

IN THE TOKISO PRIVATE ARBITRATION

BETWEEN:

SATAWU obo SS THOBANE

Applicant

and

NORTHWEST STAR (PTY) LTD (under judicial management)

Respondent

ARBITRATION AWARD

Case Number: Tokiso/P6/753

Date/s of arbitration: 20 March 2007; 10 April 2007

Closing Arguments: 24 March 2007

Date of award: 7 May 2007

No of pages: 26

Arbitrator: Ebrahim Patelia

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Hearing and Representation

The arbitration was held at the Bentley Country Lodge in Akasia.

Mr A Mataboge of the union represented the applicant. Advocate Phala represented the company.

The respondent mechanically recorded the process.

Background

The parties submitted a pre arbitration minute. The applicant was employed between the periods 1993 to 1999. The applicant was re-employed on 31 August 2001. The applicant occupied the position of security guard and earned R3041.00 per month at the time of his dismissal.

The applicant was employed by the respondent as a security guard. The respondent charged the applicant for "Suspected to be involved in theft of cash".

The disciplinary enquiry finalised on 4 April 2005 and the appeal held on 12 June 2005 upheld the finding of guilty and the dismissal of the applicant on the aforementioned charge. The applicant was effectively dismissed on 18 July 2005.

The alleged incident occurred on 31 December 2005. The applicant concedes that he worked on the day shift and returned to the company premises on the night of 31 December 2004.

Substantive Fairness:

1. Whether the applicant was at the respondent's premises at the time of the incident?
2. Whether the applicant had taken the cash from the cash office?

Procedural Fairness

Whether Mr Dichabe was the relevant person to chair the hearing?

Whether the case was heard as per the company policy and procedure?

Whether the investigation was conducted as per the company policy and procedure?

Summary of respondent's case

Mr. K Modibane testified that he is an employee of the respondent as a security manager for the last 10 years.

On 31 December 2004 the witness was at the company premises. The witness was responsible for the internal investigation on the incident of breaking and theft at the company premises on the said date. The witness was informed by Aaron Molele of the incident.

[Page 36 of the bundle] The witness identified this document as the page containing the statements of the alleged involved security personnel. Molele obtained these statements. The witness compiled the document summarising the statements as a report from the investigations.

[Page 36, paragraph 2.3.1] Mogale was the security guard in charge of the shift on the relevant night. Mogale is still employed by the respondent. Makgale was working under Mogale on the said night with security guard Nyalunga. Makgale has been dismissed on the same allegations relevant here. [Paragraph 2.3.2 of page 36 and 37 read into the record]

The witness testified that during his investigation he read "somewhere" that Makgale left his post and went out with the applicant to discuss the R500.00 owed to Makgale by the applicant. The issue of the applicant meeting Makgale is not in the statement of Makgale.

[Paragraph 37 Statement of Thobane read page 38 on top] Thobane states that he drove in and out of the premises within 10 minutes. At 22h00 on 31 December 2004, the applicant was not on duty at the company premises. It is common practice for staff to wash their cars in the day. After hours the security are not allowed to let anybody in the premises.

After summarising these statements, the witness investigated and then recommended that all people involved, security and ticket sellers on duty should be disciplined for various incidents.

Under cross-examination the witness testified that he was not on duty on the night of 31 December 2004. The witness testified that he had not seen the applicant when he knocked off duty at 17h00.

The witness was telephoned on 2 January 2005 by Molele to inform him of the incident. The witness did not find anything unusual with this. The witness testified that the padlocks on the trunks were broken. The doors and the windows to the cash office were not broken into. Mogale was responsible for the keys to the cash office.

The witness testified that all the keys to the offices are kept in the draw. Any person could take the keys from the drawer while Mogale was in the toilet. There were several people on duty that night.

[Page 36] The witness identified this as being part of the investigation report. The witness testified that his original document has the first page stating that it is an investigation report.

The witness testified that he made the applicant aware that he was conducting an investigation into the matter against him. This was not documented however.

The witness testified that the responsibility of handling cases would differ according to ones position in the company. The person is able to take a decision up to a certain level after which the person must refer to a more senior person. The process of discipline starts with the security officer approaching the security guard. These could be Malete, Setuba, Tabe.

The witness testified that Dichabe was on leave, but there were officers on duty at the time of the incident. The witness testified that the HR department would have a record of Dichabe's leave. The witness denied the proposition that Dichabe was on leave and also stated that Dichabe was involved in obtaining statements from witnesses and accordingly could not have chaired the enquiry. The witness accepted that there is no document in the bundle that refers to a statement taken by Dichabe.

The witness testified that the delegation of authority in chairing the enquiry applied in this matter. The witness testified that he and Dichabe were involved in the investigation and accordingly the matter had to be chaired by a person from another department. The witness testified that he was unable to comment on whether the case was held timeously or not.

[Page 26 paragraph 4.9.3 and page 31 paragraphs 1.2 and 1.3.2 read] The witness testified that he could not comment on whether the time periods have been complied with in this matter as the case was handed over to another department. [Page 9] The minutes indicate that the hearing started on 30 March 2005. This was 3 months after the incident. The witness could not answer as to whether the executive HR was involved. P Pule was the executive HR at the time.

The witness could not comment on the proposition that the company had a vendetta against the applicant. The witness accepted that all of the persons charged did not perform their duties on that day.

[Page 33 read paragraph 5.2.2] The witness testified that the security policy does not apply as it is for NEWTRA and not for NW transport property holdings. The witness could not remember whether NEWTRA was part of NW Star at the time. The witness denied that the paragraph 5.2.2 applied at the respondent. The witness however accepted that all cars entering the respondent had to be searched by the security.

[Page 12] Mogale's statement states that the vehicle was not searched when it entered the depot. The witness testified that he could not confirm whether this was true or not, but accepted that "had it been done" it would have been against policy. [Page 8 read applicant statement] The witness testified that the security had contravened the company policy by drinking alcohol on duty.

The witness testified that in the disciplinary and appeal he consolidated the investigation report. The witness could “not comment” to the proposition that he did not participate as a witness in the internal processes and that it was done deliberately.

In re-examination the witness testified that he was not sure exactly when Dichabe was on leave. It was however in December and half of January. The first notification to the applicant was for 24 March 2005. Dichabe on his return participated in taking statements from witnesses. Dichabe could therefore not chair the enquiry.

[Disciplinary and Appeal Procedure, Page 26 paragraph 4.9.3] The witness testified that when he started his investigation the applicant was not a suspect. For paragraph 4.9.3 to apply it is important to understand who to charge after the investigations are completed.

[Page 12 Mogale’s statement and page 7 and 8 (Thobane’s statement)] The witness accepted that Thobane states that Mogale searched the car and Mogale states that he did not search the car.

Mr. Andrew Dichabe testified that he is chief security officer and also held this position in December 2004. The witness confirmed that he was on annual leave from 1 December 2004 to second week of January 2005. The witness was informed about the incident in this matter as soon as he returned to work from leave.

The witness testified that the case was investigated by his subordinate Aaron Molele. Molele was on standby duty on the day in issue and accordingly proceeded to take statements. The witness testified that given this his immediate superior communicated with his subordinate. The witness would simply peruse the statements from Molele before it was handed to the witnesses superior.

The witness testified that he was not delegated to chair the disciplinary enquiry. However if it had been delegated to him it would not have been a problem for him to chair the enquiry. The witness testified that only his immediate superior could answer as to why he was not delegated.

Under cross-examination the witness testified he knew the applicant as his subordinate from 2004. The applicant was not a problematic person. The witness testified that there were other senior officers on duty when he was on leave.

[Page 33; Paragraph 5.2.2 read] The witness testified that this was the procedure followed by security guards. Molele told the witness that he only received information of the incident on 2 January 2005. The witness testified that he was not involved in the taking of statements during the investigation.

Mr. Heinrich Wenhold testified that he is employed by the respondent as a financial controller at Batswana Garie Transport in Mabopane, from September 2001. On 31 December 2004 the witness testified that he was also in this position.

The witness testified that he is aware of the disciplinary policy in appointing chairpersons. If the report is written by the supervisor, a person on the same level or higher will preside over the case.

[Page 9] The witness testified that these were the minutes of the enquiry and he was involved in the writing of the report in the matter. [Page 9 paragraph 1 read] The witness testified that as he had written the report in regard to the alleged theft of money by the applicant he could not preside over the matter. [Page 35] The witness identified this as the report that he wrote and signed on 16 March 2005.

The witness testified that it became apparent after the investigation that Makgale was involved in theft and he was dismissed. The witness testified that he disciplined Makgale. The witness read page 35. In the report the witness refers to the statement by the applicant after the incident as per page 7.

[Page 35] The witness testified that Nyangula stated in the disciplinary enquiry of Makgale, which the witness chaired, that the applicant came to the premises to wash his car on the night of 31 December 2004.

[Paragraph 3 page 35] The witness testified that there is a security check, where the security offices dock at certain points. This record shows that persons who actually patrolled at which location and time the patrol took place, etc. There is a checking pit which is 150 metres away from the wash bay. The witness testified that in the time that the applicant was at the premises, Makgale could not account for 38 minutes between his docking.

The witness testified that there is a parking area where employees could wash their vehicles in their free time, while on duty. The witness testified that he did not know of the practice of employees entering the premises to wash their cars after their normal working hours.

From the evidence of Makgale, in his disciplinary enquiry, Makgale, Nyalunga, a radio operator, technical foreman and most probably a fueller were on duty.

The witness testified that it was found that Makgale and Nyalunga had consumed alcohol while on duty the night of 31 December 2004 and they were then disciplined.

[Page 35 paragraph 2 lines 1 and 2]. The witness testified that from the disciplinary enquiry of Makgale he concluded that the applicant was involved in the theft on that night. The applicant knew the systems, knew that there was money in the trunks.

The applicant knew that there was money in the trucks as he was an escort to the ticket sellers and would have known that tickets were sold. The escort is responsible for the security on the ticket vehicle, that the padlocks on the ticket bus are locked and that the people and company assets are safe.

Under cross-examination the witness testified on page 35 he signed as a financial manager, yet he testified that he is a financial controller. He performed the functions of a financial controller.

The witness testified that he wrote the report against the applicant after he chaired the enquiry of Makgale.

The witness testified that the initiator is the person who starts the disciplinary process and to write the report. The witness testified that in general the company would not allow an initiator of a report to be a presiding officer. The witness testified that to him the initiator and the person who wrote the report is the same person.

The witness identified himself as the complainant. The witness testified that he was however not called to participate in the applicants disciplinary and appeal enquiry in any fashion. The witness testified that he testified here to give clarity of why he did not chair the enquiry of the applicant.

The witness understood that there is a difference between the role of the presiding officer and the initiator/complainant.

The witness testified that the security at the main gate kept the keys to the cash office. The keys on 31 December 2004 was at the main gate and there was no report of missing keys. The security that is not on duty could not hold the keys.

The witness testified that the guards at the gate are responsible for controlling access, recording of company vehicles and busses, suppliers and patrolling the premises. The witness testified that the security at the gate would randomly search a vehicle or person. Should a security guard fail in his duties an investigation and discipline would be initiated.

[Page 12, read last paragraph] The witness testified that there were at least 4 to 5 offences stated in the paragraph. The witness testified that these security guards, Makgale and Nyalunga, were not only charged with consuming alcohol. There were other charges. The witness testified that he chaired the enquiry of Makgale on the charge of theft of money from the cash office.

The witness testified that the charge against the applicant was that he was part of the theft. Makgale was also charged with the same offence. The witness testified that out of the disciplinary enquiry he

could not find that it was probable that the other guards were involved in the theft. It would be possible that the other guards had stolen money. These other guards are still employed at the company.

From the gate one is able to see the wash bay. The witness testified that he was not aware that the vehicle of Buti Moyalusi was parked at the despatch the whole night. The distance between the cash office and the wash bay is 400m. From the main gate to the cash office it would take a minute to drive, to walk it would take 4 minute. To the wash bay it would take less then one minute.

The witness testified that there is a wash bay for the buses and an ancillary vehicle wash bay. There is a building between the ancillary wash bay and the main gate. The ancillary wash bay is 200- 250 m from the main gate. From that distance the security guard would be able to see a person leaving the wash bay, if the security is looking all the time at the wash bay.

The witness accepted that he testified that he "assumed" that the applicant stole money on the night. The witness testified that the ticket seller collects the money, counts it and is responsible with the security guard that the money is safe. The ticket seller can negligently leave monies unattended.

The witness testified that he was aware that there was no break in at the cash office. The only way to get in was with the keys.

Under re-examination the witness testified per page 35 paragraphs 2 – that the keys are kept by the shift leader personally. At that time the keys were kept in the draw at the main gate. Mogale was the team leader and he was disciplined.

The applicant went to the ancillary wash bay. The ancillary wash bay is 400 metres away and would take 1 minute to drive there. There is a building between the main gate and the ancillary wash bay. A person would not be able to see all the activities from the main gate to the ancillary wash bay. There is no evidence that the guards had observed the applicant all the time.

Mr. G Nkosi testified that he is an operations superintendent at the respondent and was in such position in December 2004.

[Page 9] The witness testified that this was the minutes of the enquiry of the applicant in this matter. The witness testified that he was the presiding officer. The witness testified that based on the documents at page 9 and 10 of the bundle, the hearing first sat on 30 March 2004 and was then postponed to 1 April 2004.

The witness testified that the applicant confirmed that they had enough time to prepare for the enquiry, but was not happy with the attendance. The shop steward was concerned as to why Dichabe

was not chairing the enquiry and that there was a problem with the time of the enquiry. The witness read paragraph 1 of page 9 as his rulings on the matter.

The witness testified that he referred to the persons on paragraph numbered 1. The witness had stated that the line managers were directly involved in the case. The witness was appointed a presiding officer as he was neutral and had no prior involvement. The witness read his ruling on point 2 and stated that the case was still valid and that the investigation was ongoing.

The witness testified that he was aware of the report written on 13 March 2005, 2 days before the enquiry sat. The applicant and his shop steward agreed to continue with the enquiry under protest.

The charge was "suspicion to be involved in theft". The witness testified that the evidence presented to him showed that the applicant, on a balance of probability, was involved in the theft of cash. The reasons were based on the following: The applicant was questioned as to what he was doing at the site when he was working with the cash in the day and he had knowledge of where the cash was kept. The reason of washing his car was not sufficient to convince the witness that he was not guilty.

[Page 13 of the bundle] The witness testified that he had summarised his findings on page 13 of the bundle. The witness read the last 5 lines of his findings. The witnesses that were brought at the enquiry said that they had not seen the car searched when it entered and left. The witness could not recall who the security guards were. The witness testified that Mogale, Lunga and one other person were the security guards on duty. These guards were disciplined for their negligence in failing to search and alcohol consumption. The issue of alcohol consumption came out in the enquiry of the applicant.

The witness testified that the fact that this occurred at month end is relevant, as it was almost certain that people would buy tickets.

The witness testified that employees never return to the site after hours to wash their cars. The witness testified that if the applicant alleges that he was at the site for a short while, it adds to the improbability of his version that he came to the site specially to wash his car. The witness posed the questions as to why could the applicant not have washed his car at a garage or at his home.

The witness testified that he found the applicant guilty for the above reasons. It was also important that that applicant owed a person some money and that he was working with the ticket sellers for the whole day.

The witness testified that in the statement he owed a person R500.00 outside of the gate and that he was desperate for money and there was an argument between the two

The witness accepted that page 7 was given to him at the enquiry.

The witness testified that he awarded dismissal as the applicant was a security guard and could not be trusted by the company.

Under cross-examination the witness testified that he continued with the case as the HR representative informed him that “the report was written on a date and that the case was still on.” The witness accepted that he was aware of the time frame of 48 hours.

However, if case is “reviewed” it can take longer even three months to investigate the matter. The witness testified that he took the word of HR that all was in order and that he could go ahead.

[Page 26 point 4.9.3 read] The witness accepted that this clause does not reflect a three month period.

[Page 31 paragraph 1.1 and 1.2 and 1.3.1 and 2 read] The witness accepted that these paragraphs do not state a three month period. The witness testified that he was not aware if the applicant was suspended. These issues regarding the policies are relevant for the HR department. The witness accepted the word of the HR department that everything was in order.

The witness accepted that he had experience in chairing disciplinary enquiries and was familiar with policies in the company. He testified that he was sure that disciplinary procedures in security would differ as opposed to operations department. He was instructed to chair an enquiry in the security department despite not being familiar with all the policies applicable there.

[Page 28] The witness testified that it was an appeal and read the contents. The witness testified that he “does not know” if this letter was in line with paragraph 1.3.2.

[Page 9] The enquiry started on 30 March 2005 and the incident occurred three months before on 31 December 2004. The witness testified that he did not know if this case fell within the realm of paragraph 1.3.2.

The witness testified that he does not know the delegation of authority in the security department. The witness testified that all the person within security were involved, per the managers instruction, in the matter before hand. The witness thus concluded that no persons within security were neutral

Dichabe was involved as he read a statement before hand. This is equivalent to writing a statement and would exclude Dichabe from chairing the enquiry. The witness testified that he did not know if a person had a right to apply for a presiding officer’s recusal.

The witness testified that there was no reason for him to recuse himself. He had consulted with HR who had clarified the matter. The witness testified that he eventually gave the decision. The witness testified that his position is higher than Dichabe.

The witness testified that no investigation report was supplied to him at the enquiry. There was a written disciplinary report by financial manager and some senior security person. [Page 35] The witness described this as "sort of a statement". The witness testified that he had not seen this before and had not considered it.

The witness testified that he could not remember when the disciplinary report that he received was written. The witness testified that per page 9 the disciplinary report was written on 13 March 2005.

[Page 7 read from line 13 from the bottom to the end of the page and page 10 bottom paragraph; page 12 paragraph under witness Nyalunga] The witness testified that in these paragraphs there is mention of the R500.00 loan and not as he referred previously to the argument between the applicant and Makgale.

The witness testified that he accepted that the car was not searched as this was the statement given to him at the enquiry and it was not denied. The witnesses to the statements were present at the enquiry and they were questioned. The witness denied that he ignored the contents of page 7 to 8 (applicant's statement).

The witness testified that "maybe" the security on duty did not search the car. The witness testified that this was relevant as the applicant knew that this would happen as the securities were drinking.

The witness testified he did not know if there was a break in at the cash office as he did not investigate. He had no answer to the proposition of how he knew that monies were stolen at the cash office.

[Page 13] The witness testified that he had no knowledge of what the duties of the security guards were at the cash office. The witness denied that he was ill informed to make a decision.

The witness could not answer as to how he concluded that it was relevant that the applicant knew of the monies despite not having the knowledge of what the applicant's duties were. The witness did not know what the applicant was doing on 31 December 2004 and whether the applicant was employed at the company.

The witness testified that he does not know of persons going to the workplace at night unless the person had duties.

Under re-examination the witness testified that page 23 is the notification of the enquiry dated 17 March 2005 for 24 March 2005. Page 6 dated 24 March 2005 for an enquiry on 30 March 2005. The witness testified that he does not know of any other notice beside page 6. The witness testified that the hearing started on 30 March 2005 as per page 9.

Page 26 paragraph 4.9.3 states “under normal circumstances a final decision shall be made within 4 weeks after the incident”. The witness testified that he did not know if the applicant was charged before 17 March 2005. [Page 31 paragraph 1.3.2]

The report of 13 March 2005 speaks of the charge against the applicant. The witness testified that he is not aware of any report before this date.

The respondent requested that the applicants claim be dismissed.

Summary of applicant's case

The applicant Solomon Thobane testified that on 31 December 2004 he left the station for the depot. At the depot the applicant took the key for the bus and went to the cash office with the ticket sellers. The applicant was acting as the escort.

Mr Motlwane spoke to his colleague on the way and said that he was short. The applicant testified that in the cash office he observed as they cashed up. The applicant followed the ticket sellers out of the cash office. The applicant locked the cash office and activated the alarm. The applicant dropped the keys at the gate at 17h45.

The applicant met Laurence Mayale outside of the yard. The applicant testified that as he had problems he gave him R100.00 of the money he owed him. He left his colleague.

At 22h00 the applicant came back to the yard with his car. He met Makgale and Nyalunga who opened the gate. The applicant informed Makgale that he wished to wash his car and also that he needed to go somewhere. Makgale allowed the applicant to go to the wash bay. The applicant washed his car.

Makgale stopped him and asked to search the car. Makgale smelt of alcohol and Nyalunga was holding a bottle of beer with him. Makgale searched the applicant's car and asked the applicant to proceed.

The applicant testified that the wash bay is not that far from the main gate. Mogale opened the gate when the applicant left the depot.

The applicant testified that it is normal for people to return to the depot at night and out of duty. The security did not have a problem with this as the applicant never heard them complain.

On 31 December 2004 the applicant testified that he saw the van of the mechanic parked near the cash office. The applicant could not identify the person in the vehicle. The vehicle was however normally used by Buti Maolusi. The applicant testified that as he only sprayed his car and left he did not notice if the vehicle was still there.

The applicant testified that there are lights at the wash bay and a person can be easily seen from the wash bay. The applicant denied requesting keys as he entered the yard. The applicant denied entering the security guards office on that day

Under cross-examination the applicant testified that it was not his car that he drove into the yard on that night.

[Page 7] The applicant confirmed that he made this statement some time after 31 December 2004. The applicant testified that he had read his statement recently and that he agrees with its contents.

[Page 9 to 14.] The applicant agreed that these were the minutes of the enquiry and that he looked at it with his shop steward. Bottom of page 7 "At home I found family visitors...buy liquor". The witness testified that he was at home in Mabopane. [Page 11 (cross-examination)] The applicant testified in the disciplinary enquiry that he was coming from Attridgeville to the depot and his written statement states that he was driving from Mabopane to Attridgeville. The applicant testified that his written statement was the correct version. The applicant could not answer as to what value should be placed on the version in the minutes.

The applicant denied that he used the excuse of washing the car to get him into the premises. The applicant testified that all employees had access to the depot to wash their cars.

The applicant testified that on 31 December 2004 he did not own a car. He however had a car that he used- but not registered on his name. That was not the car used on 31 December 2004.

The applicant testified that he would park his car that he was in control of at the depot. The witness testified that this was the only time that he went to the depot after hours to wash a car that was in his control. The applicant testified that when he was at the gate he observed others entering the depot to wash their cars.

The applicant testified that Makgale and Nyalunga were aware of the practice. The applicant accepted that he testified that Nyalunga did not want to let him in on 31 December 2004. The applicant testified that Nyalunga was already drunk and was fond of arguments. Therefore Nyalunga

did not want to let him in. The applicant testified that employees did enter the depot at night to wash their cars and pour petrol.

[Page 7] The applicant testified that when he got home it was late and he found his family visitors. The applicant testified that he stayed at home for less than an hour with his visitors before deciding to go to Atteridgeville with the car.

The applicant testified that they had noticed that the car was dirty earlier. The applicant testified that he did not wash the car immediately. He went to Block E, Mabopane, bought drinks first and left his family there before going to the depot. The depot was about a minute from Block E Mabopane.

The applicant testified that he went in, rinsed the car but did not wipe it. The applicant testified that this was due to the car being dusty. The applicant testified that the owner of the car was aware that the car was dusty.

The applicant testified that the key to the cash office is kept in one of the safes at the gate. The security shift team leader at the gate would decide in which safe to place the keys at the gate. The applicant accepted that he did not challenge respondent's last witness on his testimony that the keys are kept in the drawer.

The applicant testified that the responsibilities of holding the keys are with the shift team leader. The applicant testified that Makgale was a suspect in "a cash theft case." He first heard that he was fired and then heard that he resigned.

The applicant testified that he took his notice, page 23, to the wrong trade union. This was then corrected. The wrong union did not explain the notice to him. The employer representative had not explained the notice to him. The applicant accepted that by then he had already given his written statement to Moyelele.

[Page 35 line 4 from the bottom.] The applicant testified that this statement was incorrect as he did not have sight of people buying tickets on the bus. The applicant denied that that he went to the depot and acted in cahoots with Makgale to deprive the respondent with its takings for the day. The applicant testified that the car was searched by Mogale and he opened the gate for the applicant as he exited.

[Page 12 line 5 from the bottom.] The applicant testified that Mogale's statement was incorrect as reflected here that Mogale testified at the enquiry that the vehicle was not searched.

Under re-examination the applicant testified that Batswana Gary depot is in Mabopane. The applicant testified that he stays at Lebanon in Mabopane. His relatives stay in Garankuwa and that he was driving his cousin's car.

The applicant testified that he had seen the disciplinary minutes (bundle 9-14) at the arbitration and was not given to him immediately after his disciplinary enquiry. The applicant testified that the minutes were given to him after a few days. The minutes were kept by Motaung at the enquiry.

The applicant testified that he was not the first person to wash a car at the depot at night. He testified that they were, as he is, an employee. The applicant testified that he was alone in the car when he got to the depot. The applicant testified that his family members had no access to the depot.

The applicant denied that he went into the security offices.

The applicant testified that Venold was not at the gate when he got to the depot. The shift leader should place the key in the safe. The applicant testified that he was not part of Makgale's disciplinary enquiry.

The applicant testified that as a security guard on the ticket sales bus he was responsible to keep the ticket sellers safe. The applicant did not collect cash or have sight of the cash.

The applicant testified that he went to the depot on that night to rinse the car as other employees do. The applicant denied that he had any other mission to accomplish.

[Page 12.] The last witness on that page was Mogale. Mogale does not deny that that the applicant went to wash his car. Mogale and Nyalunga have not testified at this arbitration.

Mr. S S A Nkosi testified that he was the shop steward of the applicant in the internal process. The witness testified that the matter is alleged to have occurred on 31 December 2004 and the enquiry started on 30 March 2004. The trade union requested the reasons. The company stated that they were busy with investigations. The company however did not provide the investigation report. The witness testified that they requested that the company revoke the case as the applicant would not remember the events.

The company introduced a presiding officer from another department. This was not the normal practice. The trade union objected to this and the applicant stated that he was not at ease with this. Presiding officer Nkosi refused to recuse himself. The trade union lodged a grievance against Nkosi. The applicant agreed to continue with the case under protest.

The applicant requested witnesses like Mogale, who was a key witness, at the enquiry. The company informed them that Mogale was working. The witness was told by the witnesses that the applicant requested that they should not be afraid as whatever they would testify to Nkosi would not consider it.

The witness testified that company gave the security on duty that night liquor opportunity to buy liquor. The security supervisor and Buti Moalusi also gave the security on duty that night liquor. The applicant was approximately 10-15 minutes in the depot. The witness testified that Moalusi's car was parked in the dark in the depot, near the cash office, the whole night and the security visited the car the whole night. The witness testified that the company refused to accept this version and failed to discipline Moalusi. Moalusi gave the security a bottle of alcohol.

The presiding officer of the appeal, Polkus, accepted that there was no evidence to link the applicant with the missing cash. He however upheld the decision of the presiding officer.

The witness testified that in a transgression the immediate supervisor should preside. The witness testified that Dichabe should have presided over the case of the applicant. Dichabe is the applicant's supervisor.

Under cross-examination the witness testified that he consulted with the union official. The witness testified that the minutes of the enquiry speak of the alcohol given by Moalusi to the security.

The witness testified that the problem with Nkosi presiding is that he was from another department. This was against the common practice and policy of the company. The witness testified that it was a common practice that the supervisors of the department would conduct the enquiry in that department.

The witness testified that he requested presiding officer Nkosi to recuse himself. The witness testified that it was necessary for Nkosi to withdraw based on reasons. The applicant was not at ease with Nkosi presiding over the matter. Nkosi insisted that he would preside.

The witness agreed with the issues raised and the response of the presiding officer as recorded in the minute on page 9 of the bundle. The witness accepted that Nkosi responded in this manner. However the insistence of Nkosi is not recorded by the scribe. The presiding officer did not even enquire from the applicant as to why he was not happy with them.

The witness testified that he was not present when the presiding officer had told the witnesses that he would not take their versions into consideration. The witness testified that he had raised this issue in front of presiding officer Nkosi and he had not denied it.

The witness testified that he does not know if Buti Moalusi was on duty that night.

Page 15- The minutes of the second appeal by Polkus

Under re-examination the witness testified that liquor was brought into the depot by Moalusi and others on that night. [Page 27 point 1.5] Indicates the protocol of who should handle matters of discipline.

The employee had the right to apply for the presiding officer's recusal. The HR typed the minutes and the minutes were only seen at the time of the appeal.

Mr. M Lekalakala testified that he was a shop steward of the applicant at the appeal presided by Polkus. The witness testified that according to the policies of the company it states that the matter must be handled within 4 weeks of an incident. This did not happen here. The alleged incident occurred on 31 December 2004 and the enquiry sat on 30 March 2005.

Furthermore the allegation that the applicants car was parked at the wash bay which is 750 metres from the cash office. Buti Moalutsi's car was parked 30 metres from the cash office.

Mogale, the shift leader, and Nyalunga led in evidence at the appeal of the applicant that Moalutsi had given liquor to the security shift. Moalutsi had then stayed in the depot. Senior security Molele later on the same night gave the security officers more alcohol. This was authorised by Maleja.

Nyalunga stated at the appeal that after consuming the liquor he went to sleep in a bus until 06h00am. Billy Mogale, the shift leader, led evidence that on that night he was the only person that went to the cash office twice. Mogale testified that he did this to allow for the private hires of ZCC to place money. Mogale testified at the appeal that the key to the cash office remained with him the whole night.

Mogale also stated at the appeal that the applicant had entered the depot to wash his car. Evidence was also led that Mogale and Nyalunga argued as to the applicant entering the depot. Mogale allowed the applicant in and searched the applicant's car. Mogale's car suggested that the applicants spent 10-15 minutes in the depot. The car was wet when it left and Mogale searched the car before the applicant left.

Furthermore at the appeal it was raised that Dichabe was the correct person to preside over the enquiry. Dichabe was available at the time of the enquiry. This was against the protocol and systems within the company. Presiding officer Nkosi was not familiar with the security procedures and could not appreciate the context of the evidence. The applicant proceeded at the enquiry with Nkosi under protest.

Polkus, the second appeal officer agreed with the applicant's version. However, Polkus still upheld the decision of the presiding officer. The witness testified that there was premeditation, time was overdue without reasons and the evidence did not support the charges.

[Page 28] This document is an outcome of an appeal of SE Nkosi given by the current CEO of the company. [Page 12 (witness 2 read from "Security to placed...")] The witness testified that this correspondence with the version that Mogale was the last person at the cash office.

Under cross-examination the witness testified that he was the representative of the applicant at the first and second appeal.

Page 9- the witness testified that he was not present at the disciplinary enquiry. The witness testified that he is the secretary of the union and was kept abreast with the events of the case and provided his input. The witness testified that they work as a team.

The witness testified that he was able to raise the issues at the appeal because he was kept abreast of all the events.

Page 15- the witness accepted that these were the grounds of appeal. The witness testified that the minutes have omitted to capture specifics of Nyalunga, Mogale and Moalusi. The witness disputed that the issues were raised as an afterthought. The presiding officer took notes of our statements which are not captured in the minutes.

[Page 17 first paragraph on top] The witness testified that the first two lines are what the appeal officer found in agreement with the applicant. The opinion of the appeal officer is not evidence.

Under re-examination the witness stated that the issues raised here were raised at the appeal. These factors had to have been considered.

The witness testified that he only saw the minutes of the appeal at the time before the arbitration.

The applicant argued for reinstatement with retrospective effect.

Analysis of evidence and argument

Substantive Fairness

At the outset I must emphasise that arbitration proceedings are *de novo* hearings. There is an absolute need for parties at arbitration to provide the required evidence before an arbitrator for him to make his decision on a balance of probabilities. As in the present matter, where the fact of dismissal

is not in dispute, the respondent employer has the onus of establishing a more probable version than the applicant that the dismissal was fair.

It is trite that the parties before an arbitration cannot only rely on the record of evidence presented at the internal disciplinary enquiry processes. There is a need to present evidence afresh before the arbitrator.

In the present matter the respondent presented the evidence of Modibane, Dichabe, Wenhold and Nkosi. I have considered the evidence of these witnesses carefully and have found no first hand evidence to establish the applicant's liability on the charge.

Modibane had prepared a summary of witness statements of which he had not personally taken. Dichabe had simply read these statements and reports. Wenhold had presided over the enquiry of Makgale and had prepared a report to initiate the enquiry against the applicant. His evidence related to the information he received in Makgale's enquiry. Nkosi was the presiding officer in the applicant's case and testified to his impression of the evidence presented to him.

None of these witnesses could give direct testimony to the charge against the applicant, before me. I find the value of this evidence to be of weak value of no assistance in establishing the charge against the applicant. It is based on assumption, conjecture and hearsay evidence.

Even if the applicant's evidence can be equally disregarded, based on the various defects argued by the respondent, which I am not totally in agreement with, it would not change the situation. It would simply, in my view, amount to a situation of having two equally improbable versions. This would result in the respondent still failing to satisfy its onus of establishing a more probable case than the applicant's that the dismissal was unfair.

However, the applicant has presented the only first hand evidence of the incidents of the night of 31 December 2005. The applicant has maintained the material aspects of his version, even when tested under cross-examination. The points picked on by the respondent in its closing argument, in my view is not sufficient for me to conclude that the applicant's version is weaker than the respondent's version before me.

I must find that the respondent has dismally failed in satisfying its onus. The dismissal of the applicant is accordingly found to be substantively unfair.

Procedural Fairness

Whether Mr Dichabe was the relevant person to chair the hearing?

I am satisfied that the company policy directs that the disciplinary action needs to be taken by the relevant management within the department. I am however obliged to consider the effect of this failure on fairness in the particular circumstances.

Dichabe testified that he was available to conduct the enquiry and stated that he had no problem in chairing the enquiry. This evidence is in contradiction to the evidence of Modibane and Nkosi when explaining why Dichabe could not chair the enquiry. The respondent has in my view not presented sufficient justification for its non compliance with its on policy.

I however am of the view that the effect of the respondent appointing a more senior person to chair the enquiry from another department cannot in itself create prejudice to the applicant. The employer has the prerogative to discipline and can in the normal cause appoint a person from within its management ranks to preside over any enquiry. The presiding officer must be tested on his actual performance in the enquiry.

In the present matter it was obvious that Nkosi had no clue as to the procedures and functioning of security officers. Nkosi in fact showed very little knowledge of the disciplinary procedures of the company. Nkosi became evasive and irritated when questioned in cross-examination on any procedural aspect. I found Nkosi to be unreliable in this regard.

It was evident to me when questioned on what factors he considered in reaching his conclusion that Nkosi wrongly treated the evidence of the applicant in the enquiry as paramount. He had not focussed on the quality of evidence produced by the respondent. To my mind, Nkosi treated the matter with the misguided view that the applicant had the primary onus to prove his innocence.

In my view the conduct of Nkosi had certainly contributed to the prejudice suffered by the applicant.

Whether the case was heard as per the company policy and procedure?

Whether the investigation was conducted as per the company policy and procedure?

While the applicant raised these general points, it focussed on a range of specific issues. I have dealt with the more material points.

The time in which the enquiry was conducted was a crucial argument for the applicant.

Clause 1.3.2 of the Misconduct Policy and Procedure manual states, "if a charge of misconduct has not been proved against an employee within 1 month after the date it had been laid or in the event of an employee's services having been temporarily suspended for the reasons contemplated in 1.2 and

a charge of misconduct has not been proved against him within 1 month as from the date of his temporary suspension, his status quo will be restored. However the Executive HR under extreme circumstances may grant an extension of time.”

The one month prescription period which is clearly binding to the parties is calculated from the date on which the charge was laid or when an employee is temporarily suspended. The one month is not calculated from the date of occurrence of the event.

In the present matter the applicant was charged initially on 17 March 2005 and later a second notice was given to the applicant dated 24 March 2005. The enquiry proceeded on 30 March 2005 and a final decision was made on 20 April 2005.

The applicant was charged in the first instance on 17 March 2005. The respondent had effectively overrun the 1 month time period without any extension by the Executive Manger HR. I have no reason before me to explain why this extension was not granted or requested. It is also clear that the applicant requested reasons for the non compliance with the time periods from the respondent. These were not given.

I am of the view that there is a necessity for the respondent employer to comply with its own policies and procedures. The respondent has failed to comply with clause 1.3.2 in the present instance.

It is clear that the disciplinary policy of the company states under 4.9.3 “Disciplinary Hearings must be held at the earliest opportunity after the incident Under normal circumstances a final decision shall be made within four weeks after the incident”

I am of the view that the 4 week time period is not an absolute. It refers to normal circumstances. In the present matter the respondent had taken in excess of 3 months before a final decision was made. Again the respondent makes general references to unusual circumstances that persisted.

While I appreciate that certain investigations can cause a delay in excess of four weeks, there is a need for the employer to at least communicate the reasons for the delay to the charge employee.

In the present matter the respondent had dealt with the enquiry of Makgale which resulted in a report being made according to Wenhold on 16 March 2005. Nkosi strangely testified that he was aware of the disciplinary report on 13 March 2005. The evidence of Dichabe suggests that Molele was dealing with the investigation as early as January 2005. I am left with some uncertainty as to exactly when the respondent finalised its investigation. In my view this is itself problematic.

Generally the respondent has not dealt with the enquiry against the applicant in a manner that would give credibility to its policies and procedures.

AWARD

I have found that dismissal of the applicant is procedurally and substantively unfair. The applicant has requested the primary relief of reinstatement with retrospective effect. I have no probable reason before me to prevent the award of this relief. I find that given the inherent unfairness of the dismissal that it would be just and equitable to award the relief sought by the applicant.

In making this award I have considered the matter of *SACCAWU and others v Primserv ABC Recruitment (PTY) LTD t/a Primserv outsourcing Incorporating [2007] 1 BLLR 78 LC* in which the learned judge Francis considered the fact that there were two conflicting judgements from the Labour Appeal Court on the matter of whether an order of reinstatement can go beyond 12 months for ordinarily unfair dismissals. The two judgements considered by the learned judge are *Kroukam v SA Airlink (PTY) Ltd [2005] 12 BLLR 1172 LAC* and *CWIU and others v Latex Surgical Products (Pty) Ltd [2006] 2 BLLR 142 LAC*.

The learned judge concludes, which conclusion I follow for the purposes of this award, that “[At paragraph 20] The heading of section 194 makes it clear that it places a limit on compensation that may be awarded. It does not place a limit for an order of reinstatement. The section that comes closest to placing some limit on reinstatement is section 193 (1) (a) of the Act that grants a court a discretion to decide from what date the order of reinstatement should be. There is no other section in the Act that limits an order for reinstatement.

[21] I have already pointed out that there are conflicting judgements of the Labour Appeal Court on this issue. Since there is no limitation on reinstatement or capping of reinstatement in the Act, it is competent for a court to award reinstatement that goes beyond the 12 month period.”

I accordingly award:

The respondent must on receipt or within 14 days of receipt of this award

1. Reinstatement of the applicant with full retrospective effect to the date of his dismissal on 18 July 2005. The respondent must reinstate the applicant on the same terms and conditions that existed at the time of his dismissal.
2. Pay the applicant the retrospective payments of his salary from the date of his dismissal to actual date of reinstatement at the rate of R3041.00 per month, which he received at the time of his dismissal.

3. No order as to costs

Signed at Johannesburg on 7th day of May 2007

A handwritten signature in black ink, appearing to read 'Ebrahim Patel', written in a cursive style.

EBRAHIM PATELIA