



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 50/2014

XSTRATA SOUTH AFRICA (PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

NTIMBANA N.O.

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

LUCKY NDLANGAMANDLA

Fourth Respondent

Heard: 20 August 2015

Delivered: 08 September 2016

Summary: Review of a CCMA award – dismissal - employee given final written warning for the same conduct – effect thereof - the general approach to reviews restated – whether the CCMA Commissioner properly considered all the evidence – whether the Labour Court correctly applied the jurisprudential test on review.

Coram: Waglay JP, Ndlovu JA et Makgoka AJA

JUDGMENT

MAKGOKA AJA

- [1] This is an appeal against the judgment of the Labour Court (Steenkamp J) dismissing the appellant's review application of an award made by the second respondent, a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA). The commissioner had concluded that the dismissal of the fourth respondent (Mr Ndlangamandla) was substantively unfair on the basis that the sanction of dismissal was too harsh in the circumstances of the case. On review of it by the appellant, the Labour Court dismissed the review application and made no order as to costs. The appeal, which is unopposed, is with leave of this Court.
- [2] The brief factual background is this. The appellant operates mining activities in Witbank. Mr Ndlangamandla was employed by the appellant as a full-time co-ordinator for the third respondent (NUM) at its Witbank office. Prior to that, Mr Ndlangamandla had been employed by the appellant as an electrician. Mr Ndlangamandla's position as a full-time co-ordinator required of him to access the appellant's premises and operations, including being permitted to go underground, in order to perform his functions.
- [3] To be granted access into the appellant's premises and operations, Mr Ndlangamandla was required to possess a valid medical bureau certificate (referred to in the mining industry parlance as the "red-ticket"). This is to confirm that he has undergone the necessary medical examinations, induction and first aid training (the MIF). The red ticket was renewed in the normal course by the employees undergoing the MIF annually and each time they returned from leave. Mr Ndlangamandla had undergone all the necessary tests since his employment with the appellant, but had not submitted himself for testing since 2009.

- [4] As a result, in March 2011 he was subjected to a disciplinary enquiry, at which he was charged with non-compliance with MIF in that he had disregarded bookings made for him to attend MIF. On 5 March 2011, he was found guilty. Before a sanction could be issued by the chairperson of such an enquiry, an agreement was reached with NUM (Mr Ndlangamandla's trade union) that, instead of a dismissal, and in an attempt to promote the relationship building, Mr Ndlangamandla be issued with a final written warning. As part of that agreement, Mr Ndlangamandla had to immediately undergo MIF as requested. Mr Ndlangamandla signed for his acceptance of the final written warning and related conditions.
- [5] The appellant scheduled Mr Ndlangamandla to undergo an MIF on 7 April 2011. He attended the medical centre where the test was to be conducted, but left without undergoing the test. As a consequence of that, on 24 May 2011, the appellant again charged Mr Ndlangamandla with non-compliance with MIF in that he had disregarded a booking made for him to attend MIF. A disciplinary hearing was initially scheduled for 8 June 2011. Mr Ndlangamandla failed to attend without any explanation. The hearing was rescheduled to 10 June 2011, on which occasion, Mr Ndlangamandla could not attend as he had been booked off sick.
- [6] The hearing was again re-scheduled for 14 June 2011 when Mr Ndlangamandla failed to attend without any explanation. The disciplinary enquiry proceeded in the absence of Mr Ndlangamandla. At the conclusion of the hearing, Mr Ndlangamandla was found guilty and the sanction of dismissal was imposed. Aggrieved with that outcome, Mr Ndlangamandla launched an internal appeal process on 17 June 2011, in which he challenged the sanction of dismissal. That appeal was unsuccessful, and the decision to dismiss him was confirmed on 30 June 2011.
- [7] Still dissatisfied with the outcome of the internal appeal, Mr Ndlangamandla referred the dispute to the CCMA for conciliation, and failing that, arbitration. Conciliation having failed, the dispute was referred to the commissioner, who on 29 March 2012 issued an award. The commissioner, having accepted that Mr Ndlangamandla's guilt had been established on a balance of probabilities,

concluded, however, that the dismissal was substantially unfair on the basis that the sanction of dismissal was too harsh in the circumstances. The Commissioner ordered the appellant to reinstate Mr Ndlangamandla, albeit without back pay. He also ordered Mr Ndlangamandla to submit to an MIF within 14 days from 2 April 2012.

- [8] On 11 May 2012, the appellant launched review proceedings in the Labour Court against the commissioner's award. In its review application, the appellant raised several grounds of review. Without stating each one of them separately, it suffices to say that the main thrust of those grounds is that the commissioner had ignored the materially relevant evidence in his award. It is said that the decision to order the reinstatement is not one which a reasonable decision-maker could not have arrived at in the circumstances.
- [9] Mr Ndlangamandla launched a cross-review against the commissioner's finding that he had breached the rule or standard by not submitting himself to an MIF. He argued that the commissioner had committed a reviewable irregularity in not finding that there was no policy, rule or contract of employment that he had breached. Mr Ndlangamandla's stance was that his contract of employment only required of him to attend a medical examination when he was initially appointed and when he returned from annual leave. Since he was not returning from annual leave, so was the argument, he did not have to undergo MIF.
- [10] The Labour Court dismissed the counter-review on the basis that the commissioner's conclusion that Mr Ndlangamandla had breached the rule requiring medical testing was not an unreasonable one and was thus not open to review. The effect of the dismissal of the counter-review was that the Labour Court, like the commissioner, found that Mr Ndlangamandla's guilt had been established. The only issue for determination before the Labour Court was the fairness of the sanction of dismissal.
- [11] With regard to that issue, the Labour Court found that in concluding that the sanction of dismissal was too harsh, the commissioner had taken proper account of all the relevant facts, including the fact that Mr Ndlangamandla was

already on a final written warning for the same type of conduct for which he was charged and ultimately dismissed. The Labour Court noted that the commissioner had acknowledged this fact and took it into account, and in considering the sanction of dismissal, the commissioner had regard to all the relevant factors. It concluded that the award made by the commissioner was one which a reasonable Commissioner could make. The appellant joins issue with that finding.

[12] The appellant raises four grounds of appeal. First, it is contended that the Labour Court erred in concluding that the commissioner had taken proper account of the effect of Mr Ndlangamandla's final written warning on the graduation of discipline in his determination of the appropriateness of the sanction of dismissal. Second, it argued that the Labour Court erred in concluding that the personal and surrounding circumstances in the case were not such that they rendered the commissioner's finding unreasonable. Third, it submitted that the Labour Court misdirected itself by holding that the importance of the rule breached and the reasons for its introduction also did not render the commissioner's findings on the appropriateness of sanction unreasonable as the personal circumstances (Mr Ndlangamandla being based in the NUM offices) were taken into account and a sanction of "unpaid suspension" was imposed by the commissioner. Lastly, it contended that the Labour Court erred in concluding that the reference by the commissioner to the *Nampak* case, despite it not being clear of its relevance, did not serve to render the entire award unreasonable.

[13] Before I consider the merits of the appeal against the Labour Court's judgment, it is prudent to first set out the legislative and jurisprudential framework within which such review has to take place. Arbitration awards issued by commissioners of the CCMA and arbitrators of the bargaining councils are reviewable, among others, in terms of s 145(2)(a) of the Labour Relations Act 66 of 1995 (the LRA). Arbitration awards may be reviewed if the commissioner or arbitrator commits misconduct, gross irregularity and/or acts in excess of the powers conferred, in the conduct of the arbitration.

[14] The test for review of arbitration awards made under the auspices of the CCMA is now trite and well-settled. It finds its jurisprudential foundation in the seminal judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines and Others (Sidumo)*¹ in which the court held that s 145 is now suffused by the constitutional standard of reasonableness. The question therefore is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. Applying this test, the Court explained, 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.²

[15] With regard to the practical approach to be adopted by commissioners and arbitrators in considering the sanction of dismissal, the Court laid down the following guidelines:

‘In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list...To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.’³

¹ *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* (2007) 28 IJL 205 (CC); [2007] 12 BLLR 1097; 2008 (2) SA 24; 2008 (2) BCLR 158 (CC).

² At para 110.

³ At paras 78-79.

- [16] The Constitutional Court further held that the commissioner has to consider the full extent of the relevant personal and surrounding circumstances which includes the nature, the importance and purpose of the rule breached, the nature and extent of the breach, the reasons for the imposition of the sanction of dismissal, the basis of the challenge thereto, the harm or potential harm caused or likely to be caused by the breach of the rule, further conduct, including disingenuousness surrounding the commission of the breach and the disciplinary and arbitration processes, a complete lack of remorse and re-commitment to the values of the appellant, the effect of the breach on the trust relationship and the capacity for the resuscitation of a workable employment relationship, the effect of the dismissal on the employee and his or her service and disciplinary record.⁴
- [17] The test enunciated in *Sidumo* was applied by this Court in subsequent cases. In *Fidelity Cash Management Service v CCMA and Others (Fidelity)*,⁵ this Court pointed out that the reasonableness of the decision is determined without enquiring into the fairness of such decision. That task lies, statutorily, with the commissioner. The test is therefore a stringent one to ensure that the awards by commissioners or arbitrators are not lightly interfered with.⁶ See also *Bestel v Astral and Others*⁷ where caution was expressed not to blur the distinction between an appeal and a review, i.e. unlike in an appeal, in review proceedings the question is not whether the decision is correct, but whether it can be justified.⁸
- [18] After an initial period of uncertainty as a result of the emergence of the “process-related irregularities” jurisprudence⁹ the proper application of the test

⁴ *Sidumo* at para 78.

⁵ [2008] 3 BLLR 197 (LAC)

⁶ *Fidelity*, above, at paras 98 and 100.

⁷ *Bestel v Astral Operations and Others* [2011] 2 BLLR 129 (LAC).

⁸ At para 18.

⁹ In terms of this approach, *Sidumo* was interpreted to create a large scope of review of arbitration awards on the mere existence of any proven irregularities, dialectical or otherwise, committed in the making of the arbitration award. This was propounded in cases like *Ellerine Holdings Ltd v CCMA and Others* (2008) 29 ILJ 2899 (LAC); *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC); *Afrox Healthcare Ltd v CCMA and Others* [2012] 7 BLLR 649 (LAC); *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC).

was neatly summarised by the Supreme Court of Appeal in the path-finding judgment of *Herholdt v Nedbank Ltd (Herholdt)*.¹⁰

‘[A] review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’¹¹

[19] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)*,¹² this Court pointed out that where a gross irregularity in the arbitration proceedings is alleged, the enquiry extends to whether the result was unreasonable, in particular, whether the decision arrived at by the arbitrator is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.¹³

[20] Therefore, the upshot of both *Herholdt* and *Gold Fields* is that a process failure on the part of a commissioner does not in itself render an award unreasonable. In order for it to be unreasonable, it has to be established that such failure caused the result of the award to be unreasonable. Thus, a process failure is of no consequence if the final result of the award is, nevertheless, capable of reasonable justification.

[21] I revert to the present case, and in particular, the grounds on which the judgment of the Labour Court is assailed. As stated earlier, one of the grounds of appeal is that the Labour Court had erred in not concluding that the commissioner had failed to appreciate the effect of the final written final warning on the determination of the appropriate sanction. The nature and

¹⁰ *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

¹¹ At para 25.

¹² *Goldfields Mining SA (Pty) Limited (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

¹³ At paras 14 -15.

effect of a final written final warning, was trenchantly explained by this Court in *NUM v Greenside Colliery*:¹⁴

‘A final warning... is precisely what the name suggests. It is a warning that (the employee) will receive no further warnings but will be dismissed if he again transgresses. The employer is of course not bound to carry out the threat, but an employee can have little ground for complaint if (the employer) chooses to do so. To hold otherwise would be to equate a final warning with any other warning, which clearly it is not.’¹⁵

[22] In *Transnet Freight Rail v Transnet Bargaining Council and Others (Transnet)*,¹⁶ the following was aptly said:

‘[T]he dismissal of an employee on a final written warning is consistent with progressive discipline and, given the seriousness of the offence, suspension would amount to a mere slap on the wrist for an offence which on Fourth Respondent’s own record attracted a final written warning in the first instance. Any sanction short of dismissal would amount to Fourth Respondent not being disciplined at all.’¹⁷

[23] In *NUM and Another v Amcoal Colliery*,¹⁸ dismissals followed collective misconduct. Those of the offending employees who were already on final written warnings were dismissed, while the other employees received a lesser sanction, which was subsequently reduced by one level in terms of the company’s progressive disciplinary structure. The dismissed employees did not have their sanctions reduced, which this Court found to be fair, and rejected the contention that the sanction of dismissal should have also been reduced. This Court pointed out that the other employees had disciplinary records that allowed for a lesser sanction than that initially imposed, which allowed the employer room to reduce their sanction. However, with regard to those employees on written final warning, it left the employer with little choice

¹⁴ *National Union of Mineworkers v Greenside Colliery* [1995] 4 BLLR 29 (LAC).

¹⁵ At para 31.

¹⁶ *Transnet Rail Freight v Transnet Bargaining Council and Others* (C644/2009) [2011] ZALCJHB 15 (4 March 2011).

¹⁷ At para 62.

¹⁸ *National Union of Mineworkers v Amcoal Colliery t/a Arnot Colliery and Another* (2000) 5 LLD 226 (LAC).

but to dismiss them. Had their sanction (of dismissal) been reduced it would have been to a final written warning and there would have been no progression of discipline at all. This Court reasoned that failure to impose the sanction of dismissal under the circumstances would mean that the employees were not punished for the offence with which they were charged and found guilty of.

- [24] The Labour Court found that this finding was not reviewable as the sanction imposed by the commissioner was not so unreasonable that no reasonable arbitrator could have come to the same conclusion. Therefore, this ground of review (that the commissioner had not taken proper account of the effect of a final written warning) was found to be unmeritorious. The Labour Court concluded that the commissioner had taken proper account of all the relevant factors before him, including the fact that Mr Ndlangamandla had already received a written final warning, and postulated it against the factors to be considered in determining the appropriate sanction as set out in *Sidumo*.
- [25] It seems that the Labour Court was persuaded by the mere fact that the commissioner made mention in his award to the fact that Mr Ndlangamandla was already on a written final warning, and that he had taken that into account. In my view, this fact was mentioned by the commissioner *en passant*, without according it due weight and considering its effect. This is clearly so because, apart from mentioning it, there is no indication in the award that the commissioner in fact considered the effect of the final written warning in his ultimate decision.
- [26] In concluding that the sanction of dismissal was too harsh, the commissioner took into account three factors, namely: the stance of Mr Ndlangamandla that his non-compliance with medical testing did not create any hazard because he was based in the Witbank office of the union (and therefore did not have to go underground at the appellant's mining operation); the fact that Mr Ndlangamandla was prepared to submit himself to an MIF; and that he played a crucial role between the union and the appellant. These might all be legitimate factors, but the commissioner totally ignored the fact that Mr Ndlangamandla was on a final written warning. As a result, the commissioner

did not consider this aspect, and in particular, the principle of graduation of discipline.

- [27] Graduation of discipline is an important and well-settled principle in labour law, and should be deviated from only in exceptional circumstances and for compelling reasons. To my mind, where an employee is already on a final written warning, that fact should be given serious and anxious consideration, obviously in conjunction with other factors, in determining whether the sanction of dismissal is appropriate. The default position should be that the sanction of dismissal has to be imposed, unless there are compelling reasons not to do so. Accordingly, a reasonable arbitrator will more readily impose the sanction of dismissal, unless circumstances peculiar to the case dictate otherwise. If this is stated too widely, at the very least, the fact that an employee is on a final written warning should feature prominently in the consideration whether the sanction of dismissal is to be imposed. In the present case, the commissioner correctly pitted the final written warning against the factors to be considered in determining the appropriate sanction that were set out in the *Sidumo* judgment, but failed to give the necessary consideration to the effect of a final written warning.
- [28] As observed in *Transnet* (above, para 36) by seemingly condoning an employee's conduct, especially in the face of a final written warning for the same type of misconduct, could undermine an employer's safety policy, and send a message to the employer's other safety critical employees that the breach of the rule was of no consequence. In the present case, the fact that Mr Ndlangamandla had a final written warning should have received a focussed attention by the commissioner in determining the fairness of the dismissal. This amounted to an irregularity on the part of the commissioner because, by this failure, he ignored an important factor in making his determination.
- [29] Failing to apply the sanction of dismissal in these circumstances has the result of being no punishment at all for Mr Ndlangamandla. This is unreasonable, and the commissioner's attempt to justify it by saying that the reinstatement without back pay is punishment, does not render the sanction, even with that

consideration, reasonable. It remains unreasonable in all the circumstances. In this case, anything less than the sanction of dismissal would render progressive discipline meaningless. By extending Mr Ndlangamandla's final written warning, the commissioner made a decision that a reasonable decision-maker could not make under the circumstances.

[30] In its judgment, the Labour Court said the following on this aspect:

'[I]t is common cause that (Mr) Ndlangamandla had a final written warning for the same type of misconduct for which he was charged and ultimately dismissed. The company complains that the commissioner did not appreciate this fact. When one has regard to the award, the arbitrator acknowledges that it is common cause the employee had a final written warning for similar conduct.'

It went on to say:

'It is trite law that a final written warning suggests that an employee is on the verge of being dismissed should he commit similar conduct and found guilty of such.

However, having taken into account, and in considering the sanction of dismissal, the commissioner then considers the factors outlined in *Sidumo*...

[31] The Labour Court also concluded that the commissioner's finding on the substantive fairness of the dismissal was not reviewable in that it could not be said that the surrounding circumstances were such that they would have led to a different conclusion. It found that the commissioner had taken proper account of the personal and surrounding circumstances (i.e. the fact that Mr Ndlangamandla was allegedly under the impression that he was not required to undergo MIF because he worked at NUM offices in Witbank, as opposed to the mine where there were inherent hazards, and Mr Ndlangamandla's apparent willingness to submit to an MIF after the arbitration. I do not agree.

[32] The circumstances surrounding Mr Ndlangamandla's dismissal have been set out in paras 4 and 5 above, from which it is clear that he was deliberate in frustrating any attempts by the appellant to have him attend an MIF. He was

equally obstructive when the appellant attempted to bring him before a disciplinary hearing. From the evidence in the arbitration proceedings, it is clear that he deliberately undermined the authority of his immediate seniors. Mr Ndlangamandla was also disingenuous, both in the arbitration proceedings and beyond. For example, in his founding affidavit in the cross-review, he stated that he was not part of the settlement reached between NUM and the appellant that he be given a final written warning and that that agreement was imposed on him. That was disingenuous and opportunistic in the extreme.

- [33] With regard to the nature of the rule breached, it seems to have been common cause that the purpose of the medical testing was to assess the fitness of employees to work and be able to access various areas of the appellant's operations. It, therefore, concerned safety, and in any event, it is a statutory obligation placed upon the appellant by the Mine Health & Safety Act 29 of 1996. To that extent, the rule requiring medical testing was of utmost importance in the running of the appellant's mining operations, and its breach was thus viewed in a serious light by the appellant.
- [34] It cannot be emphasised enough that safety is of paramount importance in the mining industry. Mr Ndlangamandla conceded as much during the arbitration proceedings before the commissioner. In *Exactics-Pet (Pty) v Patella NO and Others*,¹⁹ the Labour Court found, in a case where an employee had been found to have breached the zero-tolerance for alcohol rule that the employee did not need to be drunk or not able to do his work to be dismissed, as an employer could not wait for an accident to happen for it to dismiss such an employee. Similarly, in the present case, it is irrelevant that there was no loss of life or injury as a result of Mr Ndlangamandla's breach of the rule.
- [35] The commissioner's award that Mr Ndlangamandla submits to a medical examination, is inconsistent with, and flies in the face of, the established facts, especially in light of the commissioner's own finding that Mr Ndlangamandla had deliberately frustrated the appellant's efforts in that regard. Mr Ndlangamandla's offence was a very serious one. There is no doubt that he was in a safety critical position which at all times would require the strict

¹⁹ *Exactics-Pet (Pty) v Patella NO and Others* [2006] 6 BLLR 551 (LC).

application of the rule that employees in his position had to undergo a medical examination. In my view, the commissioner failed to have a proper appreciation of the importance of the strict application of that rule in this matter.

- [36] As to the extent of the breach, Mr Ndlangamandla's conduct was flagrant. The commissioner "accepted" that Mr Ndlangamandla "had tried every ground to avoid medical examination..." It ought also to have been considered that, by virtue of his position as a full-time coordinator, Mr Ndlangamandla was the most senior union representative whose role was, among others, to build and maintain good relations between the appellant, its employees and NUM. It was thus expected of him to be exemplary to employees on good conduct and compliance with the appellant's policies and procedures. If the appellant were seen to be lenient in the application of this important rule, a wrong message would be sent to other employees that they could violate important rules with impunity. The need to deter other employees from committing the same misconduct is a response to risk management and is as legitimate a reason for dismissal as a breakdown in trust. In *De Beers Consolidated Mines Ltd v CCMA and Others*,²⁰ this Court said:

'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise'.²¹

- [37] To summarise, the commissioner ignored an important factor in consideration of the award, namely that Mr Ndlangamandla was on a final written warning. Had he taken proper account of all the relevant considerations, the only logical conclusion he could have reached was that Mr Ndlangamandla was liable to be dismissed. The commissioner's arbitration award, therefore, amounts to a decision that a reasonable decision-maker could not make.

²⁰ *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2000) 21 ILJ 1051 (LAC).

²¹ At para 22.

[38] In the result, the appeal should succeed. The appeal was unopposed and there is no costs order to be considered.

[39] In the circumstances, the following order is made:

1. The appeal is upheld;
2. The order of the Labour Court is set aside and in its stead, the following is substituted:

“The review application succeeds. The award made by the CCMA is reviewed and set aside and replaced with the following:

‘The applicant’s (Mr Ndlangamandla’s) dismissal was both substantively and procedurally fair.’”

3. There is no order as to costs.

TM Makgoka

Acting Judge of the Labour Appeal Court

Waglay JP *et* Ndlovu JA concur in the judgment of Makgoka AJA

APPEARANCES:

FOR THE APPELLANT:

Mr M.B. Masuku

Instructed by Mervyn Taback

FOR THE THIRD AND FOURTH RESPONDENTS: No appearance