 occasions, of which included her being admitted in the Peglerae Clinic for a period of 6 days during December 2005, for psychiatric treatment as a result of the sexual harassment perpetrated by the Applicant on her;

20.15. the NWDC effected payment of the psychiatric treatment with Dr Moloto, which cost the NWDC in excess of R8 000.00;

20.16. the last treatment took place during May / June 2006, and Ms Marungwana feels presently that she has recovered sufficiently not to have to seek further psychiatric assistance at present; and

20.17. Ms Marungwana was transferred to a new department at the end of October 2005.

21. The evidence of the 3 complainants was corroborated in various respects by Mr Frans Motshegwa and Ms Gloria Tsogang, as well as that of Ms Poppy Lenyatse, a witness called by the Applicant in his defence.

22. Both during the disciplinary enquiry and at the arbitration hearing, the purpose of cross-examination was fully explained to the Applicant, who also indicated that he was fully aware of his duties, rights and obligations in this regard.

23. During the arbitration hearing, the Applicant complained that the presiding officer of the disciplinary hearing was patronising, in asking him more than once whether he was conversant with cross-examination or needed an explanation in this regard.

24. The Applicant failed to cross-examine any witnesses in respect of the following:

24.1. Ms Marungwana's evidence in respect of how she was physically sexually harassed and assaulted and Applicant specifically never put it to Ms Marungwana that he denied having placed his hand between her thighs, having pinched her buttocks and having forcibly pushed her against the wall and kissed her;

24.2. he failed to put it to Ms Marungwana that Kgomotso Pele and Zandile Dlamini claimed to be close friends of the complainant and that she ought to have confided in them in respect of her being sexually harassed;

24.3. he failed to put it to Ms Marungwana that he did not grab Mr Kolopang and/or hit at him on 3 October 2005;

24.4. he failed to put in issue with Poppy Lenyatsa (Applicant's own witness in the arbitration) and Ms Gloria Tsogang, that they noticed the complainant, Ms Marungwana having been unhappy for a considerable period whilst working as a professional assistant at the Applicant; and

24.5. he failed to put it to Ms Marungwana that she never sent him a letter to request him to stop the harassment.

25. In reply to the commissioner's enquiry as to why the Applicant failed to challenge the evidence of Ms Marungwana in respect of the sexual harassment per se during cross examination, he was unable to reply and failed to proffer any explanation for his failure to do so.

26. The commissioner concluded that the Applicant's dismissal was substantively fair.

She held that the dismissal was procedurally unfair, and as noted above, awarded the Applicant the equivalent of one month's compensation.

Applicable law

27. In *Sidumo and another v Rustenburg Platinum Mines Limited and others* [2007] 12 BLLR 1097 (CC), the Constitutional Court formulated the test for the review of a CCMA arbitrator's award as follows:

'The better approach is that section 145 is now suffused by the Constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

28. In *Sidumo*, the Constitutional Court developed what it termed a "reasonable decision-maker test". On this approach, this Court is entitled to interfere with an arbitration award only if the arbitrator makes a decision that a reasonable decision-maker could not reach. The Labour Appeal Court has recently held (see *Edcon Limited v Pillemer N.O. & others* (DA4/06)) that this "*boils down to saying the decision of the commissioner is to be reasonable meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision-maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof*" (see paragraph 21 of the judgment).

29. I understand this to mean that this Court is required to determine whether the arbitrator's decision was reasonable or not having regard particularly to the reasons

given for the decision. In this regard, the Court must remain alive to the distinction between appeals and reviews and the significance of that distinction. The Court's function primarily is to ensure that decisions made by arbitrators exercising their functions under the Labour Relations Act fall within the bounds of reasonableness (see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)).

30. In *Palaborwa Mining Company Limited v Anthony James Cheetham & 2 others* (unreported JA 7/2006) the Labour Appeal Court elaborated further on the significance of the *Sidumo* judgment, and its consequences for applications for review brought in this Court. The Court confirmed that the standard to be applied is whether a decision reached by a commissioner is one that a reasonable decision-maker could not reach. The Court referred further, with approval, to the minority judgment of Ngcobo J who noted that the intention of the LRA is that "*as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances*". The Court observed that the effect of the *Sidumo* judgment was to reduce the scope for a dissatisfied employee to take his or her dispute further when it comes to an employer's decision to dismiss, and reduces the potential for the Labour Courts to exercise scrutiny over the decisions of commissioners appointed to arbitrate in terms of the Labour Relations Act (see page 9 of the unreported judgment). The Court went so far to suggest that the test is now "*very much narrower and simpler indeed it will be rare indeed that the Courts can interfere with a dismissal which has been confirmed by a Commissioner*". This is the legal framework within which the Applicant's submissions must be evaluated.

Applicant's submissions

31. At the outset, I should record that the Applicant appeared to have misconstrued the nature of these proceedings. First, he addressed extensive submissions (in his heads of argument) relating to the fairness of the disciplinary enquiry rather than the arbitration

proceedings. It is trite law that arbitration proceedings under the auspices of the CCMA are conducted *de novo*. Secondly, the Applicant appeared to consider these proceedings to be in the nature of an appeal rather than a review. In relation to these proceedings, the Applicant contends that the following conduct or omissions of the commissioner render her award reviewable:

31.1. the commissioner failed to consider the Applicant's defence, ie that a witness syndicate was created by means of a conspiracy between the managing director, Mr Hein Prinsloo and the witnesses, to render false evidence during the disciplinary hearing and arbitration against the Applicant, which syndicate would have been created by Prinsloo due to the strained relationship between the Applicant and the firstmentioned;

31.2. the commissioner would not have given sufficient weight to the Applicant's evidence that in a previous disciplinary matter, where two employees were fighting, a final warning was given as disciplinary sanction (as opposed to dismissal);

31.3. the commissioner ought to have found additional procedural irregularities in the dismissal of the Applicant (save for the three issues raised in her award), with specific reference to the chairman of the disciplinary hearing not having used Form 5 of the disciplinary code and procedure of the NWDC;

31.4. the Applicant expected the commissioner to have obtained additional documentary evidence from the NWDC in the arbitration, ie a "job card" and was expected by the Applicant to see to the calling of two additional witnesses by the NWDC to testify in the arbitration, ie Mr Hein Prinsloo and Mr Jan Nel;

31.5. the commissioner was under the impression that Ms Bonolo Marungwoana did not mention the issue of the Applicant's "hitmen" in her affidavit, whilst she did in fact mention this issue therein;

31.6. the commissioner ought to have found that the chairperson of the disciplinary hearing was biased against the Applicant;

31.7. the commissioner was part of a conspiracy of Mr Hein Prinsloo to get rid of him, and was allegedly bribed to make an award in favour of the NWDC;

31.8. the commissioner did not analyse the credibility of the NWDC's witnesses in the arbitration proceedings;

31.9. the commissioner ought not to have made a negative inference from the Applicant's failure to deal with Ms Bonolo Marungwoana's specific allegations of sexual

assault and harassment;

31.10. the commissioner did not sufficiently consider whether a lesser penalty than dismissal ought to have been imposed by the NWDC for the misconduct in question; and

31.11. the commissioner failed to consider the proper amount of compensation to be awarded to the Applicant due to her finding of procedural unfairness.

Each of these submissions is considered below.

Applicant's conspiracy theory

32. The Applicant states that all witnesses who testified against him in the disciplinary hearing, are members of a "witness syndicate" put up by the Managing Director of the NWDC to lay false charges against him and to give false evidence under oath.

33. The motive of the Managing Director of the NWDC to orchestrate this "operation" in receipt would allegedly be the grievance which the Applicant submitted to the MEC for Finance, pertaining to the training service providers disagreement which the Applicant had with the Managing Director.

34. According to the Applicant, not only the employer witnesses during the disciplinary proceedings were part of the a conspiracy against the Applicant, but also the investigating officer from the Office of the Premier, Mr van Wyk, the independent attorney and chairperson of the disciplinary hearing, Mr Eric Louw, and now also the commissioner who presided in the arbitration.

35. The nature of the Applicant's conspiracy theory is demonstrated by *inter alia* the following:

35.1. during the disciplinary hearing, the Applicant accused all employer witnesses who

testified to be members of a “witness syndicate” which witnesses included Mr Poppy Lenyatsa, payroll officer in the HR Department of the NWDC;

35.2. astonishingly however, the Applicant thereafter called the same Ms Lenyatsa as his own witness during the arbitration proceedings;

35.3. not a single witness who testified during the arbitration hearing or disciplinary proceedings for that matter, admitted that he/she was coerced into laying false charges or providing false evidence against the Applicant; and

35.4. the Applicant himself could not during the arbitration indicate any grounds or proof for his wild allegation that a witnesses syndicate had been formed to get rid of him, save for the fact that he filed a grievance.

36. The first memorandum of complaint lodged by various employees of the NWDC against the Applicant with the MEC for Finance, was dispatched in February 2005, ie 4 months prior to the MD having commenced his duties at the NWDC.

37. Mr M Kolopang, one of the assault victims of the Applicant, mentioned in the grievance meeting with the MEC on 16 November 2005, that he was assaulted by the Applicant. This complaint was tabled prior to the appointment of the investigating officer, Mr J van Wyk, which only took place on 30 November 2005.

38. The meeting with the MEC referred to above was attended by approximately 100 employees of the NWDC, who according to the minutes, applauded more than once when the allegations pertaining to the Applicant’s mismanagement were raised. It is unlikely that this body of people all lay false complaints against the Applicant.

39. The employees in the meeting apologised to the Managing Director for having raised some issues that arose prior to his appointment.

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40. The Applicant's insubordination and his issue with the Managing Director regarding the procurement of training, are in any event, also contained in the charge sheet.

41. The Applicant's allegation that the commissioner failed to consider his defence (a mere denial linked to this conspiracy theory) is clearly false *ex facie* the award:

41.1. it is clear from the award that the commissioner took note of the Applicant's defence, but concluded that the evidence of the complainant, Mr Kolopang, as corroborated in all material aspects by the evidence of Ms Bonolo Marungoana (who witnessed the assault) had to be believed, based on their entire evidence presented, their demeanour during the proceedings and the manner in which they testified (having had no hesitation in cross-examination, and projected straight forward and open answers; and

41.2. the commissioner, who had an opportunity to observe the witnesses who testified on behalf of the NWDC as well as the Applicant himself, made a finding on the balance of probabilities, which favoured the NWDC, after having taken due notice of the Applicant's defence, compared to the evidence of the two employer's witnesses.

42. It accordingly follows that there is no merit in this ground of review.

Previous fighting incident

43. The Applicant's allegation that his dismissal for assault constituted inconsistent treatment, is similarly devoid of merit:

43.1. the Applicant did not argue that there was a disparity in the sanction meted out to Mr David Mogapi in respect of a fighting incident which occurred some time prior to the assault on Mr Kolopang. The Applicant's version was simply a denial that an assault on Mr Kolopang occurred;

43.2. no evidence was placed before the commissioner about the gravity of the altercation referred to by Mrs Pele, who testified about this matter on behalf of the Applicant; and

43.3. the fighting occurred after hours, whilst employees were under the influence of alcohol provided by the company (NWDC).

44. Pele testified that Mr Nel, who decided to impose final warnings, correctly took mitigating factors into account in not dismissing employees.

45. Pele further testified that the present situation, where a senior person assaults a subordinate during working hours where everyone is sober, just because he is angry with his subordinate, differs from the fighting incident mentioned by her.

46. The Applicant himself, quite to the contrary, accepted that if he were found guilty of assault on his subordinate, a sanction of dismissal will be appropriate.

47. The Applicant in addition failed to elicit any evidence regarding the seniority of the employees who had the altercation, vis-à-vis each other.

48. On the Applicant's own version, his case is not comparable to the previous matter, was vaguely and only in passing referred to by one of his witnesses, and was not relied upon by him in argument before the commission.

49. It is further submitted on behalf of the NWDC that the Applicant, who at the time was the most senior officer in its employment, abused his position of power in assaulting a very junior employee, where he ought to have set the standard of acceptable conduct instead.

50. Accordingly, this contention fails.

Completion of Form 5 of Annexure AE to Disciplinary Code

51. A disciplinary code and procedure had at all relevant times been applicable to the employees of the NWDC. The disciplinary code contains various pro forma forms intended for the guidance and benefit of the applicable disciplinary chairperson, whilst the purpose of Form 5 is merely to assist the chairperson who recommends the sanction of dismissal in a specific case to ensure that dismissal is indeed justified with reference to the individual case at hand. The disciplinary code *inter alia* provides that:

51.1. the disciplinary code is a management guideline;

51.2. sexual harassment, physical violence or assault, intimidation, gross insubordination and insulting conduct are specifically listed as incidences of gross misconduct and material breach of contract; and

51.3. the types of misconduct are expressly stated as warranting a disciplinary hearing and possible dismissal upon first transgression.

52. The Applicant submits that the commissioner ought to have found the non-completion of Form 5 to the NWDC's disciplinary code as a further instance of procedural unfairness.

53. Pele, the Applicant's own witness, testified during the arbitration that Form 5 was /merely a "checklist" in the disciplinary code to assist a chairperson in his duties.

54. Mr Eric Louw, the chairperson of the Applicant's disciplinary hearing, is not only an experienced labour law attorney, but was also at the time a senior commissioner of the CCMA. The chairperson did not require the assistance of a "checklist" provided, as he

was by virtue of his experience and the evidence placed before him in a position to decide an appropriate sanction without additional assistance.

55. The Applicant has in any event conceded that dismissal may be an appropriate sanction for the misconduct of which he had been found guilty.

56. The disciplinary code of the NWDC expressly provides that assault and sexual harassment constitute gross misconduct and a material breach of contract warranting dismissal as a first offence.

57. The Applicant's contention is irrelevant in any event, since the commissioner found some grounds of procedural unfairness and awarded the Applicant compensation in terms of her discretion accordingly.

Alleged failure to procure evidence

58. The Applicant contends that the commissioner ought to have obtained documentary evidence in the form of a "job card" for him, and ought to have compelled the NWDC to call the MD (Mr Prinsloo) and Mr Jan Nel, the previous labour consultant of the NWDC, as witnesses.

59. It is submitted that the Applicant's contention is likewise without merit as:

59.1. each party was at liberty to call whichever witnesses deemed necessary to prove its case, and it was likewise the prerogative or the election of each party not to call a witness should it find such witness undesirable or unnecessary to prove its case;

59.2 Mr Jan Nel, who the Applicant contends ought to have testified at the arbitration, was the Applicant's witness, whom he decided not to call;

59.3. at no stage did the Applicant request a postponement to afford Mr Nel an opportunity to come and testify, and his claim that the commissioner ought to have made this witness available, is with respect, disingenuous;

59.4. Nel threatened legal action against the NWDC due to the non-renewal of his retainer, and a negative inference could certainly not be drawn from the NWDC's decision not to call him - Nel did in any event not have knowledge about the Kolopang and Marungwana matters;

59.5. the Applicant neither requested the commissioner to instruct the NWDC to produce any documentation nor did the Applicant subpoena any documents which he may have desired to use in his defence; and

59.6. the Applicant failed to call, or to subpoena, if necessary, Mr Hein Prinsloo as his witness.

60. Accordingly, the Applicant's attempt to apportion blame to the commissioner for his own failure to produce evidence, falls to be dismissed.

Ms B Marungoana's affidavit

61. The Applicant submits that the commissioner committed an irregularity or mistake by holding that Ms Marungoana did testify about the Applicant's threats to call his "hitmen" to take care of Mr Kolopang, yet Ms Marungoana, according to the commissioner, did not mention this fact in her sworn affidavit.

62. It is correct that Mr Marungoana did in fact also mention the threat of the "hitmen" in her affidavit.

63. However, the fact that Ms Marungoana also mentioned the Applicant's threats in her sworn affidavit, in addition to her evidence at the arbitration and previous disciplinary hearing, only strengthens her credibility as a witness and in fact constitutes an additional reason why the commissioner ought to have preferred the NWDC's version of

events to that of the Applicant's bare denial.

64. The Applicant's contention in this regard actually favours the NWDC's case and with respect does not constitute a ground for review.

Allegations of bias and conspiracy

65. The Applicant alleged in his closing arguments before the commissioner that Mr Eric Louw, the chairperson of the hearing, was not only biased, but was part of the conspiracy to get rid of the Applicant.

66. Not content with the unfounded allegation against an independent attorney of this Honourable Court, the Applicant went further in his heads of argument filed in this Court and alleges that the commissioner had been bribed to find in favour of the NWDC.

67. The allegation of the Applicant is, apart from being defamatory of Mr Louw, without any substance whatsoever.

Analysis of witness credibility (sexual assault)

68. The Applicant's allegation that the commissioner failed to conduct a proper analysis of the evidence prior to preferring the version of Mr Bonolo Marungoana to the bare denial of the Applicant, is incorrect *ex facie* the award:

68.1. in paragraph 49 of the award, the commissioner summarises the most pertinent portions of the evidence of Ms Marungoana, under sub-paragraphs (a) to (l);

68.2. the commissioner proceeds in paragraph 50 of the award to point out that the Applicant's failure to cross-examine Ms Marungoana on the aspects mentioned in sub-paragraphs (a) to (h) went to the heart of the merits of the matter and of determining whether he was guilty or not because the Applicant having been fully conversant with

the technique of cross-examination, an adverse inference had to be drawn as to his failure to cross-examine the allegations of Mr Marungoana specifically;

68.3. the commissioner further held in the award that it was insufficient for the Applicant to simply generally deny the allegations in sub-paragraphs (a) to (h) as fabricated lies; and

68.4. the commissioner further pointed out that the Applicant in addition failed to say anything in his evidence in chief about the specific allegations, except denying them.

69. The physical observations of the commissioner during the evidence of the complainant, Ms Marungoana, are dealt with in the award which included that:

69.1. Ms Marungoana was still visibly affected when she testified about the acts of sexual assault, to the extent that proceedings had to be adjourned for her to be able to compose herself;

69.2. the commissioner observed the demeanor of the witness and her answers in cross-examination;

69.3. no material discrepancies arose from her evidence and she came forward as a credible witness; and

69.4. having regard to the evidence as a whole, the commissioner then arrives at the conclusion that on a balance of probabilities, the Applicant did in fact sexually harass Ms Marungoana.

Adverse inference due to Applicant's lack of cross-examination in respect of material issues

70. The Applicant's contention that his failure to cross-examine the complainant, Ms Marungoana regarding material evidence rendered by her (namely him pinning her

against the wall and forcibly kissing her; him placing his hand between her thighs; and squeezing her buttocks) came about due to an alleged failure by the commissioner to explain his role, is simply untrue ex facie the record of proceedings:

70.1. during the disciplinary hearing, the chairperson in detail explained to the Applicant what was required of him during cross-examination;

70.2. the Applicant raised the chairperson's repeated insistence on explaining the Applicant's role in cross-examination as patronising, and claimed that this also was indicative of bias;

70.3. it is clear ex facie the record that the Applicant is well versed in the art of cross-examination, and is acutely aware of his rights and obligations in this respect, as was, with respect, correctly pointed out by the commissioner in the award;

70.4. the Applicant's own witness, Ms Poppy Lenyatsa, testified that he actually represented the NWDC in arbitrations and disciplinary hearings;

70.5. more importantly however, when questioned by the commissioner about the reasons for his failure to put it in cross-examination to Ms Marungoana that he for instance did not forcibly kiss her or fondle her, he simply stated that he actually did put it to her, whilst the record clearly demonstrates the opposite; and

70.6. it is also significant from the record that the Applicant does not in reply to the commissioner's question regarding his failure to cross-examine Ms Marungoana on the specific acts of sexual harassment, tell her that "his role was not clarified" as that was clearly not the case at all during the arbitration hearing.

71. I find that the Applicant is opportunistically attempting to capitalise on his lack of

legal representation at the arbitration, in an attempt to escape the legal consequences 3-
of his failure to cross-examine Ms Marungoana about the most pertinent aspects of
her evidence a negative inference had to be drawn regarding such failure, especially in
view of the fact that the Applicant also in the disciplinary hearing lacked the conviction
to cross-examine the specific evidence of Ms Marungoana in this regard.

Whether dismissal was justified

72. The Applicant's allegation that the commissioner failed to consider the Applicant's
prayer for re-instatement is incorrect ex facie the award as:

72.1. the commissioner found the dismissal of the Applicant to have been substantively
fair, in view of him having been proven guilty of serious misconduct in the form of
assault and sexual assault and harassment;

72.2, it accordingly follows that the Applicant was not entitled to re-instatement;

72.3. the NWDC's disciplinary code provides for dismissal in respect of such
misconduct, also in respect of a first offence;

72.4. the Applicant himself conceded that the misconduct, with which he had been
charged, is indeed dismissible should he be found guilty;

72.5. the evidence of Mr Frans Motshegwa to the effect that the employment
relationship had irretrievably broken down between the parties had also not been
challenged by the Applicant during cross-examination; and

72.6. it can accordingly not be correctly submitted by the Applicant that his request for
re-instatement had not been considered by the commissioner.

Compensation awarded by commissioner

73 The Applicant contends that the compensation awarded by the commissioner (the equivalent of one month's remuneration) is insufficient.

74. The amount of compensation provides no ground for review on account of the following:

74.1. the unfairness found by the commissioner was of a minor procedural nature only; and

74.2. the amount awarded to the Applicant was substantial, i.e. R40 000,00.

75. A commissioner enjoys a discretion in respect of the remedy awarded to an employee (see section 193(1), 194(1) of the Act).

76. The commissioner's findings of fact clearly anticipated the remedy (compensation awarded), as she found that:

76.1. the dismissal was substantively fair;

76.2. the Applicant was on a balance of probabilities guilty of very serious misconduct;

76.3. the commissioner is not obliged to give express reasons for each and every one of her findings in respect of compensation;

76.4. the award is indicative of the commissioner having applied her mind in respect of an appropriate remedy; and

76.5. the award was accordingly fair and equitable to both parties, in the sense that ordinarily the Applicant ought not to have received any compensation at all, but for the

commissioner's desire to compensate the Applicant as a token of her disapproval in respect of mainly the improperly attested affidavits in the matter, which inconvenienced the Applicant to some extent in the commissioner's view.

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Costs

77. The Applicant makes the following statement in his founding affidavit: *"A1. My dismissal constituted unfair dismissal as contemplated by the Labour Relations Act. The Honourable Commissioner is requested to take into account the circumstances of a total unlawful and unprecedented onslaught against me, and that Mr Hein Prinsloo and Mr Eric Louw single mindedly set out to destroy my career and future at the NWDC. Their bloody mindedness must be taken into account as aggravating circumstances."*

78. The Applicant is, however, not content to merely insult Mr Louw or the Managing Director without any substance for his allegations, but in addition, in these proceedings, states the following:

"The only thing that could have caused the lapse is probably conspiracy and money involved in the whole exercise. I submit that Commissioner Tlhapi and Eric Louw effectively guided and abetted the said conspiracy which led to my dismissal and that they colluded with each other in this regard."

79. Mr Hitge submitted that, on the basis of these statements, costs on the scale as between attorney and own client should be awarded against the Applicant. The Applicant's statements are ill-founded and may well form the basis of a civil claim against him. However, for the purposes of these proceedings, I am not persuaded that a punitive costs order is equitable.

Conclusion

80. The commissioner's award does not represent a decision to which no reasonable decision-maker could come. This application is accordingly without merit.

81. I make the following order:

1. The application is dismissed, with costs;

ANDRE VAN NIEKERK

Acting Judge of the Labour Court

Date of Hearing: 06 March 2008
APPEARANCES

For the Applicant : In person

For the Respondent: Adv M G Hitge

Instructed by: Smit Stanton Inc.