**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 1797 / 17

In the matter between:

**BHEKUYISE MJOLI AND OTHERS** **Applicants**

and

**PETERS PAPERS (PTY) LTD** **First Respondent**

**DANIEL DU PLESSIS *N.O.* (AS COMMISSIONER)** **Second Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION** **Third Respondent**

**Heard: 15 October 2024**

**Delivered: 6 February 2025**

**This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 6 February 2025**

**Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of arbitrators – s 145 of LRA 1995 – determination of conduct of arbitrator, gross irregularities and reasonable outcome**

**Evidence – evaluation and determination thereof – proper assessment of evidence and probabilities by arbitrator – no basis to interfere with arbitrator's**

**conclusions on the probabilities, evidence, credibility and preferring particular evidence**

**Dismissal – theft of employer property – principles and evidence considered – conduct of employees constituting gross serious misconduct placing employer at risk and causing harm – arbitrator drawing proper inference from such conduct in finding that employees committed misconduct – dismissal justified**

**Review of award – conclusion of arbitrator correct and/or reasonable – arbitration award upheld – review application dismissed**

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**JUDGMENT**

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**SNYMAN, AJ**

Introduction

[1] This is yet another review application where there has been an unfortunate material delay in the conclusion of the matter. The case dates back almost a decade, and has only come up for hearing now. This is the kind of situation the new Rules of the Labour Court seeks to remedy, and only time will tell if this intention prevails. After all, expedition must be one of the cornerstones of employment law dispute resolution.[1]

[2] The above being said, what is now before Court concerns an application brought by the applicants to review and set aside an arbitration award issued by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), the latter being the third respondent. In terms of this arbitration award, the second respondent found that the dismissal of the applicants by the first respondent was substantively and procedurally fair. The review application has been brought in terms of section 145 of the Labour Relations Act (LRA)[2].

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[1] As said in *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187: '*… Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition …*'.
[2] Act 66 of 1995 (as amended).

[3] In this review application, the applicants seek relief to the effect that the finding of the substantive fairness of the dismissal of the applicants, as made by the second respondent, be reviewed and set aside, and be substituted with a finding that the dismissal of the applicants by the first respondent was substantively unfair, and they be reinstated into their employment with the first respondent with retrospective effect to the date of their dismissal. The application has been opposed by the first respondent.

[4] The arbitration award of the second respondent is dated 10 July 2017 and was received by the applicants on the same date. The applicants' review application was served and filed on 21 August 2017, and has thus been brought within the six weeks' time period as contemplated by section 145(1) of the LRA. The review application is therefore properly before Court for determination, and I shall now attend to deciding this review application by first setting out the relevant background facts.

<u>The relevant background</u>

[5] The first respondent conducts business of selling and distributing paper, which it either imports or sources locally. The applicants were all employed by the first respondent as either drivers, or drivers' assistants, and their duties included transporting stocks of paper to the various customers of the first respondent in vehicles provided by the first respondent.

[6] The paper stocks that are delivered to the first respondent's customers are ordinarily placed onto pallets, for ease of handling and transport. These pallets are loaded onto the first respondent's vehicles, manned by drivers and drivers' assistants, and the pallets are then offloaded at the customers. When the paper is offloaded at a customer, the pallets either remain at the customer, or the pallets are returned to the first respondent. It also happens that pallets previously kept by the customer, when the next consignment of stock is delivered, is required by the customer to be returned to the first respondent. The upshot of this ebb and flow of pallets, so to speak, is that there was a continuous flow of pallets out of and back into the first respondent, to the extent that there was always a proper stock of pallets, and it was actually an unknown occurrence for the first respondent to need to order pallets.

[7] The first respondent also strictly regulates its delivery activities. It operates an automatic route sorter, which determines particular delivery routes for drivers and their assistants, base d main routes as well as the shortest route. In fact, the route sorter not only determines the routes the vehicles must travel, but determines the sequence in which the deliveries must be made. The delivery vehicles are then loaded in the sequence of the deliveries. The drivers are issued with a route sheet for the deliveries, as well as the invoices for each and every delivery. The drivers and their assistants are obliged to adhere to these predetermined and assigned routes.

[8] The drivers record each and every arrival and departure times for deliveries at each of the customers, on the route sheet. In this context, drivers / assistants are not allowed to stop or idle at places not on their route, save only if prior permission is obtained from the first respondent's management. Permission is also a requirement for any deviation from the assigned route.

[9] Drivers / assistants are however allowed to stop their delivery vehicles for a half hour lunch break between the hours of 12h00 and 14h00, again subject to the proviso that it is on route to the various customers, and the pre-assigned route is not departed from. In addition, any personal errand is not allowed, unless permission from management is obtained, and then also, once again, subject to the proviso that there is no deviation from the assigned route.

[10] What led to the ultimate dismissal of the applicants *in casu* is that for the very first time in its history of 30 years, the first respondent ran out of pallets in 2016. It then also, for the first time, had to order a consignment of pallets from a sister company. This was a most strange occurrence to the first respondent.

[11] The first respondent then discovered, also in the course of 2016, that one of the driver's assistants had sold pallets at a pallet yard, by deviating from the delivery route to go past this pallet yard. This raised the first respondent's suspicions that what was happening was that the pallets were not being returned to the first respondent's premises as would usually be the case, but were being sold by the drivers / assistants at pallet yards, and this was why it ultimately ran out of pallets. The first respondent then embarked upon an investigation, to ascertain if these was substance in this belief.

[12] The first respondent's vehicles are tracked by a system called '*Trackmatic*'. This system has the functionality in terms of which the first respondent can set and establish specific delivery / collection points, called a '*DECO*'. This allows the system to establish when a vehicle stops or idles in a DECO, and records the time spent there. The system will not record anything if the vehicle does not stop or idle in the DECO.

[13] What the first respondent then did, using the DECO functionality, is to set up DECOs at pallet yards that buy and sell pallets. This meant that whenever a delivery vehicle of the first respondent would stop / idle at a pallet yard DECO, the system would record it. In particular, DECOs were established at four areas where there were pallet yards that purchase pallets, being Hanau Street (Hanau DECO), the Johannesburg Market (Market DECO), Albertina Sisulu Drive (Sisulu DECO), and Stormhill (Stormhill DECO).

[14] These pallet yard DECOs that were set up were not in the immediate vicinity of customer delivery sites, nor were such DECOs along the fastest and / prescribed delivery routes for making deliveries to customers, which the drivers / assistants had to adhere to. This means that where the drivers / assistants adhered to the prescribed delivery routes and made their deliveries in the ordinary course, the pallet yard DECOs would not be triggered. In the case of customers that were in the general vicinity if these pallet yard DECOs, the DECOs were set up with a radius of some 30 metres at the DECO, and this would mean that the DECO is not triggered should the drivers / assistants attend at these customers in the normal course.

[15] Utilising this system, the DECOs set up, and monitoring the movements of the drivers / assistants, the first respondent established that the drivers / assistants on numerous occasions stopped / idled within the areas of the pallet yard DECOs. In fact, and at the Hanau DECO, the drivers / assistants had stopped / idled in the DECO on more than 300 occasions. In addition, it was found that the drivers / assistants that stopped at the Hanau DECO would often return to the first respondent's premises after 16h30, which was unusual, and even resulted in overtime being paid to them. The applicants were amongst these drivers / assistants.

[16] The first respondent concluded, from its investigation, that the applicants were amongst a large number of drivers / assistants that were selling the first respondent's pallets at these pallet yards, for their own account. In the end, a total of approximately two thirds of the first respondent's drivers / assistants were charged and disciplined for this, resulting in their dismissal. This is clearly a highly unusual situation, was disruptive for the first respondent, and not lightly embarked upon.

[17] Several charges were proffered against the employees involved (including the applicants) on 22 and 25 July 2016. These included a gross deviation from the allocated daily delivery routes, misuse of company vehicles, claiming overtime for unlawful activities, theft and / or unauthorised removal of company property, and derivative misconduct. Group disciplinary hearings were held for the employees on 25, 26 and 27 July 2016 respectively. The employees were all summarily dismissed following such disciplinary hearings. This included the applicants.

[18] The applicants, duly represented by the trade union CEPPWAWU, referred a number of individual disputes to the CCMA following their dismissal. These disputes were unsuccessfully conciliated, referred to arbitration, and subsequently all consolidated into one dispute by way of a ruling by the CCMA. The consolidated dispute came before the second respondent for arbitration over a period of nine days, the first day being 23 January 2017, and the last day was on 21 June 2017.

[19] At the commencement of the arbitration, the parties narrowed down the issues in dispute to be decided by the second respondent. Where it came to the issue of procedural fairness, the only challenge raised by the applicants was that the chairperson was biased, considering his conduct in the disciplinary hearings. In addition, it was established that should it be found that the applicants committed the misconduct with which they had been charged, then dismissal would be an appropriate sanction.

[20] In his arbitration award dated 10 July 2017, the second respondent, as touched on above, found in favour of the first respondent. As far as the second respondent was concerned, and based on the reasons dealt with more fully later in this judgment, the dismissal of the applicants by the first respondent

was both substantively and procedurally fair. He dismissed the referral. These conclusions by the second respondent prompted the current review application, which I will now turn to deciding by first setting out the applicable test for review.

The test for review

[21] The test for review is settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[4]. This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[5] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[6] In *Herholdt v Nedbank Ltd and Another*[7] the Court said:

> '… 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[22] In sum, applying the correct review test has a logical chronology. First, it must be determined if there a failure or error on the part of the arbitrator. Second,

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[3] (2007) 28 ILJ 2405 (CC).
[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[5] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.
[6] Id at para 41.
[7] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.[8] Third, it would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9]

Analysis

[23] As a point of departure in deciding this case, it must be pointed out that certain material evidence emerged as either undisputed or common cause. It was not disputed that the first respondent had set up the DECOs concerned where it came to businesses that purchase pallets, and that the vehicles allocated and driven by the applicants did stop / idle within these pallet yard DECOs. It was also undisputed that the applicants were not making any deliveries to customers when stopping / idling in these demarcated DECOs. The fact that the first respondent for the first time in 30 years has experienced a complete exhausting of its pallet stock was equally undisputed. And finally, all the documentary evidence relating to the maps and tracker extracts relating to the DECOs was ultimately accepted as undisputed. Considering the award of the second respondent, it is in my view clear that he properly appreciated and considered these irrefutable facts.

[24] A second issue that must be disposed of from the outset is the issue of dismissal as an appropriate sanction, in the event that the applicants were found to have committed the misconduct with which they had been charged. In the review application, the applicants have raised as a review ground that the second respondent had committed a reviewable irregularity in finding that the dismissal of the applicants was an appropriate sanction in the circumstances. However, the record reveals that at the commencement of the arbitration,

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[8] *Fidelity Cash Management Service (supra)* at para 102.

[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

there was an exchange between the parties and the second respondent, with the objective of narrowing the issues to be determined by the second respondent in the arbitration. In this context, the following exchange then took place between the applicants' representative and the second respondent:

> '<u>COMMISSIONER</u>: Okay, and then the last issue I think I wanted to raise. If it is found that the applicants committed the misconduct on a balance of probabilities I find it is – well not the applicants, anyone, anyone that is accused of these things and it is found they probably done it, do you agree that it is a cause of dismissal or not?
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> <u>MR QOLE</u>: If you are found guilty of what is alleged, Commissioner, yes, if you are found guilty of that.'

[25] The point is that the applicants, and for that matter the second respondent as decision maker, should be held bound to this limitation of issues concluded in the course of the opening addresses of the parties. This is because there are no pleadings to speak of in CCMA arbitration proceedings, and therefore the opening addresses and the limitation of issues articulated by the parties at the outset of the arbitration, would serve the very same purpose as limiting issues in a pre-trial minute.[10] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[11] the Court dealt with the limitation of issues for determination in an arbitration, by way of the opening addresses made by the parties. The Court referred to what each party in the arbitration had said in their opening addresses,[12] and then concluded:[13]

> '… in an arbitration such as the one that happened in this matter, the parties do not exchange, and, in this case, did not exchange, pleadings that would enable each party to know what the other party's case is. In cases in which opening statements are made, they serve to inform both the arbitrator and the other side what one's case is. …'

[26] It is a trite principle that an issue placed beyond contestation by way of a pre-arbitration agreement (minute) cannot be raised as an issue in the arbitration,

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[10] See *Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALCJHB 216 (13 August 2013) at para 71.
[11] (2008) 29 *ILJ* 964 (LAC).
[12] See paras 20 – 22 of the judgment.
[13] Id at para 23.

as the parties are bound by the limitation of the issues they have agreed to.[14] As specifically said in *Filta-Matix* (*Pty) Ltd v Freudenberg and Others*:[15] '*… If a party elects to limit the ambit of his case, the election is usually binding …*'. The applicants would similarly be bound by the case as articulated in the opening address at the arbitration.[16] In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others*[17] the Court held:

> 'The effect of the events at the commencement of the arbitration, as specifically set out above, is similar to a pretrial agreement and has the same consequences. As there are no pleadings in CCMA arbitrations, the court has specifically dealt with the significance of opening addresses. …'

[27] It follows that the issue of dismissal as an appropriate sanction was beyond contestation should the second respondent find that the applicants committed the misconduct with which they had been charged. Therefore, the finding of the second respondent that dismissal was appropriate in this instance cannot legitimately form the subject of a review ground, and would thus be unassailable on review. It is strictly speaking thus not necessary or required to delve into the facts and principles where it comes to deciding whether dismissal as a sanction is appropriate and fair. Once it is accepted that the applicants committed the misconduct concerned, their dismissal must follow.

[28] It is true that one of the charges against the applicants concerned derivative misconduct, and the issue was ventilated in the arbitration. In a nutshell, derivative misconduct would be where an employee is aware of misconduct having been committed by another employee, and has a duty to report this to the employer as a result of the employee's fiduciary duty towards his / her employer. The employee then commits misconduct by failing to disclose this misconduct of the other employee to the employer. It is also true that following the judgment in *National Union of Metalworkers of SA on Behalf of Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd & Others*

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[14] See *GE Security (Africa) v Airey and Others* (2011) 32 *ILJ* 2078 (LAC) at para 20 – 21.
[15] 1998 (1) SA 606 (SCA) at 614B-D. See also *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 *ILJ* 142 (LAC) at paras 16 and 83.
[16] See *Fidelity Cash Management Service* (*supra*) at para 23.
[17] (2013) 34 ILJ 2347 (LC) at para 62. See also para 61 of the judgment.

*(Casual Workers Advice Office as Amicus Curiae)*[18] the concept of derivative misconduct is a problematic one, considering the following finding made by the Court:[19]

> 'In finding this right balance between employer and employee in fair labour practice, the reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees. In determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct. A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct increases this risk. …'

[29] The second respondent dealt with the derivative misconduct issue in his award. He recognised the difficulties associated with making a finding against the applicants on such basis. What he concluded was that in a case of theft, such as would be the case *in casu*, there was a duty on the applicants to inform the third respondent of the misconduct, however he then held that '*… it is accepted that all of the Applicants worked together in selling the pallets*'. He further concluded that *'… the Respondent has proven the misconduct having been committed by each of the Applicants'*. These findings, despite being dealt with under the heading, so to speak, of derivative misconduct, are in fact not commensurate with a finding of derivative misconduct. A finding that each of the applicants committed the misconduct necessarily means that it is not about whether some of the applicants failed to inform the third respondent of misconduct by the other applicants. The finding that the applicants were '*working together*' would be more indicative of a common purpose between them, which is not the same as derivative misconduct.[20] What happened *in*

[18] (2019) 40 ILJ 1957 (CC).
[19] Id at paras 75.
[20] In *SA Commercial Catering and Allied Workers Union and Others v Makgopela NO and Others* (2023) 44 ILJ 1229 (LAC) at para 16, the Court said: '*A dismissal for misconduct based on common purpose arises as a consequence of the deemed participation of the employee as part of the group which committed the primary misconduct, and at para 17 Involvement with the primary misconduct is proved through application of the general principles required to prove common purpose … In general, common purpose will be proved if the individual was present at the scene of the misconduct; was*

*casu* is in line with the following dictum in *A J Charnaud and Co v SA Clothing and Textile Workers Union on behalf of Members and Others*[21] where the Court held:

> 'In short, the arbitrator's reference to the employees being 'either primarily or derivatively guilty' is unfortunate — the evidence before him established, on a balance of probabilities, that the employees had directly participated in the misconduct for which they were dismissed. The arbitrator's reference to derivative misconduct is a misnomer, but the conclusion to which he ultimately came is not untenable, having regard to the evidence that served before him. The arbitrator's factual findings must therefore be upheld.'

[30] It follows that derivative misconduct does not feature in this case, despite being mentioned as one of the charges against the applicants, and the second respondent referring to it. Rather, this is a case to be decided on whether the evidence showed that the misconduct of selling the pallets belonging to the first respondent was perpetrated by all the applicants, or at the very least that all the applicants acted with a common purpose in selling those pallets. This is therefore the central question in this review application, namely whether the second respondent's determination that this was the case would be sustainable on review, based on the evidence before him as a whole. As a result, the applicants' ground of review relating to the issue of derivative misconduct does not take the matter any further, and cannot serve as basis to upset the award of the second respondent.

[31] And finally in the preliminary phase of this analysis, the applicants, on review, do not seek to challenge any of the findings made by the second respondent on the issue of procedural fairness, as part of their review grounds. The applicants are bound by the grounds of review as raised in the founding affidavit, as they elected not to file a supplementary affidavit in terms of Rule

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*aware of the misconduct; intended to make common cause with those who perpetrated it; manifested some common purpose with the perpetrators of the misconduct by performing an act of association with the conduct of the others; and possessed the requisite mens rea. …*'.

[21] (2024) 45 ILJ 2257 (LAC) at para 29.

7A(8).[22] Accordingly, the conclusion of the second respondent that the dismissal of the applicants was procedurally fair stands.

[32] I now return to the merits of the case. The misconduct with which the applicants were charged, described as simply as possible, is they perpetrated or were involved in the theft of the first respondent's pallets, by way of selling those pallets at various pallet yards. Ancillary to this charge is a further charge that the applicants deviated from their prescribed delivery routes in doing so. Some of the applicants also faced charges of unlawfully claiming overtime, however I do not deem it necessary to separately delve into this misconduct, as in my view everything turns on the two instances of misconduct referred to above.

[33] Now it is true that there was no evidence presented of any of the applicants actually having been witnessed or in any manner caught red handed in selling pallets at one of the pallet yards. But the critical question then is what the applicants were doing in the DECOs specifically set up at such pallet yards, which, at the very least on a *prima facie* basis, they had no business being at. The inference the first respondent sought to draw from this, considering the background that led to the establishment of these DECOs, was that the applicants were selling the pallets at these pallet yards. The second respondent, in his award, accepted that this was the proper inference to draw. The question now is whether the probabilities support such an inference, because if that was not the case, then then the conclusion arrived at by the second respondent would not be reasonable.

[34] What must thus be considered is what is called the '*inherent probabilities*'.[23] The determination of probabilities entails an inference to be drawn from the



[22] See *Northam Platinum Ltd v Fganyago NO and Others* (2010) 31 ILJ 713 (LC) at para 27; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
[23] See *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5; *National Union of Mineworkers* (Id fn 14) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others Sasol Mining* (2011) 32 ILJ 723 (LC) at para 8.

evidence as a whole, on the following basis, as explained in *SA Post Office v De Lacy and Another*[24]:

> 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.'

[35] Deciding a matter on the probabilities thus entails a complete consideration of all the evidence, as a whole, in order to decide which outcome is the most logical, natural and plausible out of a number of possible different outcomes.[25] As said in *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[26]:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

[36] As stated, it was not disputed that the applicants indeed stopped / idled their vehicles on a large number of occasions in DECOs concerned, and it was never their case that they were conducting a delivery at any customer of the first respondent at the time when doing so. In simple terms, the applicants never said that stopping / idling at a DECO was delivery to a customer. Against this backdrop, there are several further important probabilities to consider. The first is that there are pallet yards at these DECOs that purchase pallets. The second is that these DECOs were not situated on the shortest / direct and prescribed delivery routes to customers, which the applicants are compelled to follow, unless permission is obtained from management to deviate. Even if it can be said that the applicants stopped / idled in the DECOs

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[24] 2009 (5) SA 255 (SCA) at para 35. See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 37.
[25] See S*FW Group* (*supra*) at para 5; *National Union of Mineworkers* (*supra*) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC) at para 8.
[26] 1985 (3) SA 916 (A) at 939I-J.

for personal errands, the same contention applied. The third is that the applicants never asked for permission for personal errands, as required. The fourth is that most of these stops / idling at the DECOs took place outside the ordinary lunch period. The fifth is that the applicants were in the position to sell pallets. And finally, this all took place against the backdrop of the first respondent running out of pallets for the first time in 30 years, and that since the dismissal of the employees involved in this misconduct, none of the first respondent's drivers / assistants have been found to have stopped / idled at any of the DECOs.

[37] All these probabilities, derived from the evidence as a whole, in my view established at least a proper *prima facie* case that the applicants perpetrated or were involved in the theft of the pallets, by selling the same at the various pallet yards situate at the DECOs. This was also the conclusion reached by the second respondent, and I believe he cannot be faulted for doing so. As held in *Cooper and Another NNO v Merchant Trade Finance Ltd*[27]:

> '… If the facts permit of more than one inference, the Court must select the most "plausible" or probable inference. If this favours the litigant on whom the *onus* rests he is entitled to judgment …'

[38] So where does this leave the applicants? As the second respondent correctly and rationally appreciated in his award, the duty then shifted onto the applicants to provide a plausible and acceptable explanation to the contrary, so as to avoid a final conclusion that they committed the misconduct. In *Federal Cold Storage Co Ltd v Angehrn and Piel*[28] the Court held that: '… *Once the appellants had proved a prima facie case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents … to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal, must be taken to be established. …*'. And as succinctly said in *National Union of*

[27] 2000 (3) SA 1009 (SCA) at para 7. See also *Minister of Police v Safety and Security Sectoral Bargaining Council and Others* (2023) 44 ILJ 1017 (LAC) at para 16.
[28] 1910 TS 1347 at 1352.

*Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[29]:

> '… the third respondent had at least made out a prima facie case. That meant that there was a duty on the second applicant to advance and provide a reasonable alternative explanation. His failure to do so in my view counts heavily against him. … '

[39] The explanations sought to be offered by the applicants were simple. First, they baldly denied any involvement in the sale of pallets. In fact, some of them even denied having knowledge that there were pallet yards in the DECOS. Insofar as stopping / idling in the DECOS are concerned, the explanations in essence boiled down to conducting personal errands, namely purchasing food, drink, airtime and other items for personal use. As said above, the applicants never explained that they were actually conducting deliveries at customers at that point in time. Especially where it came to the Hanau DECO, the applicants sought to explain that they were often in Hanau Street to buy food and/or cigarettes and/or airtime and/or cold drinks from a particular vendor. The applicants offered similar explanations where it came to the Market and Stormhill DECOs. In the case of the Sisulu DECO, the only explanation provided was that the applicants stopped / idled at such DECO to obtain food from Shakes Restaurant.

[40] Can these explanations be accepted? Obviously, and in this context, it would be required of the second respondent to determine the truth thereof. This entailed conducting the following exercise, as articulated in *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others*[30]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to



[29] (2013) 34 ILJ 945 (LC) at para 41. See also See also *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 34; *SA Municipal Workers Union on behalf of Damens v Breede Valley Municipality and Others* (2014) 35 ILJ 2018 (LC) at para 13; *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 2567 (LC) at paras 21 and 23; *SATAWU obo Mpoko and Another v National Bargaining Council for the Road and Freight and Logistics Industry and Others* (JR2039/16) [2019] ZALCJHB 192 (15 August 2019) at paras 36 – 39.

[30] (2011) 32 ILJ 723 (LC) at para 7. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 37; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20.

> make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. …'

[41] Starting with the issue of credibility, the second respondent obviously preferred the first respondent's witnesses, describing their evidence as '*credible*' in his award. However where it came to the evidence of the applicants, the second respondent found their testimony not to be credible, describing it as '*pre-rehearsed*'. He also considered that the constant leading questions asked of the witnesses for the applicants detracted from their credibility, and the fact that some of the versions offered by the applicants were presented for the first time under cross examination. He also considered that some of the applicants contradicted the others, and avoided answering questions. Insofar as the grounds of review raised by the applicants include an attack on these credibility findings made by the second respondent, it must be said that this Court should be loath to interfere with credibility findings of arbitrators who have the opportunity to observe witnesses, gauge their demeanour and listen to their testimony in real time. A review Court, only seized with a record, does not have this important benefit. As held in *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[31]

> '… Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. …'

[42] It is my view that this Court should only interfere with credibility findings made by CCMA arbitrators, if the evidence contained in the record before the Court shows that the credibility findings of the arbitrator are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record when considered as a whole.[32] I do not believe that a proper

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[31] (2012) 33 ILJ 485 (LC) at para 18.
[32] See *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 31; *Truworths Ltd v Commission for Conciliation,*

conspectus of the record *in casu* establishes any basis for interference with the award on these grounds.

[43] In particular, and having considered the record, I am of the view that the applicants' testimonies leave much to be desired, insofar as it concerns the issue of credibility. The second respondent was correct in concluding that a significant amount of the testimony was elicited by leading questions. A comparison of the testimony presented by each individual applicant leaves one with the distinct impressions of a version having been decided on beforehand, and then presented, leading to a justified conclusion as being 'pre-rehearsed', as the second respondent found to be the case. The applicants also gave different evidence as to the location of the Hanau Street food stall, where they say they on many occasions ordered food from. These contradiction also applied where it came to what could be purchased from such vendor. Several of the applicants were quite argumentative when answering questions under cross examination and failed to make obvious concessions. Overall considered, I would say that the credibility findings made by the second respondent resort comfortably within the required parameters to be unassailable on review.

[44] The lack of credibility of the applicants would of course be a formidable obstacle to them succeeding in establishing an acceptable explanation. But this is not where it stops. As the second respondent in my view not only reasonably, but actually correctly appreciated in his award, there were a number of factors that indicated that the version (explanation) sought to be offered by the applicants could simply not hold water. I now set out these factors.

[45] The first important tissue to consider is what the applicants did not explain. They did not explain why they departed from the direct and main routes they were required to follow, in attending at the various DECOs. None of the DECOs were on such routes, and attending at the DECOs would involve a departure from such pre-assigned and required routes, which is not

*Mediation and Arbitration and Others* (2009) 30 ILJ 677 (LC) at para 25; *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at para 22; *Kgoadi v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 31908 (LC) at paras 51 – 52.

permissible without permission. There was a suggestion from one witness (who was not even a driver) that they could determine the routes for themselves, but this was clearly false and contrary to the uncontested evidence of how the routes are determined. They also could not explain why they did not seek permission for stopping for these alleged personal errands at the DECOs. They could not answer why they attended at the Market DECO when they knew the Johannesburg Market was off limits, *per se*, without prior permission. And finally, there was no explanation as to why the applicants would regularly stop at these DECOs outside the normal lunch period, when it is expected for then to conduct their personal errands. It must be remembered that the one common denominator for all these DECOs is the pallet yards.

[46] But it is especially the explanations for the stopping / idling at the Hanau DECO that is concerning. It is clear that this was where the bulk of the stopping / idling took place. There were some 300 instances recorded of the applicants stopping / idling at Hanau DECO. In addition, the tracking data reflected that the applicants virtually always idled in the Hanau DECO, which meant that they did not switch off their vehicles which would record '*stop*' on the system, for which there is a specific report. In any event, the vehicles would only idle for a short time in the DECO. It was also apparent that a number of the applicants went to the Hanau DECO on more than one occasion in a single day. How does the applicants then explain all of this? The crux of the explanation was that the applicants were buying food, cold drinks, airtime and other items from a particular individual vendor in the area. The explanation was expanded on by way of the suggestion that this vendor would often not have change for the applicants, and they then had to go back for their change. The applicants also suggested that they had such a close relationship of trust with this vendor that they would take food from her without paying, and return later to pay her. And finally, it was explained that the applicants would call the vendor and pre-order food, which they would then collect.

[47] In dealing with the aforesaid explanation offered, the second respondent was critical of the fact that the applicants failed to call two critical witnesses, to substantiate their explanation relating to their stopping / idling in the Hanau DECO, and in my view, quite rightly so. Firstly, it was critical for the applicants

to have called the Hanau DECO vendor they alleged they did most of the transactions with, especially considering that the applicants led testimony to the effect that most of them had her number, so they could pre-order food from her. It was suggested on behalf of the applicants in the course of the arbitration that the vendor would be called to testify. Secondly, it was suggested in the opening address as well as on several occasions in the course of the arbitration, including when cross examining the first respondent's witnesses, that the owner of the pallet yard at the Hanau DECO would be called to testify that he bought no pallets from the applicants. But in the end, these two witnesses were never called, with no explanation for this failure. As the second respondent correctly found, this in all probability indicated that these witnesses would not support the applicants' version, and this must count heavily against them. In *ABSA Investment Management Services (Pty) Ltd v Crowhurst*[33] the Court held:

> '... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case …'

[48] The second respondent also determined that the explanations offered by the applicants lacked credibility, based on a number of considerations. He found that it was highly improbable that a food vendor, running a small business, would either almost never have change, or would have the kind of relationship with the applicants to simply allow them to take food and pay her later. He was critical of the version that the applicants would call the vendor to pre-order food, which was not likely for such a business. He further described it as improbable that the vendor would have built a relationship with the applicants based on trust, in terms of which she would allow them to take food, and return later to pay her, or not give them change. Although the applicants alleged to have pre-ordered food from the food vendor, they never disclosed the telephone number they allegedly used to contact her to pre-order food. And finally in this regard, the second respondent referred to the fact that there

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[33] (2006) 27 ILJ 107 (LAC) at para 14. See also *Zeffertt et al SA Law of Evidence (5 ed)* at 128-30; *General Food Industries Ltd v Food and Allied Workers Union* (2004) 25 ILJ 1260 (LAC) at para 46; *Simelane and Others v Letamo Estate* (2007) 28 ILJ 2053 (LC) at paras 22 and 23; *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at para 29

was no acceptable explanation for the number of times the applicants were in the Hanau DECO outside of their normal lunch hours, and in particular, would go there shortly before closing time resulting in them arriving back at the first respondent's premises shortly before or after closing time. All this reasoning and conclusions of the second respondent make sense to me, and in my view, would certainly qualify as findings that are reasonable based on a proper consideration of the evidence.

[49] Where it came to the DECOs other than the Hanau DECO, the second respondent found that no reliable evidence was presented to demonstrate that the applicants had a *bona fide* reason for being there, and in particular, an explanation for being in the Market DECO, considering the applicants were expressly prohibited from going to the Johannesburg Market to buy food. A consideration of the record leaves me convinced that there is no basis for upsetting these findings of the second respondent.

[50] In the case of the Hanau DECO, the first respondent produced evidence that the food stall the applicants contended they would often visit is not even situate in the area of the DECO that had been set up. The food stall was on the pavement, on the corner of Hanau and Gus Streets, being approximately 120 / 130 metres away from the pallet business in Hanau Street. The DECO only covers 30 metres around such business. Considering that when the applicants stopped / idled in the Hanau DECO, they would be about 100 metres away from the food stall, and this begs the question that why the applicants would stop / idle their vehicles so far away from the food stall, and not right at the food stall. The point is that if they stopped / idled at the food stall, it would not have triggered the DECO. But stopping / addling at the pallet yard would trigger it. This equally detracts from the explanation that the applicants stopped / idled in the Hanau DECO to buy food. And added to this, there was no reason provided why the applicants could not have purchased food from the vendors right outside the premises of the first respondent, or the first respondent's own canteen.

[51] Although the applicants did not dispute that the first respondent ran out of pallets in 2016, for the first time in 30 years, they offered the explanation that the pallet shortage could be caused by the third respondent disposing of

broken pallets, or customers not returning pallets. The first respondent, in evidence, admitted that broken pallets or wood from broken pallets were disposed of by the first respondent from time to time. The first respondent also admitted that customers may sometimes not return pallets. But the point the first respondent made is that this *modus operandae* had always been the case throughout the 30 years, and nonetheless, the first respondent never ran out of pallets. And added to this, the first respondent presented evidence that the applicants were not returning pallets to the first respondent. This put paid to the explanation the applicants sought to offer in this regard, as nothing changed in the first respondent as to how pallets were handled by it, and there was always a sufficient ebb and flow of pallets to maintain pallet stock. However, and suddenly, the first respondent ran out of pallets. On the probabilities, as the second respondent reasonably appreciated, the most plausible and logical inference would be that this sudden change came about as a result of the employees (including the applicants) finding out that they could sell the pallets for their own benefit.

[52] Mr Frahm-Arp, representing the applicants, made specific reference to the case of one of the applicants, being Themba Sibiya (Sibiya). A pertinent ground of review was raised in this regard, to the effect that Sibiya drove a Toyota Tazz vehicle when making deliveries, which was too small to carry a pallet. It was also contended that there was no evidence of Sibiya's vehicle being found to have been in a DECO. As such, it was contended that he was not involved in any misconduct, and the second respondent committed a reviewable irregularity in so concluding.

[53] I do not consider there to be any substance in this ground of review. What is true is that Sibiya drove a Tazz to conduct deliveries. This is a hatchback motor vehicle. The first respondent's fleet supervisor, Trevor Janse Van Rensburg (Janse Van Rensburg) testified that the smaller empty pallets can fit into the Tazz and then be taken to be sold at a pallet yard. Janse Van Rensburg did concede that a full pallet could not fit into the Tazz, however he explained: '*… he can always take a pallet from a customer and put it in the back of the Tazz and then go and sell it …*', as such a pallet would be empty. A consideration of Sibiya's own testimony reveals that he conceded that a small

pallet would fit in the Tazz. This disposes of the point that the vehicle used by Sibiya meant he could not sell pallets.

[54] Next, it was never the case of Sibiya, either in the disciplinary hearing, or in the arbitration, that he did not attend at the Hanau DECO. The explanation he actually offered was that he did not know he was not allowed to be there, and he could not recall why he was there. He added that he normally buys food there, which is why he could have been there. He added that it would be convenient for him, as he makes deliveries to customers in the general vicinity. So, all considered, this is exactly the same kind of explanation offered by all the other applicants, and must therefore meet the same fate. The attempt to somehow distinguish Sibiya is unfounded, and this ground of review has no substance.

[55] All the above considered, it is clear to me that the explanations the applicants sought to offer for what is undeniably misconduct on their part by stopping / idling in the DECOs, are improbable, contrived and lacking in credibility. These explanations were rightly rejected by the second respondent and there is no reason for this Court to interfere with such findings. It must then follow that the most plausible and logical inference to be drawn from all of the facts, and the acceptable evidence, must be that the applicants committed the misconduct of theft, in selling the pallets at various pallet yards. Further, and considering that there was in essence no explanation for the applicants deviating from the prescribed routes they had to follow, they committed this misconduct as well. The second respondent's conclusion that the aforesaid was the case is unassailable on review.

[56] Even though, as a result of the pre-arbitration limitation of issues discussed above which made the fairness of the sanction of dismissal to be out of contention, I will nonetheless shortly deal with it, as it was raised as a ground of review. It is undeniable that the misconduct in this case concerns an offence of dishonesty. The fact of the matter is that as a general proposition, dishonesty is the kind of misconduct that justifies the sanction of dismissal as

an appropriate and fair sanction.[34] In *SA Society of Bank Officials and Another v Standard Bank of SA and Others*[35] it was held as follows:

> 'Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception. This court in *Nedcor Bank Ltd v Frank & others* defined dishonesty as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. Deceitfulness can manifest itself in various forms, which include providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal. …'

[57] There can thus be little doubt that the applicants' misconduct was very serious, and they in effect acted in direct contravention of their duty of good faith towards the first respondent as their employer. The deviation from their prescribed routes coupled with the sale of the pallets all form part of the same dishonesty misconduct package, so to speak. There is little doubt that the applicants sought to escape responsibility based on contrived and false defences and explanations. This means, as appositely described in *Malaka v General Public Service Sectoral Bargaining Council and Others*[36], the following:

> 'The evidence reveals that the appellant's dishonest conduct rendered continued employment intolerable and incapable of restitution. Conduct, such as we have here, is incompatible with the trust and confidence necessary for the continuation of the employment relationship. The Department of Justice was entitled, in the circumstances, to end the employment relationship …'

[58] In general terms, what the second respondent needed to consider was articulated in *Vodacom (Pty) Ltd v Byrne NO and Others*[37] as: '*… the*

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[34] *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC) at para 15; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 *ILJ* 901 (LAC) at paras 35 and 37; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 52.

[35] (2022) 43 ILJ 1794 (LAC) at para 17. See also *Continental Oil Mills (Pty) Ltd v Singh NO and Others* (2013) 34 ILJ 2573 (LC) 29 – 34; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 23.

[36] (2020) 41 ILJ 2783 (LAC) at para 34.

[37] (2012) 33 ILJ 2705 (LC) at para 9.

*determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …*'. I have little doubt that the second respondent discharged this obligation on him. He clearly considered the serious nature of the misconduct, the fact that it involved dishonesty, and that the trust relationship had been destroyed. I may add that instead of showing contrition, the applicants instead relied on false justification. In the end, it was appropriate, in the context of risk management by the first respondent, to bring the employment relationship with the applicants to an end. As said in *De Beers Consolidated Mines Ltd v Commission for Conciliation*, *Mediation and Arbitration and Others*[38]: '*… 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. …*'. Therefore, the conclusion by the second respondent that dismissal was a fair sanction resorts well within the bands of what may considered to be a reasonable outcome.

[59] I thus conclude that the second respondent's finding that the applicants' dismissals were substantively fair is in conformity with the facts, and the applicable legal provisions. It is a finding that resorts well within the parameters of what may be considered to be a reasonable outcome, and is unassailable on review.

<u>Conclusion</u>

[60] Therefore, based on all the reasons set out above, I conclude that the second respondent's arbitration award is not reviewable. I am satisfied that the second respondent's findings of facts are properly supported by the evidence before him. His views concerning the applicants and their conduct are justified and reasonable. His finding that dismissal was a fair sanction is substantiated by the facts and legal principle. Insofar as the issue of the outcome arrived at by the second respondent is considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort

[38] (2000) 21 ILJ 1051 (LAC) at para 22.

within the bands of reasonableness as required, in order to be sustainable on review. The applicants' review application thus falls to be dismissed.

Costs

[61] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. I am aware of what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[39]. In exercising this judicial discretion, the same Court recently re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[40]

[62] I do not believe that the applicants acted in an unreasonable and frivolous manner in pursuing this case. I also consider that the case was prosecuted in a proper manner by the applicants, and they were competently assisted by Mr Frahm-Arp on a pro-bono basis, which must always be lauded. These factors, coupled with an overall consideration of fairness to both parties, leaves me convinced that it would be appropriate and fair to make no order as to costs.

[63] In the premises, the following order is made:

Order

1. The applicants' review application is dismissed.

2. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

[39] (2018) 39 ILJ 523 (CC) at para 25.
[40] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.

<u>Appearances:</u>

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| For the Applicants: | Mr L Frahm-Arp of Fasken Attorneys |
| For the Third Respondent: | Advocate P Moll |
| Instructed by: | David Shapiro & Associates Attorneys |