THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 77/2014

K M LAWRENCE — **Appellant**

and

MUTUAL & FEDERAL (PTY) LTD — **First Respondent**

LARRY SHEAR N.O. — **Second Respondent**

Heard: **22 September 2015**

Delivered: **15 September 2016**

Summary: Review of private arbitration award – employee contending that arbitrator failing to apply his mind to material facts and to apply section 193 of the LRA – employee also contending that Labour Court erring in not granting costs. Arbitrator guided in his function by the terms of reference. Arbitrator applying his mind to all material facts – section 193 not applicable in private arbitration and arbitrator correctly granted relief in light of the terms of reference. In respect of costs, court finding that the Labour Court correctly exercised its discretion and that such discretion could not be interfered with in the absence of any misdirection on the part of the Labour Court. Labour Court's judgment upheld – appeal dismissed.

Coram: Tlaletsi DJP, Coppin JA *et* Makgoka AJA

JUDGMENT

THE COURT

[1] This is an appeal against parts of the judgment of the Labour Court (Prinsloo AJ) handed down on 9 May 2014, in terms of which the Labour Court declined to review and set aside in its entirety, a private arbitration award under the provisions of the Arbitration Act.[1]The Labour Court only set aside a portion of the award and substituted it with its own determination. The Labour Court also declined to grant costs to the appellant. The appeal is with leave of the Labour Court.

<u>The facts</u>

[2] The first respondent is a short term-insurer, insuring among others, against motor vehicle accidents. The appellant was employed by the first respondent in June 2008 in the position of General Manager: Claims Technical, based at the first respondent's head office in Johannesburg. The first respondent had a motor liability claims department (MLCD) which was housed in some 25 branches nationally. One of the primary responsibilities of MLCD was to recover monies from third parties, which monies had been paid out to the first respondent's policy holders, where third party drivers are deemed to be at fault and responsible for motor vehicle accidents which gave rise to the claim. These claims had to be enforced within a period of three years from the date of the occurrence of the incident giving rise to the claim. If not so pursued, the claims would prescribe.

[3] In November 2008, the first respondent embarked on a restructuring project called "Claret" which entailed, among others, a re-evaluation of staff structures and costing within the company. The 25 MLCD branches were reduced to five

[1] Act 42 of 1965.

hubs, which were all centralised in Johannesburg. This resulted in a reduction of 30% of MLCD staff. Staff in other branches which closed had to relocate to Johannesburg. There was resistance to this move, which resulted in serious staff shortage in Johannesburg, while the workload increased significantly. For example, the Johannesburg took over a backlog of approximately 26 000 recovery files from branches that had been closed. In addition, about 50 000 new recovery files were referred to the Johannesburg MLCD hub annually. From 1 December 2009, the MLCD came to fall under the overall authority of the appellant.

The prescription of claims and the appellant's dismissal

[4] During 2009, Mutual & Federal conducted an investigation and determined that claims against third parties to the value of R7, 6 million had prescribed. It is common cause that this occurred whilst the MLCD was under the management of the appellant. As a result, on 4 August 2010, the appellant was suspended pending a disciplinary enquiry on various counts of alleged mismanagement. The disciplinary hearing was instituted against the appellant for gross negligence. The applicant was eventually found guilty on a charge of gross negligence and was dismissed in July 2011.

The arbitration agreement

[5] Aggrieved with the substantive unfairness of his dismissal, the appellant initially referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). However, this was later withdrawn and the parties agreed to refer the matter for private arbitration in terms of an arbitration agreement dated 5 October 2011. The private arbitrator was given the same powers and functions as a commissioner of the CCMA as contemplated in s 135 of the Labour Relations Act 66 of 1995. The arbitrator was required to determine the following issues:

(a) whether the applicant (the appellant) is guilty of gross negligence in that he failed to exercise due care and/or grossly failed to implement control and adequate monitoring mechanisms regarding prescribed claims, thereby exposing the first respondent to a financial loss of R5 million – R10 million and thereby causing an unwarranted premium reduction (“clause 3.1”);

(b) If so, whether the dismissal of the appellant was substantively fair (“clause 3.2”);

(c) if not, the appropriate legal relief to be awarded to the appellant (“clause 3.3”); and

(d) whether the first respondent will be entitled to deferred payment of the appellant’s 2009 bonus, plus interest thereon, from 16 February 2011 to date of payment, less income tax to be deducted.

<u>The arbitration proceedings</u>

[6] The arbitration proceedings commenced on 11 October 2011. Seven witnesses, including the appellant, testified in the proceedings. It is not necessary to set out the evidence of each witness. It was established during the evidence that about 750 files had prescribed. The question that became key and relevant during the arbitration was whether there were effective measures and controls in place to prevent prescription. The first respondent contended, on the one hand, that the appellant had failed to put in place any or adequate control measures to prevent the prescription of claims.

Summary of key areas of the evidence

[7] One of the witnesses to testify on behalf of the first respondent was Mr Mohamed Isaacs, to whom the appellant reported. Mr Isaacs testified that after it came to his attention in July 2010 that some claims had prescribed, he communicated with the appellant to determine measures to prevent further claims from prescribing. He further testified that after the interaction with the appellant, the latter would immediately initiate an action plan to stem the flow of further prescription. However, this was not done.

[8] On the other hand, the appellant contended that there were various and sufficient control measures in place, and that nothing more could have been done to prevent prescription. According to the appellant, MLCD was under

extreme pressure and barely able to cope with the demands of current and new work, let alone the work inherited from the various regions after operation Claret. The appellant testified that MLCD inherited a poor situation from the "old regime" and would take at least 18 months to turn the situation around. He said that he and his team leaders focussed their attention mainly on new and target files, which had a better chance of recovery. According to him, there was no point in closing files in which claims were about to prescribe, as some work would have been done on them, and some recovery of money was possible on those files. As a measure, for example, MLCD introduced an incentive scheme for staff on recovery. During the first six months, MLCD had requested a staff member to draft an action plan, which was presented to Mr Isaacs, and the latter was satisfied with it.

[9] Ms Rene Van Coller, a previous employee of the first respondent in MLCD, testified on behalf of the appellant. She testified that there were measures and controls in place in MLCD to prevent prescription. These included age analysis, dairy systems and target files. Greater emphasis on target files as they had a greater chance of recovery. According to Ms Coller, the recovery rate was 10%. Ms Van Coller further stated that there were limited resources available at MLCD and it took some prioritising to allocate resources in the most efficient manner.

The arbitration award

[10] The arbitrator handed down a varied[2] arbitration award on 16 November 2011. The arbitrator found that the appellant was not guilty of gross negligence, but only of negligence, for failing to take adequate and additional measures, as a general manager in MLCD, to ensure that claims did not prescribe. With regard to the sanction, the arbitrator did not make any specific finding as to whether the dismissal was substantively fair, as required in the private arbitration agreement. Instead, the arbitrator stated that he "not entirely satisfied that dismissal was the only and necessarily appropriate

[2] The initial award dated 29 October 2011 was found to be defective in the calculation of the quantum of compensation awarded to the appellant, and with regard to the appellant's entitlement to a performance bonus. These errors did not in any way alter the essential reasoning in the initial arbitration award.

sanction."[3] Instead, the arbitrator ordered the first respondent to pay the appellant the equivalent of six months' salary as compensation, calculated to be R550 000. The first respondent was also ordered to pay the appellant 50% of his performance bonus for the financial year 2009, being R76 722.50 plus interest at the prescribed rate from 1 October 2010 until 1 October 2011. The arbitrator made no order as to the costs.

[11] In making the award referred to above, the arbitrator took the following factors into account. He accepted that the situation became extremely difficult within MLCD in the Johannesburg office after operation Claret. He also accepted that certain measures were in place, but were inadequate. In particular, he found that the appellant failed to develop a clear plan to cope with and deal with the increased workload, especially in respect of older files, which "were breathing their last breath" and appeared to have slipped through the control measures in place. The arbitrator found that the appellant had fell short of his responsibilities and obligations as a general manager, in ensuring that sufficient measures and procedures were in place, especially after he was alerted to the looming danger of prescription and the consequences were the claims to prescribe.

[12] On the above considerations, the arbitrator concluded as follows on whether the appellant was guilty of gross negligence:

> 'The crisp question is whether the applicant was guilty of gross negligence. It is my view that (the) applicant was not guilty of gross negligence, but, I do believe that he was negligent in not ensuring that whatever measures were in place were sufficient and properly monitored by himself and his staff. Applicant was the general manager of claims, under which MLCD resided. He must take ultimate responsibility for any shortcomings within the department. I do not believe that he is guilty of gross negligence because the evidence established that:
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> (i) measures were in place;
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> (ii) the department was understaffed;

[3] At para 106 of the arbitration award.

(iii) it appears that the impact of Operation Claret was not properly thought through by senior management;

(iv) that after Claret the department was severely understaffed.

However, despite these factors, (the) applicant as the general manager, should have, and as a matter of urgency, applied himself to create the necessary safeguards to avoid what did occur. In this regard, I believe he failed. A plan should have been put in place, but wasn't.'

<u>In the Labour Court</u>

[13] The appellant was dissatisfied with the arbitration award, in particular, that the arbitrator did not order that he be reinstated to his position and that the arbitrator had awarded him only 50% of his bonus. The appellant approached the Labour Court seeking to review and set aside the arbitrator's award and its variation on the grounds that the arbitrator had committed several gross irregularities in the arbitration proceedings. The grounds of review were that the arbitrator had:

(a) failed to determine directly one of the issues he was required to determine in the terms of reference contained in the private arbitration agreement, namely, whether the appellant's dismissal was substantively fair;

(b) failed to critically analyse or make any findings on credibility or make a determination on the probabilities on any of the evidence adduced;

(c) disregarded material evidence and argument pointing to the appellant's innocence of any negligence. Put differently, it was contended that there was no proper basis on which to find the appellant guilty of any negligence. Alternatively, it was argued that the arbitrator had acted *ultra vires* the powers given to him in the private arbitration award in that he was not required to determine whether the appellant was guilty of negligence, but solely of gross negligence;

(d) failed to consider the prescripts of s193(2) of the LRA regarding reinstatement or re-employment as an obligatory remedy;

(e) failed to provide any cogent reasons for awarding payment of only 50% of the appellant's 2009 performance bonus, or for the date determining interest on the capital amount to be paid.

[14] The Labour Court heard the matter on 21 November 2013 and handed down its judgment on 9 May 2014. After setting out the test applicable on review, the Labour Court considered the fact that the arbitration award in the present case was pursuant to a private arbitration agreement between the parties, and could only be reviewed in terms of s 33 of the Arbitration Act, on the basis of the *dictum* in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another.*[4]

[15] The Labour Court then proceeded to consider each of the appellant's grounds of review and found the first three of such grounds to be unmeritorious and dismissed them. It however, upheld the last ground, finding that the arbitrator's failure to provide reasons for awarding only 50% of the appellant's bonus is reviewable. With regard to costs, the Labour Court stated that it took into account that "the applicant is an individual who feels prejudiced and wanted this Court to consider his matter" and that "in law and in fairness", a costs order was not appropriate.

[16] In the result, the Labour Court made an order dismissing the application for review on the first three grounds relating to: failure to determine the substantive fairness of the appellant's dismissal; acting *ultra vires* the powers given in the private arbitration agreement; and failure to consider the prescripts of s193(2) of the LRA. Although not expressly stated, the Labour Court reviewed and set aside the portion of the arbitrator's award dealing with the appellant's entitlement to the performance bonus, and substituted the following for it:

[4] 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC).

> 'The applicant is entitled to his full performance bonus for the 2009 financial year being R165 567 plus interest at the prescribed rate from date of accrual to date of payment, less income tax deductions.'

[17] The appellant, aggrieved with the dismissal of his review application as far as the first three grounds of review are concerned, and the non-awarding of costs in his favour, applied for leave to appeal on 30 May 2014. The appellant contended that the Labour Court erred in dismissing those three grounds of review, and in not making a costs order in his favour. On 11 July 2014, the Labour Court granted leave to the appellant to appeal to this Court on those grounds.

<u>In this Court</u>

[18] In this Court, the appellant pursued only the second and third grounds of appeal as initially argued in the Labour Court, and the costs order. In other words, the appellant abandoned the first ground of appeal in which it was argued that the arbitrator had failed to make a finding as to whether the appellant's dismissal was substantively fair, as provided for in the private arbitration agreement. For completeness sake, the appellant's argument in this Court is premised on three grounds of appeal. They are:

(a) The Labour Court erred in dismissing the appellant's contention that the arbitrator had committed a gross irregularity by disregarding material evidence alternatively failed to apply his mind to the evidence and argument presented in the arbitration proceedings;

(b) The Labour Court erred in dismissing the appellant's argument that the arbitrator failed to consider and follow the prescripts of s193(2) of the LRA by not ordering the reinstatement of the appellant.

(c) The Labour Court erred in not making a costs order in favour of the appellant despite his partial success in the review application.

[19] Before we consider these arguments, it is prudent to restate the test for reviewing a private arbitration award. Such an award can only be reviewed on the narrow grounds set out in s33 of the Arbitration Act, and not in terms of the grounds set out in s 145 of the LRA.[5] Section 33 of the Arbitration Act provides:

> '(1) Where
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> (a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
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> (b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers;
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> (c) An award has been improperly obtained,
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> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[20] We turn now to consider in turn, the appellant's three grounds of appeal.

The arbitrator failed to consider evidence

[21] There is no merit in this ground of appeal, and it is mentioned to be dismissed. The arbitrator did consider all the evidence. That explains how he came to the conclusion that the appellant was not guilty of gross negligence, but only negligence. We have, in paras 10-12 above, referred in some detail, to the reasoning of the arbitrator in arriving at that conclusion. In short, the arbitrator concluded that the appellant had failed to ensure that there were proper control measures in MLCD. We agree with Mr *Van As*, counsel for the first respondent, that such a finding by a private arbitrator, even if wrong, does not constitute a reviewable irregularity. As explained by Harms JA in *Telcordia*, the general principle is that "when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was."[6]

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[5] See *Stocks Civil Engineering (Pty) Ltd v Rip N.O. and Another* [2002] 3 BLLR 189 (LAC) at para 52 and *Telcordia Technologies Inc v Telkom* SA Ltd 2007 (3) SA 266 (SCA) (*Telcordia)*.
[6] At para 55.

[22] It was also contended that the arbitrator failed to make credibility findings in respect of the witnesses who testified during the arbitration proceedings. The Labour Court was, therefore, correct in its conclusion that the arbitrator's decision was not reviewable on this ground.

Reinstatement

[23] The terms of reference of the private arbitration agreement gave the arbitrator the same duties and powers of a CCMA commissioner as contemplated in section 135 of the LRA. Using that as a basis, the appellant argued that section 193 of the LRA was applicable and that the arbitrator failed to take into consideration the prescripts of that section. The section concerns remedies for unfair dismissal and unfair labour practices, and it provides as follows:

> '(1) If the Labour Court or an arbitrator finds that a dismissal is unfair the court or arbitrator may:
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> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
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> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
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> (c) order the employer to pay compensation to the employee.
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> (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:-
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> (a) the employee does not wish to be reinstated or re-employed;
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> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
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> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
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> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[24] The Labour Court approached this issue as follows:

> 'The applicant's case is that once the arbitrator found that the dismissal was substantively unfair, he had no option but to reinstate the applicant. I cannot agree with this submission. It is evident that the arbitrator considered the appropriate remedy and in doing so found that reinstatement is not the appropriate remedy and he awarded compensation. The reasons for not reinstating the applicant and for determining the amount of compensation had been fully set out in the arbitration award. I cannot find that the arbitrator failed to take into account of or consider the prescripts of section 193 of the Act. He considered the facts and his finding that the applicant was indeed negligent and came to a finding that reinstatement would not be appropriate but compensation should be awarded. The arbitrator provided reasons why he did not reinstate the applicant and awarding compensation, he carried out his mandate to determine the appropriate legal relief.' (Our underlining for emphasis)

[25] This was a private arbitration and section 193 of the LRA would have only been applicable if the parties specifically made the section applicable to their arbitration, otherwise it does not apply automatically.

[26] The arbitrator was only given the same powers and functions as a CCMA commissioner as contemplated in section 135 of the LRA.[7] Section 135 only relates to powers and functions required to resolve disputes through conciliation, and has nothing to do with the arbitration or the application of section 193 of the LRA.

[27] The arbitrator was not given all the powers and functions of a CCMA commissioner. In any event, even if he was given such powers, it does not imply that section 193 was applicable to the arbitration.

[28] The point raised by the appellant regarding the applicability of section 193 was a bad point and ought to have been dismissed on the simple basis that the section did not apply.

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[7] Clause 2 of the terms of reference states: "the arbitrator is given the same powers and functions as a commissioner of the CCMA as contemplated in section 135 of the LRA 66 of 1995".

[29] It is clear from a reading of the other terms of reference, in particular, clauses 3.1, 3.2 and 3.3, and the arbitrator’s award, that he understood exactly what his powers and functions were and that he complied fully with the terms of reference.

[30] The arbitrator was at liberty to determine the appropriate relief to be awarded to the appellant if he found that the appellant’s dismissal was not substantively fair. In terms of clause 3.1 of the terms of reference, he was to determine if the appellant was guilty of gross negligence in light of what was stated in that clause. In clause 3.2, it is stipulated that if he finds that the appellant was grossly negligent, he (i.e. the arbitrator) had to determine whether the dismissal of the appellant was substantively unfair, i.e., the determination of substantive fairness only had to be made if the arbitrator found that the appellant was grossly negligent for the reasons stipulated in clause 3.1.

[31] In terms of clause 3.3, if the arbitrator did not find that the appellant was grossly negligent he had to determine “the appropriate relief to be awarded to the [appellant]”.

[32] The terms of reference clearly assume that the appellant was at least negligent. The arbitrator found that the appellant was not grossly negligent, but negligent and in accordance with clause 3.2, he did not have to specifically determine whether the appellant’s dismissal was substantively unfair, but, in accordance with clause 3.3, had to determine the appropriate relief to be granted to the appellant. The arbitrator was of the view that the appropriate relief was compensation and not reinstatement. He cannot be faulted in that regard. He fairly and reasonably complied with the terms of reference.

<u>Costs</u>

[33] There remains the issue of costs, to which we now turn. As stated earlier, the Labour Court made no order as to costs in the review application. Its reasoning was as follows:

> 'With regard to costs, I take into account the fact that the applicant is an individual who feels prejudiced and wanted this Court to consider his matter. I do not in law and in fairness consider a costs order to be appropriate.'

[34] The appellant argues that the Labour Court erred in not granting costs in his favour. The argument is premised on the fact that the Labour Court had upheld one of the three grounds of appeal, in terms of which the Labour Court reviewed and set aside the arbitrator's award of 50% of the appellant's performance bonus, and ordered that the appellant be paid his full performance bonus for the year 2009. The appellant contends that the Labour Court was supposed to grant costs in his favour, as he was at least partially successful in the review application and being awarded financial relief as a result.

[35] The general approach to be adopted by a court of appeal when considering an appeal against costs is trite. The award of costs and the scale thereof is a matter within the discretion of the court making the order.[8] The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made.

[36] Put differently, a court of appeal's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court below, acting reasonably, could have made the order in question.[9] In applying this principle to the present case, it should always be borne in mind that the court not only granted costs against a losing party, but also that such costs were ordered on a punitive scale of attorney and own client.

[37] We shall, for completeness sake, refer to the general principles applicable in the Labour Court as regards costs. This is governed by s162 of the LRA, which provides that in making orders for payment of costs, the Court has to have regard to the requirements of law and fairness. In deciding whether to

[8] *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and another v Jongilanga* 1985 (3) SA 117 (A) at 124B.
[9] See *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D – E.

order payment of costs, the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and during the proceedings. In *Moloi v Euijen and Another,*[10] it was observed that the framework of s162 supports the proposition that when making orders of costs the requirements of law and fairness are paramount.[11] The requirements of law and fairness are on equal footing, and none is secondary to the other. See in this regard *Callguard Security Services (Pty) Ltd v Transport and General Workers Union and Others*[12] and *Xaba v Portnet*.[13]

[38] The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court, and such orders are made in accordance with the requirements of law and fairness. See in this regard *Member of the Executive Council for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*[14] where Zondo JP explained the rationale for that approach:

> '[T]he norm ought to be that costs orders are not made unless those requirements [of law and fairness] are met. In making decisions on cost[s] orders this Court should seek to strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. This is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes…'[15]

[39] In the present case, it is clear from the reasoning of the Labour Court, as set out in para 31 above, that its disposition was to grant costs against the appellant because he was partially, and not substantially, successful. He had proffered four grounds of appeal. Only one was upheld. Accordingly, the Labour Court decided against awarding costs against the appellant, on

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[10] (1999) 20 IJL (LAC).
[11] At para 20.
[12] (1997) 18 ILJ 380 (LC).
[13] (2000) 21 IJL 1739 (LAC).
[14] [2008] 6 BLLR 540 (LAC).
[15] At para 17.

considerations of fairness and law. We do not see how it can be said in those circumstances that the Court did not exercise its discretion properly. In our view, it did. There was neither capriciousness nor misdirection in the manner the Court exercised its discretion. There is therefore no merit in the appellant's argument in this regard.

Order

[41] In the result the following order is made:

1. The appeal is dismissed;

2. There is no costs order in respect of the appeal.

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THE COURT

Tlaletsi DJP, Coppin JA and Makgoka AJA

APPEARANCES:

FOR THE APPELLANT:	Adv. J. Campanella Instructed by Dewey Herzberg Levy Inc Sandton, Johannesburg
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