IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 1735/15

In the matter between:

PSA obo G B MOLOSIWA **Applicant**

and

DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT-NORTH WEST **First Respondent**

COMMISSIONER: THANDO NDLEBE **Second Respondent**

EDUCATION LABOUR RELATIONS COUNCIL **Third Respondent**

Delivered: 4 October 2019

JUDGMENT

MABASO, AJ

Introduction

[1] A school principal (the applicant) accused by his employer, the second respondent (the Department) of three counts of executing corporal

punishment on three high school learners was found guilty of these charges during the disciplinary hearing. The Chairperson imposed a sanction of demotion from being a principal to be a school based Head of Department (the HOD). He internally appealed this decision to the Member of Executive Council (the MEC). Without hearing further submissions from the applicant, the MEC unilaterally substituted the Chairperson's sanction with one of dismissal. Subsequently, the applicant, assisted by his union the PSA (the union) declared an unfair dismissal dispute against the Department before the Education Labour Relations Council (the Bargaining Council) which appointed the arbitrator to arbitrate the dispute who later concluded that the dismissal was fair as he found no fault on the approach taken by the MEC. The applicant has approached this Court challenging this finding. The second respondent is opposing this application.

[2] Questions answered in this judgment are whether:

2.1 The arbitrator committed a reviewable irregularity in concluding that the applicant's dismissal was substantively fair?

2.2 The arbitrator committed a reviewable irregularity by finding that the dismissal was procedurally fair, despite the applicant not being given an opportunity to present evidence during the appeal?

2.3 The arbitrator committed a reviewable irregularity in concluding that the delay in finalising the outcome of the appeal was procedurally fair?

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The arbitration

[3] The evidence of the Department, in summary, is that: Ms Bagenti testified that she was a learner at a High School which the applicant worked. On 18 May 2011, the applicant arrived in their class and found that the class was not cleaned, he then ordered all the female learners to stand up. He proceeded to hit the whole class and later took both her and a fellow learner, Kristina, to the staff room where he proceeded to assault them. When Kristina tried to give an

explanation the applicant slapped him. Ms Bagenti further stated that the applicant was accused of assaulting Matlholwa at a funeral. As a result of this conduct, on a Monday when learners were about to write exams, other learners disrupted the exams by burning tyres and complaining that the applicant had assaulted the learners.

[4] The second learner, Matlholwa, testified that together with other learners and the applicant attended the funeral of a fellow learner. He was not able to get transportation to the graveyard as the bus was already full, he saw the applicant's bakkie then went to ask for a lift. When they reached the grayeyard he was slapped on his cheek by the applicant. The applicant accused the applicant of undermining him and telling him that "he has children".

[5] The third learner, Pokwane, the president of Learner Representative Council (LSC), contended that he was told about the assault of Matlholwa and then proceeded to where the incident allegedly was taking place. He found Matlholwa who complained about pains on his cheek, and indeed observed marks of hands on Matlholwa's face. Clearly this evidence corroborated Matlholwa's evidence in respect of assault, but then the remaining issue was who had assaulted Matlholwa. The applicant denied this accusation.

[6] Mr William Modiroa, the assistant Labour Relations Manager of the Department, testified that he was involved in the investigation of the allegations against the applicant. He explained the process which was followed. He further explained the reasons which caused the delay in instituting and finalising the disciplinary hearing.

[7] The applicant also testified. When asked as to whether he administered corporal punishment to the learners on 11 May 2011, he answered that "*in as far as I am concerned I don't recall myself administering corporal punishment to the learners on the said date*". When he was asked about the incident at the graveyard, denied that he had hit Matlholwa, but confirmed that he did speak with him.

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[8] At the conclusion of the arbitration, the arbitrator concluded that the applicant did commit the offences charged with, therefore, the dismissal was substantively fair. In support of this conclusion, the arbitrator proceeded to summarise the evidence presented and under the analysis of evidence, deals with the procedural aspect of dismissal wherein he concludes that paragraph 9(5) of the Employment of Educators Act[1] (the Act) allows the appeal authority, the MEC, to amend the sanction in the manner which he/she deems fit and appropriate therefore he concluded that the MEC acted within her powers to amend the sanction from demotion to dismissal.

[9] In respect of the delay in finalising the disciplinary hearing, the arbitrator confirmed that the applicant's concern was that the respondent took more than a year to respond to his appeal application. Therefore, it was unreasonably lengthy. According to the arbitrator, the question that he had to ask himself was whether the applicant suffered prejudice for the delay as a result of the finalisation of the appeal. He opined that there was none, moreover, he concluded that the dismissal was procedurally fair.

Grounds for the review application

Were the offences committed?

[10] In respect to charges 1 and 2, it is contended that the arbitrator failed to take into account the probabilities.

[11] In respect of charge 3, it was submitted that the arbitrator failed to apply his mind to the totality of the evidence before him, and to resolve the necessary disputes of fact, to make proper findings concerning which witnesses to believe. As the applicant contends that the arbitrator gave no basis for why he preferred the version of the learner over the evidence of an independent member of SAPS who was present at the time the alleged incident took place.

[1] Act 76 of 1998.

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[12] The first question that one will easily ask himself is why would the learners gang up against the principal of the same school that they are attending and make such serious allegations against him. However, Mohammed JA in *S v Ipeleng*[2], answered this type of a question as follows, which authority I opine that it applies even in labour disputes,

> *'it is a wrong approach in a criminal case to say 'What should a witness for the prosecution come here to commit perjury'? It might equally he asked: 'Why does the accused come here to commit perjury?' True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted'. '*

[13] In the matter of *CUSA v Tao Ying Metal Industries and Others*[3], the Constitutional Court held that an umpire needs to decide the real dispute between the parties, ignore unnecessary counterclaims, and reach the desired outcome based on the evidence that was properly placed before him.

[14] In deciding a review application, the Labour Appeal Court (LAC) in *Shatterprufe (Pty) Ltd v Sesani NO and Others*[4] held thus:

> *'…A review of a CCMA award is permissible only if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Thus, even had the arbitrator committed an irregularity by not resolving the factual disputes, it*

[2] 1993 (2) SACR 185 TPD at 189.
[3] [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC).
[4] [2014] ZALAC 44 (10 September 2014) at para 29.

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was incumbent on the court to enquire further to determine if the outcome was unreasonable, which, for the reasons given, in this case it was not.'

[15] I confirm that the arbitrator committed irregularity by not giving reasons as to why he accepted the evidence of the Department as compared to the applicant's. However, I have perused the records of the arbitration, and conclude that the arbitrator did deal with the question of whether the applicant committed the offences charged with, for example, as highlighted above in respect of the issues of whether the applicant assaulted Matlholwa at the graveyard, there was corroborating evidence before the arbitrator that Matlholwa had marks on his face when Pokwane approached him and this was immediately after the applicant had spoken to him, therefore, taking into account the totality of evidence, Matlholwa was assaulted. As to who did this, there was evidence that the applicant asked Matlholwa to follow him until they reached a place where cars were parked, away from the graveyard, and that is where Matlholwa was hit by the applicant. On the balance of probabilites, the applicant was the perpetrator because why would the applicant ask Matlholwa to follow him just to ask him a question. Despite the arbitrator not stating the reasons of accepting the department's evidence, I conclude that he did not commit reviewable irregularity.

[16] In respect of the incident of 11 May 2011: taking into account the answer that was provided by the applicant in paragraph 7 above, and the totality of the evidence before the arbitrator, I conclude that that the applicant indeed committed the offence. As much as there were inconsistencies in respect of the evidence of the Department, such inconsistencies were not material as the arbitrator answered the question that he had been called upon to decide and an error of facts alone does not call for the setting aside of an arbitration award.

Procedural unfairness

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[17] The applicant contends that the arbitrator committed a reviewable irregularity by not taking into account that the appeal hearing should have been conducted speedily. Therefore, the delay should have had an impact on the sanction of dismissal because this demonstrated that the employment relationship had not irreparably broken down. Further, this rendered the dismissal, under the circumstances, to be procedurally unfair.

[18] The applicant further submits that the MEC in unilaterally amending the sanction of demotion to one of dismissal made an error of law, therefore, the arbitrator's finding that the MEC had the power to impose a sanction of dismissal is unreasonable. He contends that he should have been warned prior to the increase in sanction.

[19] It is further submitted that the arbitrator made an error of law by not following the LAC judgment, *South African Revenue Service v CCMA and Others*[5] and that of *Rennies Distribution Services (Pty) Ltd v Biermann.*[6] This ground has no merits.

[20] The applicant further states that the arbitrator failed to determine one of the issues that were before him, in that the applicant alleged that he was not provided with an opportunity to testify at the hearing. Therefore the arbitrator failed to deal with the procedural fairness of the dismissal.

Ground one: The delay in prosecuting the DC/ Appeal

[21] A reviewing court has to answer *inter alia* the following questions, depending on the ground raised, as set out in *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others*[7] ,:

> '(i) ...

[5] (2016) 3 BLLR 297 (LAC).
[6] [2009] 7 BLLR 685 (LC).

[7] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20. (*Goldfields*)

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(ii) Did the arbitrator **identify** the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

(iii) Did the arbitrator **understand** the nature of the dispute he or she was required to arbitrate?

(iv) Did he or she deal with **the substantial merits** of the dispute? and

(v) Is the arbitrator's decision one that **another decision-maker reasonably have arrived** at based on **the evidence.**' (Emphasis added.)

[22] During opening statements, before the arbitrator, the applicant advised the arbitrator that he was challenging both the procedure and reason for dismissal. Concerns about the flaws relating to the interpretation of the provisions of the Act and how the procedure transpired in handling the disciplinary process. The issue of delay in finalising both the disciplinary and appeal hearings. The Department stated that the problem was about the changing of the MECs (this was not evidence). However, a letter that was received by the applicant indicates otherwise, suggesting that the MEC's office might have misplaced the appeal papers. The applicant resubmitted it in July 2013.

[23] The applicant was charged in terms of Act. Schedule 2 provides that,

'2. Principles.—The principles underlying the Code and Procedures and any decision to discipline an educator are that—
(a)discipline is a corrective and not a punitive measure;
(b)discipline must be applied in a **prompt, fair, consistent and just'**[8]

[24] The LRA provides for the speedy resolution of disputes in the workplace and it must be concluded in the shortest time frame.[9]

[8] Court bolding and underlining.
[9] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 1. See also Schedule 2, 2 (g) of the Act.

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[25] The Constitutional Court in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others,* in expounding the question of the delay in an internal disciplinary hearing provided these salutary paragraphs:

> '[71] This also accords with the general principles of how delay impacts the fairness of disciplinary proceedings. *The question of whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules*. Whether the delay would impact negatively on the fairness of disciplinary proceedings would thus depend on the facts of each case.' [10]

And the Court further held that,

> 'The requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion. If an employee is retained in employment for an extended period after the institution of disciplinary action, it <u>may</u> indicate that the employment relationship has not broken down.<u>*An appeal procedure is a separate facet of the disciplinary procedure and must be conducted with the same degree of alacrity for procedural fairness to be fulfilled*</u>.' [11] (Court's emphasis).

[26] The Labour Court, regarding the assessment of delay held that: (a) The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable. (b) The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness. (c) <u>*It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing*.</u> (d)

[10] (CCT33/18) [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC) (7 February 2019) at para 71.
[11] Id at para 67.

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Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case. (e) *The nature of the alleged offence must be taken into account.* The offence may be such that there is a particular imperative to have it decided on the merits. This requirement, however, does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. *What it means is that the nature of the offence could in itself justify a longer period of further investigation*, *or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable*. (f) All the above considerations must be applied, not individually, but holistically.[12]

[27] A dismissal must be considered against its facts and circumstances. In *casu*, in applying the principle above, this Court has to take into account that the person who was tasked to investigate the dispute between the Department and the applicant is the arbitrator. If a party is challenging a decision of the arbitrator, he must not only show that the arbitrator committed irregularity but that such prevented him from having a trial of issues.

[28] The challenge before the arbitrator in respect of the procedural aspect, was that the Department took time to charge the applicant and to finalise the appeal in respect of the period of time of the alleged offences and the conclusion of the disciplinary hearing. Having considered the records and the nature of the offence the applicant faced, I am convinced that the Department provided an excusable reason for the delay and its primary reason was that it had to do a proper investigation. Therefore I conclude that the Department preferred *"an explanation that can reasonably serve to excuse the delay".*

[29] In respect of the delay in finalising the outcome of the appeal, the evidence before the arbitrator was that the applicant after being notified of the sanction of demotion, lodged an appeal on 13 September 2012. Almost a year later on 23 August 2013, he received a letter from the Department advising him to

[12] Confirmed by the CC in Stokwe's judgment, fn 10 above.

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resubmit same, which he did. The outcome of appeal was communicated on 12 February 2014. The Department did not present evidence in respect of the causes for the delay. Despite the provisions of the LRA providing for the speedy resolution of disputes, but the inquiry does not end here, as further factors have to be assessed. For example, whilst he was waiting for the outcome of the appeal, he was based at the district office. On or about July 2011, he was asked to take a post of a principal at St Mary's School, later was asked to take one at ZM Seatlholo High School, but he did not accept the positions as his concern was about the issues with learners which was still pending as the outcome of the appeal had not been released.

[30] The arbitrator concluded that the applicant suffered no prejudice. I have taken into account that the applicant confirms that besides being based at the district office, there were positions that were made available for him to occupy, the Principal positions, and he declined such positions as his concern was that he had issues with the learners. I have taken into account the circumstances of this case, and I agree with the arbitrator that there was no prejudice suffered by the applicant.

[31] Schedule 2 of the Act allows the retention of an employee within the Department's employ whilst awaiting an outcome of the appeal, as stated above, the applicant was transferred to the district office therefore there was nothing wrong about the applicant being kept in the employ of the Department during that period, as this is in terms of the Act, and I do not find a convincing point as to why the applicant will opine that the period that he spent there is an indication that the trust relationship had not broken down. One has to take into account that the charges were that he hit the learners, and they were special measures taken to accommodate him as he was offered interim positions but he declined them.

[32] However, the circumstances of this case require one to ask himself a question as to why the matter had not been resolved by the MEC, as there is no evidence tendered by the Department except in opening statements, mentioned above, it has to be reiterated that one of the issue that was before

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the arbitrator was about the unexpained more than a year period of the delay in finalising the appeal. I conclude that the arbitrator failed to take into account the totality of the circumstances of the case, therefore, the delay renders the procedure to be unfair, as it is contrary to schedule 2 (9) of the Act which requires that there must be a prompt and fair procedure, as the delay in finalising the appeal is unacceptable.

Substitution demotion with dismissal without a hearing.

[33] Schedule 2, clause 9 of the Act allows an educator to appeal against a sanction which is imposed by a chairperson. In this matter, after being found guilty of the three charges, the chairperson imposed the sanction of demotion, from principal to HOD, however, the applicant was not satisfied with this outcome, and he exercised his right by launching an appeal. The MEC substituted such sanction of demotion, with that of dismissal.

[34] Schedule 2 provides that:

> '9. Appeals.—(1) An educator or an employer may appeal against a finding or sanction by making an application in accordance with Form E attached to this Schedule.
>
> [Sub-item (1) substituted by s. 6 of Act No. 1 of 2004.]
>
> (2) The educator or the employer must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be.
>
> [Sub-item (2) substituted by s. 6 of Act No. 1 of 2004.]
>
> (3) On receipt of the application referred to in sub item (1), the Member of the Executive Council or the Minister, as the case may be, *must request the employer to provide him or her with a copy of the record of the proceedings and any other relevant documentation*.

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(4) If the Member of the Executive Council or the Minister, as the case may be, *chooses to allow further representations by the educator, or his or her representative or an employer, he or she must notify the educator or employer respectively of the date, time and place where such representations must be made*.

[Sub-item (4) substituted by s. 6 of Act No. 1 of 2004.]

(5) The Member of the Executive Council or the Minister, as the case may be, must consider the appeal, and may—

(a)uphold the appeal;

(b)in cases of misconduct contemplated in section 18, amend the sanction; or

(c)dismiss the appeal.'

[35] The arbitrator in paragraph 50 and 51 of the award focused on the word "amend" and then concluded that the MEC was within its right to substitute the finding with the one of dismissal. However, I am of the view that the arbitrator did not entirely understand the issue before him in that the applicant's concern was that the MEC had no right to substitute a sanction without being allowed to make representations. What was required of the arbitrator was not to concentrate on the word "amend" as the enquiry does not start there but from clause 9(3) read with (4) of Schedule 2 of the Act

[36] I agree with the arbitrator that the MEC had a right to amend the sanction, however, before doing that the arbitrator should have looked at the provisions of Schedule 2, clause 9 (4) which inter alia provides that,

> 'If (the MEC)…***chooses*** to allow further representations by the educator, or his or her representative or an employer, he or she must notify the educator or employer respectively of the date, time and place where such representations must be made.'[13]

[13] Court emphasis.

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[37] My view, is that the word “chooses” as used by the Act gives the MEC a discretion to decide to call for further hearing in circumstances whereby the sanction that the MEC intends to impose is harsher than the one that a chairperson of the disciplinary hearing had imposed. Therefore, before the MEC could amend the sanction to a harsher one he would have to hear the other side, the employee, whereby he would have to provide the date, time and place where such representations must be made. Meaning, an employee has to be notified of a potential increase in his sanction so that proper representations such as mitigating factors can be presented before the MEC as it is my view that the MEC cannot be given carte blanche in deciding on matters of this nature, without allowing an employee a right to be heard.

[38] An employee who is appealing a finding of a chairperson of the disciplinary hearing is communicating to the higher authority his unhappiness, and if such employee was to be dismissed without being allowed to be heard, that would be unfair. I therefore conclude that the MEC had no right to substitute the demotion with dismissal without giving the applicant an opportunity to make representation. This means that the arbitrator failed to investigate this aspect which results to his award to be partly reviewable.

Replace dismissal with demotion or order compensation?

[39] The applicant is alleging that he was not given an opportunity by the MEC to make submission before dismissal ruling, therefore, as the arbitrator failed to deal with this issue, this court has powers to substitute the arbitrator's conclusion with an order that would be appropriate taking into the circumstances of this matter.

[40] Section 194(1) of the LRA says:

> ‘The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee unless –
>
> (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;

(c)it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d)the dismissal is unfair only because the employer did not follow a fair procedure.'

[41] The applicant joined the school in 1992 as a teacher in the year 1994, he was then promoted to be a deputy principal, and in 1996, he was appointed as the principal until his dismissal in 2013. The applicant prides himself as a person who managed to increase the grade 12 results for 3 to 4 years in succession.

[42] The Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[14] referring with approval the *dictum* in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* held that:

'The Labour Court or an Arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the Court or Arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).'

[43] Given that the arbitrator made an error of law in not properly applying his mind to the provisions of clause 9(4) of schedule 2 of the Act, may this Court order reinstatement in the demoted position or compensation? It has to be remembered that the applicant confirms that following the charges that he was found guilty of, he was removed from the school and was based at the district office where he was offered a position of being a principal in another school, pending the outcome of the appeal, he declined because of the issues

[14] [2017] 1 BLLR 8 (CC) at para 38.

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he had with the learners. The applicant has not shown remorse despite being convicted of three serious misconducts. I conclude that the applicant cannot work with learners, therefore continued employment would be intolerable.

[44] And reinstatement cannot be possible taking into account the circumstances of this case and further the charges that the employee was found guilty of and dismissed for, in that corporal punishment is an assualt and is no longer legal in this country and is against the law.

[45] Therefore, I conclude that compensation would be appropriate, as to how much would be the next inquiry. Taking into account the number of years that the employee has worked and that the internal Chairperson had imposed a sanction of demotion, and that this Court confirms the gulity verdict, I therefore conclude that the following order will be appropriate.

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

Order

1. The arbitration award under case under case number PSES694/13/14NW is reviewed and set aside and replaced with the order that,

'1. The dismissal of the Applicant by the Head of Department of Education and Sport Development was was substantively fair but procedurally unfair,

2. The Head of Department of Education and Sport Development is ordered to pay the applicant a salary equivalent to 6 months calculated at the date of dismissal.'

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S Mabaso

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Mr H Pretorius
Instructed by:	Macgregor Erasmus Attorneys
For the Respondent:	Mr Chwaro
Instructed by:	Motshabi & Modiboa Attorneys

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