IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2803/16

In the matter between:

NUMSA obo VUSI MATHONSI	**Applicant**
and	
SCAW METALS (PTY) LTD	**First Respondent**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**Second Respondent**
IMTHIAZ SIRKHOT N.O.	**Third Respondent**

Heard: **18 July 2019**

Delivered: **20 August 2019**

Summary: **Application to review and set aside arbitration award – review test – reasonableness of arbitrator's decision – onus of proof properly discharged – credibility of witnesses – Commissioner's finding of procedural and substantive fairness was substantiated by the evidence – review application dismissed.**

JUDGMENT

DEANE AJ

LABOUR COURT

The Parties

Before I move onto a brief introduction in this matter, I have decided to firstly deal with the Parties herein due to the inconsistent referral of said parties in the records.

[1] The Applicant is the National Union of Metal Workers of South Africa (NUMSA), acting on behalf of Mr Vusi Mathonsi (hereinafter "Mathonsi"), who was the employee.

[2] The First Respondent is Scaw Metals (Pty) Ltd, the Employer of the employee.

[3] The Second Respondent is the Metal and Engineering Industries Bargaining Council (MEIBC) established in terms of section 117 of the Labour Relations Act.[1]

[4] The Third Respondent is Imthiaz Sirkot N.O. (hereinafter "the Commissioner" and/or "Arbitrator"), who was appointed to arbitrate a dismissal dispute between the Applicant and the First Respondent.

Introduction

[5] This is an application to review and set aside an arbitration award, handed down by the Commissioner under case number MEGA47012 issued on 18 November 2016. In terms of this award, the Commissioner held that the dismissal of Mathonsi by the First Respondent was procedurally and substantively fair.

[6] The Application for Review is opposed by the First Respondent.

Material Background Facts

[7] Mathonsi worked for the First Respondent as a Charge and Mentor whilst also performing the duties of an Assistant Administrator.

[8] Mathonsi reported directly to Mr Melodie Segole (Segole), the Melt Shop Manager.

[1] Act 66 of 1995.

[9] Mathonsi was paid on a weekly basis and he was accustomed to receiving overtime payments.

[10] On 6 February 2015, Segole sent an e-mail to Mathonsi instructing him that all overtime needs to be signed by him, for approval, and that no overtime shall be paid without pre-approval.

[11] On 12 February 2015, management issued an internal memorandum to staff regarding, *inter alia*, concerns about control weaknesses and possible fraud relating to overtime and the commissioning of an investigation in relation thereto.[2]

[12] It is common cause that despite these communication Mathonsi did not seek pre-approval for overtime.

[13] On 17 February 2015, Segole sent a further e-mail instructing Mathonsi to comply with the instructions regarding the pre-authorisation of overtime, to which Mathonsi responded to on 18 February 2015. The contents of these communications are provided in detail in the records.

[14] As a result of the controls that were implemented pertaining to overtime, Mathonsi ceased to work on Sundays and consequently, his weekly salary was reduced by 50 percent. Mathonsi was upset about this and personally blamed Segole for this reduction in his salary.

[15] On 17 March 2015, Mathonsi was alleged to have entered Segole's office wherein he physically assaulted Segole. Mathonsi was subsequently charged with physical assault and following a disciplinary hearing, he was dismissed on 24 June 2015.

[16] Upon his dismissal, Mathonsi referred an unfair dismissal dispute to MEIBC, whereupon the Arbitrator was appointed to arbitrate the dispute.

[17] The Arbitrator concluded that the dismissal was both procedurally and substantively fair.

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[2] Transcribed Record dated 19/10/2016 at pg 21. (Transcribed Record).

Grounds for Review

[18] The main basis of this review is that the Applicant contends that the Commissioner committed a gross irregularity in that the Commissioner failed to appreciate the totality of evidence presented before him; in deciding on the probabilities of the issues that were placed before him; and in determining the credibility of witnesses.

[19] The Applicant maintains that it is this gross irregularity on the part of the Commissioner, that prevented the Applicant employee from having a fair trial, and which led to an unreasonable decision by the Commissioner.

The Test on Review

[20] The test that the Labour Court is required to apply in a review of an arbitrator's award is, "is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"[3]

[21] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make, and the reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and Others*[5] where it was held that "the question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable".

[22] As the Court rightly pointed out in *The National Commissioner of the South African Police Service v Myers and Others*[6] *"*….whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach".

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110. (*Sidumo*).
[4] *Ibid* at paras 118-119.
[5] *Computicket v Marcus NO and Others* 1999 (20) ILJ 343 (LC) 346.
[6] *The National Commissioner of the South African Police Service v Myers and Others* CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) at paras 103-104. (*Myers*).

[23] In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the Arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. [7] The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[8]

[24] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

[25] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*,[9] the Court rejected a piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it "assumes the form of an appeal" and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the Labour Relations Act in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly.[10]

[26] On this approach, therefore, the failure of a commissioner "to mention a material fact in his or her award", or "to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute", or

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[7] See *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* 2011 ZASCA 74 (25 May 2011).

[8] *Herholdt v Nedbank Ltd* (701/2012) 2013 ZASCA 97; 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA) (5 September 2013). (*Herholdt*).

[9] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* 2014 (1) BLLR 20 (LAC). (*Gold Fields*).

[10] *Gold Fields* at paras 18-21.

"commits an error in respect of the evaluation or consideration of facts presented at the arbitration" [11] would not, in itself, render the award reviewable. Having considered the evidence at arbitration, the Court held "….I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come".[12]

[27] In *Fidelity Cash Management Service v CCMA and Others* [13] Zondo JP applied the *Sidumo* test thus:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently.'

And that:

> 'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.'

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[11] *Ibid* at para 20.
[12] *Myers* at paras 103-104.
[13] *Fidelity Cash Management Service v CCMA and Others* 2008 (3) BLLR 197 (LAC) at paras 98-100. (*Fidelity Cash Management Service*).

[28] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

[29] It is on this basis that I proceed with the merits of the application below.

Legal Considerations and Analysis

[30] Both the Applicant and Employer's versions are recorded in detail in the Transcribed Record[14] and in the Arbitrators Award[15] and it will therefore not be repeated in detail herein. Only those salient facts pertinent to this Review Application will be referred to.

[31] The dispute came before the Commissioner, who was tasked with determining the substantive and procedural fairness of the dismissal.

[32] On the issue of procedural fairness, the Applicant contends that he was denied the opportunity to appeal his disciplinary sanction. No evidence, in writing or otherwise was brought before the Arbitrator to show that Mathonsi had exercised his right to appeal and that such appeal was denied by the First Respondent.

[33] On the basis of the substantive fairness of the dismissal, Mathonsi denies the physical assault on Segole, contending that such assault could not have taken place by virtue of the fact that he (Mathonsi) did not even see his manager on the day of the alleged assault. The Applicant contends that the "*bone of contention*" between the employer and the employee, was whether or not Segole was assaulted and if he was assaulted then the enquiry was whether he was assaulted by Mathonsi.[16] The Applicant further contends that "*the onus was on the company to show by way of evidence that Mathonsi was responsible for the acts of assault to Mr Segole*".[17]

[14] See Transcribed Record.
[15] Arbitration Award dated 13/11/2016 at pgs 2-5. (Arbitration Award)
[16] Founding Affidavit of Prudence Gqoba at pg 5 para 9.
[17] *Ibid* at para 10.

[34] Mathonsi further argues that he and his manager had an "*unhealthy relationship*" and he maintains that this acrimonious relationship was the reason Segole was fabricating the charge of assault to "*get rid*" of him.[18]

[35] At the arbitration hearing, both parties were represented. The First Respondent led the evidence of four witnesses whilst the employee led the evidence of two witnesses.

[36] The first witness for the First Respondent was Segole. Segole led evidence outlining the reasons that he believed led to the physical assault by Mathonsi, on himself. Segole led evidence whereby the First Respondent required that for future overtime claims, all overtime needed to be signed by him for approval and that according to the company policy, no hours shall be paid without pre-approval.[19] He showed proof, via e-mails[20] of this, as well as e-mail proof of Mathonsi's displeasure at this request; [21] together with Mathonsi's continued disregard to comply with the request,[22] and evidence of Mathonsi's lack of regard for following what has been shown to be a lawful request from the company authorities was also provided.[23] As a consequence of the controls regarding overtime being implemented, Mathonsi's weekly salary was reduced by half. Mathonsi was not precluded from working overtime but he was first required to apply for pre-approval of said overtime.

[37] It is clear from the e-mail communication that Mathonsi held Segole responsible for the reduction in his salary, without appreciating that Segole was merely the implementer of a decision taken by management of the First Respondent.

[38] Segole further led evidence through the company's clocking card system[24] showing that Mathonsi was at work on the day of the assault and that Mathonsi was at work before him. Evidence was led showing that due to the structural settings of the offices, Mathonsi in all probability knew that Segole

[18] Arbitration Award at pg 5 para 26.
[19] Transcribed Record at pgs 20-21.
[20] Index to the Bundle of Documents A at pgs 17-19.
[21] Transcribed Record at pgs 22-23.
[22] Index to the Bundle of Documents A at pg 16-18.
[23] Transcribed Record at pgs 19-20, 24-27.
[24] Index to the Bundle of Documents A at pg 5.

was at work and in his office.[25] It is clear from a reading of all the evidence before me, that Mathonsi was at work, he was at work earlier than Segole and that he did in fact see Segole on the day in question.

[39] As to whether Segole did in fact sustain an injury and that he sustained it at work, the Commissioner considered the photographic evidence, [26] the evidence of the other witnesses regarding the injury, [27] the medical certificates,[28] as well as the employees routine practice once they clock in.[29] Based on this evidence, the probability that Segole sustained an injury whilst at work was highly likely.

[40] Evidence was then led whereby it was maintained that in December 2014, Mathonsi lodged a grievance against Segole. In that enquiry, Mathonsi called Ms Thato Seotsanyana (Seotsanyana), as witness to assist him. No conclusive evidence implicating Mr Segole was found.

[41] Under cross-examination and re-examination, Segole's version was examined and tested.

[42] The First Respondent thereafter called their second witness. The second witness was Mr Emile Timmins (Timmins), a Foundry Manager of 26 years'service with the company (the First Respondent). Timmins corroborated Segole's physical assault, whilst also being one of the persons who took photographs of Segole's injury. [30] He also attested to Segole's emotional and physical state at the time.[31] Timmins further led evidence of Mathonsi's previous disciplinary record wherein he was formerly found guilty of assault on another employee. [32] In that case, Timmins testified that Mathonsi once again called Seotsanyana as a witness to assist Mathonsi in his case. [33] Pursuant to the disciplinary enquiry being held Mathonsi was issued with a final written warning, which warning had lapsed at the time of

[25] Arbitration Award at pg
[26] Index to the Bundle of Documents A at pgs 8-13.
[27] Arbitration Award at pg 7 para 30.
[28] Index to the Bundle of Documents A at pgs 14-15.
[29] Arbitration Award at pg 7 para 31, specifically with regards to them changing into PPE overalls.
[30] Transcribed Record at pgs 82-83.
[31] *Ibid* pgs 81 and 84.
[32] *Ibid* at pg 86.
[33] *Ibid* at pg 101.

the Arbitration.[34] Timmins was cross-examined and re-examined on his evidence.

[43] The Employer's next witness was Mr Freddy McDugal, a pattern shop manager who was in the employ of the First Respondent for 36 years. He supported Timmins version that Segole was clearly in need of medical attention due to an altercation that had occurred[35] and he was the one to drive Segole to the First Aid Medical Centre.[36]

[44] The First Respondent's fourth and final witness was Mr Rene Muller (Muller), a maintenance manager who confirmed Timmins' version that Segole informed them both that he had been assaulted by Mathonsi, and that Segole was in pain from the injuries that were clearly visible to him.[37] Muller also testified to various injuries on Segole's person and which was furthermore evidenced by a doctors medical certificate which certificate attributed said injuries to blunt force trauma.[38] The First Respondent then rested its case after showing *prima facie* proof of Mathonsi's misconduct.

[45] With regards to the *onus*, in an unfair dismissal case relating to misconduct, the "evidentiary burden" starts with the employer but once the employer provides *prima facie* proof of the misconduct as alleged, the "evidentiary burden" shifts to the employee to prove his own defence. If the employee then fails to put up a defence or fails to prove his defence, the employer's *prima facie* proof of misconduct becomes conclusive proof and the employer has then discharged the "overall onus" that always rested with it.[39]

[46] In his evidence, Mathonsi maintains his innocence in the alleged physical assault and further maintains that because he did not see Segole on the day in question he could not have physically assaulted him. Mathonsi maintains that there was a conspiracy to get rid of him.[40]

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[34] *Ibid* at pg 87.
[35] Arbitration Award at pgs 110-111 and 115.
[36] Transcribed Record at pgs 17 and 109.
[37] Arbitration Award at pgs 118 and 120.
[38] Index to the Bundle of Documents A at pgs 14-15.
[39] *Woolworths (Pty) Ltd v CCMA and Others* 2011 (32) ILJ 2455 (LAC) at para 34.
[40] See Transcribed Records.

[47] Seotsanyana, an ex-employee of the First Respondent and who had worked as a production administrator, then testified in support of Mathonsi and stated that contrary to Segole's statement she did not bear witness to the alleged assault.[41] She also denied having a close relationship with Mathonsi[42] despite being carbon copied in on e-mails to Segole, [43] e-mails that clearly amount to insubordination and insolence.[44] After Seotsanyana concluded her evidence, she being the final witness, the Applicant rested its case.

[48] Once all evidence has been led and closing arguments were submitted, then and as the Applicant rightly puts it, the Arbitrator "*had to evaluate all evidence properly presented before him, and make probability findings, and once this has been done, he (is) required to decide on the credibility*"[45] of the evidence and witnesses.

[49] In *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others,*[46] the Court said the following as to the establishment of probabilities:

> 'The *locus classicus* on this issue is the judgment in *Govan v Skidmore* where the court held that it was trite law that 'in general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt, so that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

[50] In this case, the Commissioner specifically dealt with the issue of the credibility of witnesses, and based on this he accepted the evidence of the First Respondent. The reasons given by the Commissioner is that he properly considered all of the evidence before him and on a proper construction of the

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[41] *Ibid* at pgs 85-86 and 91.
[42] *Ibid* at pgs 103-104.
[43] *Ibid* at pgs 95-96.
[44] Arbitration Award at pg 6 para 26.
[45] Founding Affidavit of Prudence Gqoba at pg 5 para 11.
[46] *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* 2013 (34) ILJ 945 (LC) at para 37.

evidence, including the totality of all of the witnesses oral testimonies; the medical reports, the photographs, the clock report from the company;[47] evidence led as to the structure of the office and evidence as to the antagonism Mathonsi felt towards Segole wrongly believing that Segole was the reason for the rule regarding overtime.

[51] Furthermore, I am satisfied in accepting that the most natural and plausible conclusion to be drawn from the evidence in this case is that Mathonsi indeed committed the assault. The Commissioner's finding that this was indeed the case is thus entirely sustainable, and certainly not irregular. It is, in short, a reasonable outcome.

[52] In *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[48] the Court went on to say that:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole simply provides no basis for interfering with the credibility findings of the

[47] That it was more probable that Mathonsi did see Segole and that he was responsible for the assault on Segole.
[48] *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* at para 31.

> second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

[53] The Commissioner analysed and discussed the probabilities of both parties' versions[49] and found that based on the evidence before it, that it was Mathonsi that fabricated his version and that Mathonsi's witness, Seotsanyana was complicit in this fabrication.[50] Based on the evidence before him, he found that because Seotsanyana was a witness for the Applicant at a previous assault case, that she was once again called as a witness in support of his version, that she was copied in on e-mails when she had nothing to do with the pre-approval for overtime work, the Commissioner concluded that it was more probable than not that Seotsanyana and Mathonsi enjoyed a close relationship.[51] He found that during her testimony Seotsanyana was an evasive witness and she was not forthcoming as to what happened on the day of the assault.[52] Her credibility as a witness was therefore in question and the Commissioner rightly found that she was not credible.[53] On the other hand Segole's witnesses provided corroboratory evidence in support of Segole's version of events, making his version more probable.[54]

[54] A consideration of the evidence presented by the witnesses as contained in the transcript convinces me that the same reasoning as posited in the *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* case applies equally. There is simply nothing on the transcript to show that the credibility finding of the Commissioner is completely out of kilter with the evidence or the probabilities.

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[49] *Ibid* at pgs 6-8.
[50] *Ibid* at pg 7 paras 31 and 32.
[51] *Ibid* at pg 7 para 32.
[52] *Ibid* at pg 6 first paragraph.
[53] *Ibid* at pg 8.
[54] *Ibid* at pgs 7-8.

[55] The First Respondent, through its witnesses and documentary evidence established *a prima facie* case of misconduct arising from the physical assault, which then shifted the evidentiary burden to the employee to present evidence that would exonerate him from blame in this regard.

[56] However and as the Commissioner reasoned, "*the version of the applicant is one of bare denial, i.e. that he had not assaulted Segole*".[55] In my view, and taking into account the factual evidence, there is simply no basis to interfere with the Commissioner having preferred the evidence of the First Respondent to the Applicant's evidence. The reasons provided by the Commissioner are in my view correct, and certainly substantiated by the transcript. No case has been made out by the Applicant, in its founding or supplementary affidavits, as to why such a preferring of evidence by the Commissioner should be interfered with in this instance.

[57] Furthermore, the Commissioner's award passes the test for reasonableness set out in *Herholdt* in that it cannot be said to be entirely disconnected with, or unsupported by the evidence. The evidence led at the arbitration clearly bears out the fairness and reasonableness of confirming the sanction of dismissal imposed by the First Respondent at the disciplinary hearing.

[58] In light of these considerations, the decision of the Commissioner in finding that the dismissal was both procedurally and substantively fair does not in my view, fall outside of a range of reasonable responses to the Applicant's case.

[59] Having due regard to the reasoning of the Commissioner on the evidence before him at the arbitration, it is clear from an analysis of the award that the Commissioner properly weighed up all of the evidence before him – the totality of the circumstances, in the parlance of *Sidumo* – and it is in the light of all those circumstances that he found that dismissal was a fair sanction.

Conclusion:

[55] *Ibid* at pg 5.

[60] In conclusion, the Applicant's review has no basis as the Commissioner's finding of procedural and substantive fairness was substantiated by the evidence and is not in any way irregular.

[61] The conclusion that the Commissioner reached is one that a reasonable decision-maker would have come to and I am, therefore, unable to conclude that his decision was one that a reasonable decision-maker could not reach.

[62] The finding must accordingly, be upheld.

Order:

[63] In the premises, I make the following order:

(1) The Review Application is dismissed.

(2) There is no order as to costs.

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T Deane

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Adv. NL Dyirakumunda

Instructed by: Ruth Edmonds Attorneys Inc

For the Third Respondent: Prences Mohlahlo