IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1963/19

In the matter between:

GLENCORE OPERATIONS SA (PTY) LTD **Applicant**

and

CCMA **First Respondent**

COMMISSIONER S MASHEGO N. O **Second Respondent**

COMMISSIONER X NDUNA N. O **Third Respondent**

THE NUMSA **Fourth Respondent**

ELIAS DUMISANI NKOSI **Fifth Respondent**

Heard: **11 June 2021**

Delivered: **28 June 2021**

Summary: Review – award issued without jurisdiction is a nullity. A commissioner not empowered to set aside a decision taken by another commissioner in the performance or purported performance of the function in terms of the Labour Relations Act, 66 of 1995 (LRA). Such

decisions are reviewable in terms of section 158 (1) (g) of the LRA. Until the setting aside of the decision, another commissioner lacks jurisdictional power to arbitrate. Commissioners are not law unto themselves. The Director of the CCMA must investigate the alleged conduct of Commissioner Nduna. The award issued is not one that a reasonable decision maker may issue.
Held: (1) The award is reviewed and set aside. It is replaced with an order of this Court. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed application seeking to review and set aside an arbitration award issued by Commissioner Mashego on the allegations that it was issued without the necessary jurisdictional powers and that it is not one that a reasonable decision maker would reach. Additionally, the applicant seeks a review of the alleged conduct of Commissioner Nduna. The application was initially enrolled on 21 April 2021. On this day, this Court was informed that the union official appointed to move the application was hijacked a day before. As a result, the parties agreed to stand the matter down to 11 June 2021 for argument.

Background facts

[2] Mr Elias Dumisani Nkosi (Nkosi) was employed by the applicant (Glencore) as a composite operator. Nkosi was dismissed on 28 September 2018 on allegations that he was absent from duty on 24-25 August 2018 and 30-31 August 2018 as well as 01-02 September 2018 without permission and without communication to Glencore. Nkosi was

placed on a 4-day shift cycle. During the month of August, he went on leave and was scheduled to resume employment on 24 August 2018.

[3] Instead, he failed to resume his duties and his whereabouts were not reported to Glencore. Attempts to locate Nkosi drew blank. A letter that was addressed to him went unanswered. On 18 September 2018, Glencore issued a disciplinary notification for Nkosi to answer to the allegations of being absent without permission and communication on 28 September 2018. Nkosi failed to appear and Glencore employed the provisions of the desertion policy. Once the policy is effected, an employee has a right of appeal. On 19 December 2018, Nkosi launched an appeal and sought to be reinstated following a desertion. It transpired that Nkosi was found guilty of armed robbery and was sentenced to a prison term of 15 years on 17 August 2018. He was granted bail on 11 December 2018 pending an appeal against the conviction and sentence imposed.

[4] An internal appeal hearing was convened on 11 and 14 January 2019 respectively. The appeal chairperson upheld the dismissal of Nkosi. Aggrieved thereby, Nkosi referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair dismissal. Conciliation failed to resolve the dispute and Nkosi requested resolution through arbitration. The arbitration proceedings were scheduled before Commissioner Mashego (Mashego) on 22 July 2019.

[5] It is common cause between the parties that at approximately 9:50am on the scheduled day, Nkosi failed to arrive. As a result, Mashego, issued a written decision within the contemplation of section 138 (5) (a) of the Labour Relations Act[1] (LRA). After the decision was made and as the parties were making their way out of the building, Nkosi emerged. Whilst being advised of the outcome of his case by his union representative, Commissioner Nduna, overheard the conversation and forcefully grabbed a copy of the written decision out of the hands of the

[1] No. 66 of 1995, as amended.

representative of Glencore and 'ordered' the parties to return to the arbitration room. Indeed, Mashego proceeded with the arbitration notwithstanding his earlier statutory decision. I must state at this point that the transcript of the arbitration proceedings does not record that an earlier decision was made nor does Mashego recall that decision.

[6] On or about 30 July 2019, Mashego issued an arbitration award in terms of which it was found that the dismissal of Nkosi was unfair. He ordered Glencore to reinstate Nkosi effective 12 August 2019 on same terms and conditions, which prevailed before his dismissal.

[7] Glencore was displeased with this outcome and launched the review application one day out of the prescribed time period. The parties agreed that since the period is minimal, it is condonable. Without any further ado, condonation was granted.

Grounds of review

[8] The applicant contends that continuing with an arbitration process in the face of a decision dismissing the matter amounted to a gross irregularity. Properly understood, the applicant contends that Mashego lacked the necessary jurisdictional powers to arbitrate the dispute.

[9] Further, the applicant contends that the conduct of Commissioner Nduna of tearing up the ruling and ordering the parties to return to arbitration proceedings amounted to an abuse of power and/or a gross irregularity.

[10] Further, the applicant contends that the commissioner committed other reviewable irregularities in the process – by precluding the applicant from leading evidence around the communication with the wife of Nkosi in the previous incident; failing to appreciate that there was no credible or plausible evidence; and that Nkosi failed to inform the applicant about his conviction. Above all, Glencore contends that the award is not one that a reasonable commissioner may make.

Evaluation

[11] With effect from 1 December 2014, the CCMA published a Code of Conduct for Commissioners.[2] Clause 3 of the Code contains general obligations of commissioners. It requires commissioners to act with honesty and conduct themselves in a manner that is fair to all CCMA users and the public at large. The question that emerges in this matter is whether the alleged conduct of Commissioner Nduna is consistent with the purport and the spirit of the Code. In my preliminary view, the alleged conduct does not comply. However, if Nduna is still a CCMA commissioner, the Director of the CCMA must probe these allegations further as they have the potential of placing the CCMA, as an important dispute resolution institution, into serious disrepute. I shall in due course consider the question whether the alleged conduct renders the impugned award reviewable or not.

[12] On 17 May 2015, the CCMA published guidelines[3] dealing with misconduct in the arbitration process. In terms of these guidelines, a commissioner acting as an arbitrator has a duty to confirm that the CCMA has the necessary jurisdiction to hear the dispute irrespective of whether the issue of jurisdiction is raised by any of the parties.

The conduct of Commissioner Nduna

[13] Glencore contends that the alleged conduct of Nduna amounts to an abuse of power and/or gross irregularity that vitiates the award issued by Mashego. *Prima facie*, the alleged conduct of Nduna amounts to an abuse of power. It is inappropriate for a commissioner not seized with a matter to impose rulings in a matter. A written ruling is an official record of the CCMA and obliterating such a record must be inconsistent with the Code of Commissioners. Rule 30 (3) of the Rules for the Conduct of

[2] Published under GN 918 in *GG* 38230 of 21 November 2014.
[3] CCMA Guidelines on Misconduct Arbitration GN 224 in *GG* 38573 of 17 March 2015 took effect on 1 April 2015.

Proceedings before the CCMA provides that if a matter is dismissed, the Commission is obligated to send a copy of the ruling to the parties within 14 days. In terms of section 16 (1) (a) and (b) of the National Archives of South Africa (NASA)[4], it is an offence to destroy any public record in the control of the government body. In terms of section 1 of the NASA, public record means a record created or received by a governmental body in pursuance of its activities.

[14] That notwithstanding, I disagree with a contention that the conduct amounts to a gross irregularity capable of vitiating an arbitration award. In terms of section 145 (2) (a) (ii) of the LRA, a defect means a gross irregularity committed in the conduct of the arbitration proceedings. The alleged conduct of Nduna was committed outside the arbitration proceedings. He was not an allocated commissioner. As defined by the Courts, the gross irregularity contemplated in section 145 of the LRA is one that prevents a party from receiving a fair hearing. An irregularity committed outside the arbitration hearing is incapable of hampering a fair hearing.

[15] For reasons set out above, this Court is not empowered in these proceedings to censure the conduct of Nduna. For that reason, the CCMA Director is directed to probe this allegation further. As a ground of review, the alleged conduct of Nduna – the irregularity – is dismissed.

The jurisdictional powers of Mashego

[16] On application of the *functus officio* principle, a functionary is entitled to exercise a power once. There exists a constitutional principle that once a functionary exercises a statutory power, only a Court of law is empowered to set aside that exercise of power. It is for that reason that parties are allowed to approach a Court to review own decisions. When Mashego dismissed the matter, he was exercising a statutory power. Section 138 (5) (a) empowers the commissioner at his/her discretion to

[4] Act 43 of 1996.

"dismiss a matter". In due course, this Court shall consider what the phrase "dismiss the matter" means.

[17] Once a matter is dismissed, unless reinstated, the CCMA lacks jurisdiction over the matter.

Was the matter reinstated?

[18] Nowhere in the transcript or the arbitration award does this Court find a recall of the decision to dismiss the matter. Thus, the simple answer to this question is that the matter was not reinstated. The effect thereof is that Mashego lacked the necessary jurisdiction to arbitrate the dispute unless it is reinstated. This Court has held in several matters that where a review is deemed withdrawn, the Labour Court lacks the necessary jurisdiction to hear that review until reinstatement of that review application[5]. Similarly, where a matter has been dismissed within the contemplation of the enabling section, the CCMA lacks jurisdiction until the matter is reinstated.

Is rescission an answer to the conundrum?

[19] Glencore contends that Mashego was required to rescind the earlier ruling before he can lawfully arbitrate the dispute. On the other hand, Nkosi and NUMSA contends that since Mashego is empowered to *mero motu* rescind his ruling in terms of section 144 of the LRA, by hearing the dispute he has done so and he acquired the necessary jurisdiction. The difficulty with this contention is that nowhere is there any evidence of the exercise of that rescission power by Mashego.

[20] Withal, I take a view that rescission is not an answer nevertheless. I say so because, what Mashego did was to perform a statutory function. Dismissal of a matter is a statutory function in terms of the enabling section. Section 158 (1) (g) of the LRA necessarily empowers the Labour

[5] See: *Savuka Mines v Mazozo and others* [2019] JOL 41783 (LC).

Court to review the performance of any function provided for in the LRA on any grounds that are permissible in law.

[21] Section 144 is specifically reserved for arbitration awards and rulings. At first blush, it can be argued that a dismissal decision is a ruling. In my view, its appropriate label should be an exercise of a statutory function. A ruling is defined as an authoritative pronouncement especially a judicial decision[6]. In my view, a ruling would arise where a pronouncement is made on a dispute presented to an arbitrator. However, where a decision obtains fortification from the provisions of a specific section of the law that is an exercise of a statutory power. As evidence that a statutory power was exercised, one simply has regard to the jurisdictional facts to enable the exercise of that power. Whereas a pronouncement in a form of a ruling may require something more. In order to dismiss the matter – a jurisdictional statutory power – a commissioner requires the presence of the following jurisdictional facts: (a) failure to appear or to be represented at the arbitration proceedings; and (b) the party failing to appear having referred the dispute. Once those facts emerge, a commissioner may at his or her discretion dismiss the matter. This, in my mind, although at first blush has the hallmarks of a ruling, does not amount to a ruling within the context of the LRA. If it is, one observes a clash for turf between the CCMA acting under section 144 and the Labour Court acting under section 158 (1) (g) of the LRA. The proper approach is to have statutory exercise of functions reserved for the Labour Court and the pronouncements, which are ordinarily administrative in nature, to be tackled by the CCMA.

[22] In order to appreciate the point being made in this judgment, it is apposite to have regard to the provisions of section 115 of the LRA with regard to the CCMA. In terms of subsection (1) thereof, the Commission is obligated to attempt to resolve any dispute through conciliation if the dispute is referred to it in terms of the LRA. Further, it is obligated to arbitrate a dispute if the LRA requires it to do so and most importantly if a

[6] Shorter Oxford English Dictionary 6th Edition volume 2 2007.

referring party has requested arbitration. The next section to consider is section 136, which requires a commissioner to arbitrate the dispute. When a commissioner is sent to an arbitration process, he or she goes there to resolve the dispute. The LRA does not appropriately define what a dispute is. A dispute is nothing but a difference of opinion between the parties or some form of disagreement. Clearly, when a commissioner dismisses a matter, he or she is not resolving a difference of opinions or a disagreement.

[23] The next section to consider is section 191 of the LRA. In terms thereof, if there is a dispute (difference of opinions or disagreement) about the fairness of a dismissal, the dismissed employee may refer the disagreement about the fairness of the dismissal to the Commission. As to what happens to that disagreement, as far as arbitration is concerned, section 191 (5) (a) dictates that the Commission is obligated to arbitrate the disagreement at the request of the employee.

[24] In terms of the CCMA rules, a party requests arbitration by completing the prescribed forms. For the requesting party, a dispute shall be resolved if a finding is made on the disagreement about the fairness of the dismissal. It is worth repeating at this stage that when a commissioner dismisses a matter he or she does not resolve the disagreement. Thus, in my view, there can be no award issued nor a ruling issued but only a statutory function being performed. For the purpose of records and posterity, such an exercise of statutory power in terms of the CCMA rules must be recorded in a written ruling. Naming it a ruling is, in my view, a measure of convenience. The enabling section does not mention a ruling but simply states: '*commissioner may dismiss the matter*'.

[25] It is important to observe that the legislature carefully refers to a matter as opposed to a dispute. Given the statutory framework extrapolated above, a disagreement (dispute about the fairness of a dismissal) is first referred to conciliation and thereafter a request is made to have the

dispute arbitrated. However, in law, a matter is a subject of consideration, disagreement, or litigation as a legal case, dispute, or issue often used in titles of legal proceedings. Given this meaning, it follows that a commissioner is empowered to dismiss the dispute. However, that dismissal necessarily occurs without ruling on the *pros* or the *cons* of the disagreement (fairness or otherwise of the dismissal).

[26] Ultimately, the conclusion I reach is that a rescission order is not the answer. Even if it may be argued that it is the answer, there is no evidence in this matter that Mashego rescinded the 'ruling' to dismiss the dispute. Concrete and tangible evidence, as opposed to an assumption, is required that Mashego has *mero motu* rescinded the dismissal of the dispute. In terms of rule 31 (9) of the CCMA rules a determination is anticipated.

What is a dismissal of a matter?

[27] Revelas J sitting in the Labour Court stated the following (as quoted by the LAC):

> "Furthermore, dismissing a matter in the absence of a party is akin to striking a matter from the roll as it would happen in a court. If a court strikes the matter on the roll in error, it may reinstate it. The effect of reinstatement is to rescind the ruling in terms of which the matter was struck off the roll. No rescission application would be necessary, let alone a review application."[7]

[28] This reasoning was not fully endorsed and accepted by the LAC in the matter of *Premier Gauteng and Another v Ramabulana N.O and Others*[8]. Jappie AJA in a separate but concurring judgment, concluded that what applied in that matter was the provisions of the collective agreement, which did not have rescission provisions. He concluded that section 144

[7] *Premier Gauteng and Another v Ramabulana N.O and Others* [2008] 4 BLLR 299 (LAC) at para 14.
[8] [2008] 4 BLLR 299 (LAC).

of the LRA was not applicable on the matter. Zondo JP (as he then was) in a supporting judgment confronted the issue from the perspective of the LRA. The *Premier Gauteng* matter dealt with a dismissal of a referral to conciliation as opposed to an arbitration request. However, the learned Judge President considered the provisions of rule 30 of the CCMA Rules. The Rule is worded in a similar fashion as section 138 (5) (a) of the LRA. Zondo JP stated the following:

> "[19] …The question arises: What does it mean to say that in such a situation, the commissioner may dismiss the matter? In seeking to determine what the CCMA Rules mean in this regard certain observations must be borne in mind. The one is that a commissioner dealing with such a matter has no power to deal with the merits of the dispute in the sense of deciding whether or not a dismissal is fair or not. His authority is limited…"
>
> [22] In the light of all the above it seems to me that to construe "dismiss the matter" in Rule 30 (1) of the CCMA Rules as meaning that the employee loses his right to take the dispute to arbitration…If the phrase is construed to mean that the matter is dismissed for purposes of conciliation – and, therefore, not for purposes of any future arbitration or adjudication, that is not in conflict with the Act and is in line with the powers of the CCMA. If it is construed to mean that it is struck off the roll of the conciliation process that is also not in conflict with the Act. I am of the view that the phrase bears one of the above meanings and cannot conceivably mean that the employee or the union is precluded from having the dispute arbitrated…
>
> [23] The conciliator had no power to "dismiss" the referral in the sense of dismissing it on the merits or in the sense of precluding the employee party from pursuing the dispute to arbitration… Assuming that the bargaining council or the CCMA places dispute referral on the a kind of a "conciliation roll" like a motion court roll or a trial roll in the Labour Court or High Court, such a decision can be taken to mean that the matter is struck off the

> conciliation roll with the result either that it can be placed on the conciliation roll again only with the leave of the bargaining council."

[29] Zondo JP stated all the above because the LRA did not make provisions for the dismissal of the matter, it was only the CCMA Rules that made provision for dismissal. All the meanings suggested by Zondo JP was to attempt a reconciliation between Rule 30 and the LRA as it stood at the time. However, in this matter the LRA does empower a commissioner to dismiss the dispute. As indicated earlier in this judgment by dismissing the matter, a commissioner does not deal with the merits of an unfair dismissal dispute. Therefore, dismissal in this instance must be akin to a striking off and or withdrawal of the dispute. Where a party does not appear and had referred a dispute, it is not incongruent to conclude that such a party has withdrawn the dispute. With that possibility, until arbitration is re-requested as it were, the commissioner lacks jurisdiction over a dismissed dispute.

[30] Lagrange AJ, as he then was, correctly observed in *Ncaphayi v CCMA and others*[9] that withdrawal of a dispute at the CCMA is not an act of any functionary, which the Labour Court can review. Lagrange AJ further concluded that as it was held in the matter of *Kaplan v Dunell Ebden and Co*[10] that withdrawal of a matter by a party is akin to an order of absolution from the instance, which does not preclude a party from reinstituting the proceedings. This view seem to have received approval from the Constitutional Court when it interpreted the provisions of section 67 (2) of the Competition Act[11], in the matter of *Competition Commission v Beefcor (Pty) Ltd and Another.*[12] The Constitutional Court concluded that unless the merits of the complaint are decided, a withdrawn complaint might be reinstated to be considered again.

[9] (2011) 32 ILJ 402 (LC).
[10] 1924 EDL 91.
[11] Act 89 of 1998.
[12] [2021] ZACC 9 (13 May 2021).

[31] In light of the above, the conclusion this Court reaches is that dismissing a matter in the context of section 138 (5) (a) means that the dispute is withdrawn alternatively that the other party is absolved with the consequences that unless and until arbitration is requested again, the CCMA lacks jurisdiction the same way this Court lacks jurisdiction over a deemed withdrawn review. In my view, an aggrieved party has two options available to it. Either the decision to dismiss the matter is reviewed within the contemplation of section 158 (1) (g) of the LRA, given the fact that a functionary effects the dismissal exercising statutory powers or a re-request for arbitration of the dispute is made. There is no room for *res judicata* because the merits of the dispute could not have been resolved.

[32] However, a commissioner may not act in complete disregard or ignorance of the exercise of a statutory power and assume jurisdiction as if the decision to dismiss does not factually exist. An administrative action – which in my view this type of a dismissal of a matter is – factually exits with the necessary consequences until set aside by a competent Court. This is what the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[13] tells us. In the matter of *Score Supermarket Kwa Thema v CCMA and others*[14], Molahlehi J concluded that where a matter is dismissed within the contemplation of rule 30 of the CCMA rules, *res judicata* principle is sustainable. On the strength of the LAC judgment in *BMW v Van Der Walt,*[15] he decided against upholding the plea of *res judicata*.

[33] In my view, in as much as I agree that the dismissal of a matter somewhat disposes of the dispute, I cannot agree that the principle of *res judicata* finds application. The LAC in the matter of *PT Operational Services (Pty) Ltd v Rawu obo Ngwetsane*[16] concluded that the principle of *functus officio*

[13] [2004] 3 All SA 1 (SCA).
[14] (2009) 30 ILJ 215 (LC)
[15] (2000) 21 ILJ 113 (LAC).
[16] [2013] 3 BLLR 225 (LAC)

does not apply to matters that are not finally decided[17]. In that matter, a commissioner dismissed a rescission application because it was defective. The Court concluded that the commissioner having not dealt with the merits of the rescission application he was not *functus officio*. The Court equated the dismissal of the matter with a striking off the roll due to lack of urgency[18] and found that the appropriate order was not to dismiss because the merits were not considered.

Consequences

[34] An award issued without the necessary jurisdictional powers is a *brutum fulmen*. It is a nullity and must be set aside on that basis. Accordingly, the award issued by Mashego ought to be reviewed and set aside.

The Merits

[35] In the event that this Court is wrong in its conclusion that Mashego wrongly assumed jurisdiction and the award is not a nullity, hereunder this Court considers the reviewability of the award.

Is the award one that a reasonable decision maker may arrive at?

[36] Where an employer dismisses an employee for reasons related to misconduct, the dismissal shall be considered to be fair if the employee is guilty as charged and the sanction of dismissal is appropriate. Nkosi was dismissed for desertion or absence from duty without the necessary permission. Where a commissioner misconstrues the true nature of the enquiry, he or she is bound to reach a decision that a reasonable decision maker would not reach. In other words, the outcome shall be

[17] At paragraph 32 of the Competition Commission matter (id fn 12 supra) Jafta J concluded that "*Therefore the words "completed proceedings" are employed in section 67 (2) in the sense of finalised proceedings in respect of which the Tribunal has disposed of issues relating to the merits of the complaint."*

[18] See: *CSARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA).

distorted. The following finding demonstrates that Mashego was barking up a wrong tree:

> "It is common cause that the Applicant was imprisoned from 17 August until 11 December 2018. The Respondent decided to charge and dismiss the Applicant for failure to inform them about his absence on the days stated above and not for absenteeism or excessive absenteeism during the period of his imprisonment that incapacitated the Applicant from honouring his part of the employment contract."

[37] All the documentary evidence point to the fact that what concerned Glencore was the absence without permission. On the charge sheet appears the acronym "AWOP", which means absent without being permitted. The misdemeanor was not so much the failure to inform but the absence without permission. Absence without permission is a form of misconduct. In terms of section 188 of the LRA a dismissal for reasons of misconduct is fair. Therefore, the real inquiry should have been whether Nkosi was absent without permission. Fact that he was absent, when he was supposed to be present was common cause. Fact that he was not given permission to be absent was also common cause. The following conclusion indicates that Mashego dismally failed to address the relevant issue:

> "In short it was impossible for the Applicant to freely without serious hindrances inform the Respondent about his predicament because he was imprisoned and as such cannot be blamed for failing to inform the Respondent about his absence. Therefore, dismissal for failing to inform is unfair."

[38] Ordinarily, an employee has an obligation to fully place his or her services at the disposal of the employer. Once an employee absents himself or herself, he or she is in breach of the obligation. Whether an employee informs an employer about his or her whereabouts that does not detract from the fact that an employee has breached his or her obligations to place his or her services to the disposal of an employer.

Where an employee is absent from duty, the employer suffers operationally and unless permitted to be absent that employee commits misconduct even if he or she can inform the employer that he or she is at home or elsewhere and not at work, where he or she is obligated to be. By concentrating on the informing part and ignoring the common cause facts of absence from work and lack of permission, Mashego failed to appreciate the real dispute and the real reason that led to the dismissal of Nkosi.

[39] In light of the undisputed evidence, by being absent for a period of six days without the necessary permission, Nkosi committed a misconduct. The fact that Nkosi was arrested serves as a justification for his absence but does not detract from the fact that he was absent without permission. If an employer does not accept the justification, it does not follow that the dismissal that ensues is bereft of an acceptable reason in terms of section 188 of the LRA. Nkosi was not dismissed for incapacity but for misconduct.

[40] In light of the above, the conclusion I reach is that the award does not fall within the bounds of reasonableness thus reviewable in law.

[41] In terms of section 145 (4) of the LRA this Court, after reviewing and setting aside an arbitration award, has discretionary powers to determine the dispute in the manner it considers appropriate. This Court is in as good a position as Mashego was. On the common cause evidence, Nkosi is guilty of being absent from his duties without the required permission. As pointed out above, such amounts to a misconduct. With regard to the sanction of dismissal, I have no doubt in my mind that being absent from duty for a period of over 5 days without permission is serious enough to warrant a dismissal. Mr Mosehla, the supervisor of Nkosi testified that Nkosi as a diesel bowser performed critical functions. His absence meant that the machines did not work and operations stopped. The reason why Glencore imposed the sanction of dismissal is that the absence of Nkosi negatively affected its business. The duty of this Court

is not to substitute the sanction imposed by Glencore but to consider whether in all the circumstances it was fair to dismiss Nkosi. Regard being had to the reasons advanced by Glencore and the seriousness of the offence of absence without permission, dismissal, as a sanction was appropriate and fair. Nkosi was already sitting on a final written warning.

[42] Turning to the question of costs, Mr Cithi, appearing for the applicant submitted that although there is an on-going relationship between the trade union and the applicant, the opposition of the application was frivolous and warrants a cost order. On the other hand, Mr Masutha on behalf of the trade union accepted that the award is reviewable, yet there was no formal withdrawal of the opposition. He, however, submitted that given the ongoing relationship a cost order should not be warranted. In terms of section 162 of the LRA, this Court retains a wide discretion when it comes to awarding costs. In the exercise of my discretion, I do not believe that a cost order is warranted in this regard.

[43] In the results, I make the following order

Order

1. The award issued by Commissioner Mashego dated 29 July 2019 under case number MP686-19 is hereby reviewed and set aside.
2. It is replaced with an order that the dismissal of Nkosi is substantively fair.
3. The Director of the CCMA must investigate the alleged conduct of Commissioner Nduna.
4. There is no order as to costs.

_____

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr D Cithi of Mervyn Taback Inc, Houghton

For the Respondents: Mr N Masutha, Numsa official