THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Of interest to judges

Case no: JR1160/17

In the matter between**:**

AZWIITEI AWELANI MPHAPHULI **Applicant**

and

MATTHEWS RAMOTSHELA *N.O* **First Respondent**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) **Second Respondent**

EXXARO COST LIMITED **Third Respondent**

Heard: **14 August 2019**

Delivered: **17 September 2019**

Summary: **Review application – breach of a zero tolerance safety policy is a serious misconduct – testing positive for alcohol following a breathalyser test – avoiding a follow up test – entering the mine premises to perform duties when the state of sobriety was questionable – dismissal is justifiable.**

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JUDGMENT

NKUTHA–NKONTWANA. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA). The applicant seeks an order to review and set aside the arbitration award of the second respondent (commissioner) issued under case number LP646-17 dated 16 May 2017. The first respondent, Mr Matthews Ramotshela (commissioner), ruled that the applicant's dismissal was substantively fair.

[2] The applicant is mainly challenging the reasonableness of the commissioner's award.

Background

[3] The applicant was employed by the third respondent as Head of Production: Coal Beneficiation, a senior position. The third respondent is running coal mine operations.

[4] The applicant was summoned to a disciplinary enquiry to answer to the following charges:

> '**2. Charge(s):**
>
> **It is alleged that you committed the following offences(s):**
>
> Contravention of clause 7.1 read with the Exxaro's Zero Tolerance Management Instruction and 3.1 of the Disciplinary Code and Procedure.
>
> **3. Particulars of the charge(s):**
>
> **Charge 1**
>
> It is alleged that:
>
> On/or about 21 November 2016 whilst reporting for duty you were randomly selected and tested for alcohol during which event you tested positive for alcohol. Despite having tested positive for alcohol you still

[1] Act 66 of 1996 as amended.

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proceeded to drive into the mine and ignored the security officers' attempts to prevent you from entering the mine. When further attempts to reach you telephonically were made, you did not answer to any of the telephone calls out through to your work allocated cell phone.

By testing positive for alcohol you were in contravention of the Exxaro Zero Tolerance Management Instruction which clearly identifies alcohol related cases as those that are covered by the Company's zero tolerance approach. Your conduct as described above amounts to improper behaviour damaging the interest of the company especially given your position as a senior member of management.

Furthermore, your conduct of defying the security officer's instructions to stop and your proceeding into the mine after testing positive for alcohol, was in contravention of regulation 4.7.1 of the Mine, Health and Safety Amendment Act 74 of 2008 which provides that 'no person in a state of intoxication or any other condition which may render or be likely to render him incapable of taking care of himself or a person under his charge shall not be allowed to enter the workings of a mine or be in proximity of any working place or near any machinery on the surface of the mine or at a works'. The company regards this testing positive for alcohol as one such condition which may render or be likely to render you incapable of taking care of yourself and/or person under your care.'

Charge 2

It is alleged that:

On 21 November 2016 you acted dishonestly in contravention of clause 3.1 of the Disciplinary Code in your dealing with the company's investigating officer. It is alleged that when questioned about the whereabouts of your cell phones on 21 November 2016, you lied and told the investigating officer that both your cell phones were at home. This statement turned out to be false and your cell phones were found in your motor vehicle which was parked in the mine premises. These facts were admitted in your statement dated 21 November 2016.

Please be warned that the Company regards your conduct as described above in a very serious light as it has the potential of damaging the trust

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relationship that should exists between the Company and you, as a senior manager. Accordingly, a guilt finding may result in your dismissal.'

[5] The applicant pleaded guilty to charge 1 and not guilty to charge 2. He was found guilty in respect of both charges and consequently dismissed. The applicant challenged the substantive fairness of his dismissal by referring a dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). He requested that the dispute be arbitrated following the unsuccessful conciliation. The parties agreed during the pre-arbitration hearing to drop charge 2.

Arbitration proceedings

[6] The record of the disciplinary enquiry was admitted into evidence by agreement between the parties. As such, the only issue that was in dispute was whether there was an attempt by the security officer to prevent the applicant from entering the mine premises.

[7] The third respondent accordingly led the evidence of three witnesses, Messrs Jan Ntini (Mr Ntini), Eric Manaka (Mr Manaka) and Mr Phethani Ravele (Mr Ravele). Mr Ntini testified that he was the security officer who stopped the applicant for a random alcohol test. He clocked in the applicant using his access card and thereafter he gave the applicant a breathalyser. The applicant blew into the breathalyser and handed it back to him. The applicant proceeded to drive into the mine premises without waiting for the test results.

[8] Mr Ntini attempted to stop the applicant. He also signalled to his colleague, Mr Manaka, who was at the loading zone where the applicant had stopped to pick up a passenger. Mr Manaka could not figure out which motor vehicle he had to stop as there were two vehicles at the loading zone. Mr Manaka confirmed this evidence.

[9] Mr Ntini reported the incident to his supervisor, Mr Charles Mokgokong, who instructed Mr Simon Senaka to transport him to the applicant's office. They did not find the applicant in his office and tried to contact him by way of his

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cell phones. The first number they called was on voice mail and the second number rang but was dropped. Upon second attempt, the second number went to voice mail as well.

[10] Mr Ntini explained that it was not the first time he administered an alcohol test on the applicant and previously he waited for the results before entering the mine premises. As such, he expected him to wait for the results.

[11] Mr Ntini was adamant during cross examination that there was no need for him to tell the applicant to wait for the alcohol test results as he, the applicant, knew that he had to wait for the results before entering the mine premises. Mr Ntini also rejected the applicant's version that was put to him that, upon entering the mine premises, the applicant went straight to conduct an inspection; Hence he was not at his office.

[12] Mr Ravele testified that the applicant came to his office at about 06h10 and asked for a glass of water. They spent some time chatting until about 10h00. His cross examination was solely on the accuracy of the time the applicant arrived at his office. He stood by his evidence in chief that the applicant arrived at about 06h10.

[13] The applicant closed his case without leading any evidence to challenge the evidence of Messrs Ntini and Ravele. The only record of the version of his defence against the charges is contained in a handwritten statement he had prepared on the date of the incident. That statement was admitted into evidence as part of the agreed bundle of documents that was handed in during the arbitration. In fact, counsel for the applicant, Mr Cook, submitted that there was no dispute as to the authenticity and the contents of the documents which included the record of the disciplinary enquiry.

[14] The applicant's statement can be summarised as follows:[2]

[2] See pages 132 - 133 of the Record.

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14.1. On the morning of 21 November 2016, at about 05h55 he was asked to take a breathalyser test at the entrance of mine which he did.

14.2. He proceeded to enter into the mine premises without waiting for the results. The security screamed at him but he drove off as he thought the security was screaming at someone else.

14.3. He went to the plant to do inspections in stockpiles. Thereafter, he went to a meeting with Mr Ravele.

14.4. He switched off his cell phones and left them in his car. However, he told the investigating officer that he had left his cell phones at home, which was not true.

14.5. He had family problems since 2014. He was divorced and his children were putting a huge strain on him and his new family life. He did see the Social Services with his children up until 2015 but he left the program early.

14.6. He seriously needed help with his impulsive reaction to minor things and not taking into consideration the consequences of his action. He was willing to see the Employee Assistance Programme (EAP) for help.

14.7. He conceded that he could be charged for alcohol transgression and he would plead guilty because he did drink alcohol the previous night.

14.8. He took accountability for his actions which he conceded that were wrong.

[15] The same statement was admitted into evidence during the disciplinary enquiry as the applicant did not testify in his defence even during those proceedings.

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[16] It is clear from the record of the disciplinary enquiry that the focus was on the sanction since the applicant had pleaded guilty to charge 1. The chairperson of the disciplinary enquiry considered, *inter alia*, the following uncontested evidence of the third respondent in relation to the applicant's previous similar transgression as indicative of a pattern that he (the applicant) was not a stranger to discipline:[3]

16.1. On 17 December 2009, the applicant was found guilty and issued with a final written warning on a charge of being under the influence of drugs/alcohol while on duty.

16.2. On 22 October 2015, the applicant was found guilty and issued with a final written warning on charges of testing positive for alcohol on 19 September 2015. It was also alleged that even in that instance the applicant drove away without waiting for the results and the third respondent's Risk Management battled to get hold of him.

16.3. The applicant refused the third respondent's offer to assist him after testing positive for alcohol on 19 September 2015.

[17] The chairperson of the disciplinary enquiry also considered the evidence of the applicant's witnesses who testified in mitigation of the sanction. All of them confirmed that the applicant had family problems and believed that the third respondent could help him.

[18] The chairperson recommended a sanction of dismissal in respect of both charges.

[19] In the arbitration proceedings, the applicant challenged the finding of guilty in respect of charge 1, despite having pleaded guilty during the disciplinary enquiry. Notwithstanding, as stated above, he still relied on his written statement and the record of the disciplinary enquiry.

[3] See page 141, para 2.4 of the Record.

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[20] The crux of the applicant's impugn in those proceedings was that the third respondent failed to prove that he was under the influence of alcohol or was in a state of intoxication or any other condition that could have rendered or likely to render him incapable of taking care of himself or of any other person.

Failure to lead evidence

[21] In *Bargaining Council for Manufacturing Industry, KwaZulu-Natal v VKD Marketing CC and Others*[4], the Labour Appeal Court (LAC) held that an adverse inference will be drawn against a party failing to testify only if the evidence of the other party calls for a reply. That is typical in the present matter.

[22] Mr Ntini testified that the applicant had been subjected to the alcohol tests before and duly waited for the results before entering the mine premises. Also his version that he could not be located after he entered the mine premises because he went to conduct inspections was put to question by Mr Ravele's evidence.

[23] Even though the applicant had a right not to testify in his defence, the general rules of evidence dictate that he ought to have led evidence in rebuttal of the third respondent's evidence, particularly the evidence of Messrs Ntini and Ravele. In the absence of the applicant's evidence in rebuttal, that evidence remained unchallenged. The commissioner was spot on in this regard.

Entering the premises

[24] Conveniently, the parties, together with the commissioner, had agreed that the third respondent's policies dealing with alcohol offenses were common cause.[5] The policy on Prevention of Intoxicating Substances (Alcohol Policy)

[4] (2013) 34 ILJ 96 (LAC)
[5] See Arbitration Award, paginated page 5, para 3(1).

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pertinently states in paragraph 7.6 that testing for intoxicating substances will, *inter alia*, be conducted:

> '7.6.5 When nominated by the system generated randomizers for random testing for alcohol or drugs (yellow/amber light or alarm when clocking at the access/exit control points for alcohol and SAP/Honeywell nomination list for drug testing). Random testing is compulsory and must be done immediately (in work time).'

[25] Clearly, Mr Ntini was correct when he explained that he had to clock in the applicant first before he could administer the alcohol test as the random selection was done by the system upon clocking in. Therefore, there is no merit in the version that was put to him during his cross examination to the effect that he had granted the applicant access to the premises of the mine by swiping his access card. In any event, Mr Ntini's evidence in this regard was never challenged and must stand.

[26] The applicant admitted that he was aware that he had to wait for the test results and that he did not heed Mr Ntini's attempt to stop him. Strangely, the applicant seemed to have been under the impression that Mr Ntini was screaming at someone else. However, he did not proffer any explanation as to what informed his thinking because at that moment he had just drove off without waiting for the results of his alcohol test and Mr Ntini was clearly trying to prevent him from proceeding.

[27] Nothing turns on the second attempt to stop the applicant when he was at the loading zone because by that time he was aware that he had breached the Alcohol Policy by not waiting for the test results and ignoring Mr Ntini's first attempt to stop him from entering the mine premises.

[28] The commissioner correctly found that the applicant was fully aware that he had to wait for the test results and entering the mine premises without the knowledge of his results was a deliberate attempt to circumvent the inquiry into his state of sobriety.

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Zero Tolerance Safety Policy

[29] Indeed, the third respondent's case was not that the applicant was under the influence of alcohol or intoxicated as submitted by Mr Cook. However, the prescripts that the applicant allegedly offended are instructive. The Alcohol Policy provides:

> '7.5 Policy and legislation
>
> 7.5.1 No person will be allowed to be on the premises of GGC (Exxaro) whilst under the influence of any intoxicating substance.
>
> 7.5.2 An employee who tests positive for any intoxicating substance will be dealt with in accordance with the Exxaro disciplinary code (Section 7.1) and can/may also be charged criminally…
>
> 7.5.3 Any person contravening any of these regulations will be/may be handed over to the local SAPS for criminal prosecution.
>
> 7.6…
>
> 7.7…
>
> **7.8 Testing procedure**
>
> **…**
>
> 7.8.1 the alcohol test must be carried out within 25 Minutes after the allegation was made that a person is suspected to be under the influence of intoxicating substance.
>
> 7.8.2 …
>
> 7.8.3 …
>
> 7.8.4 …

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7.9 Procedure after testing

7.9.1 When the outcome of the test is positive, the Risk Control Official on duty will make necessary arrangement for the person to be sent home for the rest of the shift. Necessary disciplinary actions will be initiated by risk control and steps will be taken against all offenders. An employee will receive remuneration only for the time worked on his/her shift if any.

7.10 Procedure to follow when a person refuses to be tested

When a person refuses to be tested for any intoxicating substance or delays the process e.g. by running away, it will be assumed that for all purposes that he/she is positive for alcohol and/or mind altering drugs and will be dealt with accordingly. (statements of all persons present at the scene will be taken). In cases where persons avoid testing by any means one (1) day/shift unpaid leave will be applicable. Such person will also be charged for refusing to comply with a legal and fair instruction. Management reserves a right to retest such a person before access to the GGC will be allowed.

7.11 …

7.12. Rehabilitation

7.12.1 After disciplinary hearing where a person is found guilty of abusing intoxicating substance, Management will offer assistance for rehabilitation…If a person knows that they have a problem, he/she can request for assistance with rehabilitation before getting to the unfortunate situation of a disciplinary hearing.

7.12.2 Refusal of rehabilitation will be recorded during inquiries and will be used as an aggravating factor with a second offence which will most probably lead to dismissal.'

[30] Whilst the Zero Tolerance Safety Policy provides:

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2. Instruction

After research on the history of Exxaro and even Kumba Resources, it was identified that the elements of the 13 Zero Tolerance Safety Rules contributed to the majority of all fatalities and serious injury related incidents in the company.

Exxaro's intent of implementing these rules is merely to highlight what already exists in Legislation, company procedures, rules and policies and to protect the Health and Safety of all Exxaro employees and contractors.

In the interest of Health and Safety of all employees and contractors, Exxaro will follow a ZERO TOLERANCE APPROACH and will apply Consequence Management against employees and contractors transgressing these Safety Rules.

The Disciplinary Code (Section 7) makes provision for when safety regulations, policies, procedures and practices are contravened. Management has identified 13 important aspects of safety, which resort under this section. Offences regarding these crucial aspects will be referred to as Zero Tolerance Rules.

The Disciplinary process must always be followed in the case of non-adherence to the Zero Tolerance Safety Rules by an employee. Attention is also drawn to the fact that a transgression of any one of these offences can even in the event of first offender lead to dismissal.

These Exxaro Zero Tolerance Rules should not be seen as exhaustive list and any Health and Safety related infringement outside the confines of this list will lead to disciplinary action and if found guilty could be dismissal unless there are compelling mitigating factors, which could lead to a lesser sanction as an alternative to dismissal.

Disciplinary charges, related to the Exxaro Zero Tolerance Rules, should therefore be based on Section 7.1 and the applicable rule transgressed.

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EXXARO ZERO TOLERANCE SAFETY RULES:

1. **DRUGS AND ALCOHOL (Sec.5)**
   No person may enter or intend to enter the mine premises and work areas under the influence of an alcohol or illegal substance. No person may be found in possession of alcohol or illegal substances on the mine premises and work area.' (Emphasis added)

[31] The above policies give effect to the Regulation 4.1.7 of the Mine, Health and Safety Amendment[6] which provide that:

> 'No person in a state of intoxication or any other condition which may render or be likely to render him incapable of taking care of himself or a person under his charge shall not be allowed to enter the workings of a mine or be in proximity of any working place or near any machinery on the surface of the mine or at a works, and any person who may have entered the workings of a mine or who is found in the proximity of any workings of a mine or any machinery on the surface of a mine or at any works in a state of intoxication may be arrested immediately by a manager or some person dully appointed by him and be immediately handed over to the police, and shall deemed to be guilty of an offence under these regulations.'

[32] It is not disputed that Regulation 4.1.7 places a duty on the third respondent to ensure that its operations are undertaken in a safe environment and to exclude or prevent any one who is not in control of his/her faculties from entering the mine premises. Also the applicant accepts the third respondent's Zero Tolerance Safety Policy. In fact, Mr Maeso who appeared for the third respondent correctly submitted that the third respondent's zero tolerance approach is one of the mechanisms undertaken to prevent fatalities that are caused, *inter alia*, by alcohol.

[6] Act 74 of 2008.

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[33] In order to assess the risks to the health and safety of its employees, the third respondent utilises a random testing system as employees enter the premises. It is clear from the Alcohol Policy that once an employee tests positive for alcohol after a breathalyser test, a follow up test must be conducted to establish the state of the employee's sobriety and that should happen within 25 minutes from the time it is established that the said employee is suspected to be under an intoxicating substance.

[34] In this instance, the applicant did not avail himself to a further test after he tested positive for alcohol. Instead, he decided to duck and dive. He deliberately switched off his cell phones and went to spend the entire morning in Mr Ravele's office. As a result, his state of his sobriety could not be established.

[35] When confronted, the applicant conceded to 'wetting his whistle' the night before and volunteered to plead guilty to an 'alcohol transgression' which he did. However, he somersaulted during the arbitration proceedings. It was his submission that he was not guilty of any offence because testing positive for alcohol is not a transgression. Mr Cook also persisted with that submission in these proceedings. That is so despite the Alcohol Policy clearly stating that 'an employee who tests positive for any intoxicating substance will be dealt with in accordance with the Exxaro disciplinary code (Section 7.1) and can/may also be charged criminally…' Clause 7.1 of the respondent's disciplinary code states that it is an offence to contravene any regulation contained in any applicable legislation, internal policies and procedures. In this instance, the prescripts referred to are Regulation 4.1.7, the Alcohol Policy and the Zero Tolerance Safety Policy.

[36] In my view, when the applicant tendered a plea of guilty at the commencement of the disciplinary enquiry it meant that there was no fact placed in issue and as such there was no further evidence necessary. Nonetheless, to the extent that the arbitration is a *de novo* hearing, the

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applicant's statement was admitted into the record in those proceedings. Section 15 of the Civil Proceedings and Evidence Act[7] provides that:

> 'It shall not be necessary for any party in any civil proceedings to prove, nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'

[37] It follows that the applicant was guilty of testing positive for alcohol. I concur with the commissioner's finding that after testing positive for alcohol, the applicant's access to the mine premises presented a safety hazard as the third respondent could not establish the extent and the effect of the alcohol that had been consumed by the applicant. To make matters worse, applicant himself contended that after testing positive for alcohol, he went straight to perform inspections even though he was aware that his state of sobriety was questionable.

[38] In the circumstances, it is clear that the applicant blatantly breached the Zero Tolerance Safety Policy.

Appropriateness of the sanction of dismissal

[39] The record shows that the applicant is an inveterate Zero Tolerance Safety Policy transgressor. It was not disputed that he had been subjected to a disciplinary enquiry on the same transgression and under similar circumstances. The currency of the sanction of a final written warning that had been rendered in respect of the transgression that took place in September 2015 is of no consequence. What matters is that in a space of just more than a year the applicant committed the same transgression. Clearly, the pattern of transgressing the Zero Tolerance Safety Policy could not be ignored.

[40] The applicant seemed to blame his conduct on his family problems which started in 2014. However, he refused the third respondent's help when he

[7] Act 25 of 1965.

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was found guilty of the same offence in 2015 and bailed out from the Social Services program prematurely. The Alcohol Policy makes it clear that the request for assistance must be proactive and not be defensive. Also, in terms of clause 7.12.2 '[r]efusal of rehabilitation will be recorded during inquiries and will be used as an aggravating factor with a second offence, which will most probably lead to dismissal.'

[41] Clearly, the applicant had already squandered the clemency of a final written warning provided in clause 7.1 of the Disciplinary Code when he was found guilty in November 2016. As such, there is no merit in Mr Cook's alternative submission that, even if the applicant was guilty as charged, the respondent ought to have issued him with a final written warning. Also, the Zero Tolerance Safety Policy endorses a sanction of dismissal where there are no compelling mitigating circumstances as typified in this instance. In any event, as correctly submitted by Mr Maeso, the third respondent's Disciplinary Code clearly states that the sanctions set out in respect of specific transgressions constitute guidelines and 'do not constitute inflexible rules which have to be followed slavishly'.[8]

[42] In my view, like any other safety rule, due weight must be accorded to the Zero Tolerance Safety Policies in the mining industry as they clearly underscore the importance of safety in the workplace and are aimed at obviating the consequences of infringements; which in most instances are grave and may result in loss of life.[9] Consequently, the commissioner cannot be criticised for taking judicial notice of the hazardous nature of mining operations and the importance of safety regulations.

[43] The applicant obviously did not live up to the standard of compliance and oversight expected of him as a senior manager.

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[8] See page 192, paras 7.2 and 7.3 of the Record

[9] See: *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 32.

[44] In all the circumstances, the commissioner's finding that the breach of the Zero Tolerance Safety Policy by the applicant justified a sanction of dismissal cannot be faulted.[10]

[45] I am satisfied that the commissioner correctly construed the issues at hand and his outcome meets the reasonableness benchmark succinctly expounded in *Head of the Department of Education v Mofokeng*.[11]

Conclusion

[46] In view of the above, it is clear that the commissioner's award is unassailable. Accordingly, the review application stands to be dismissed.

Costs

[47] It is trite that costs in this Court do not follow the result. The requirements of the law and fairness are a consideration.[12] I am disinclined to award costs against the applicant who is an individual litigant, especially since it does not seem that he was *mala fide* in launching this application.

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

Order

1. The review application is dismissed.
2. There is no order as to costs.

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[10] See: *XStrata Coal South Africa v Commission for Conciliation Mediation and Arbitration and Others* [2014] ZALCJHB 14 at para 16 to 18.
[11] [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Sidumo v Platinum Mines Limited and Others* [2007] 12 BLLR 1097 (CC).
[12] See: Section 162 of the LRA.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate AL Cook
Instructed by:	Alladardyce & Partners
For the Third Respondent:	Mr MG Maeso of Shepstone & Wylie Attorneys

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