REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA20/2012

In the matter between:

PALACE ENGINEERING (PTY) LTD **Appellant**

and

THULANI NGCOBO **First Respondent**

COMMISSIONER SHAAM GOVENDOR N.O. **Second respondent**

COMMISSIONER FOR CONCILIATION MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **23 May 2013**

Delivered: **05 February 2014**

Summary: Review of arbitration award emanating from dismissal of probationary employee for poor work performance- Labour Court substituting commissioner's award and finding that the dismissal was procedurally fair but substantively unfair

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Appeal: Reasons for dismissing probationary employees less onerous but the dismissal must still be for a fair reason that passes muster against the entire provisions of item 8(1) of the Code of Good Practice. Appeal dismissed.

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal against the order of the labour Court (Reddy AJ), which found that the first respondent's dismissal was substantively unfair and ordered the appellant ("employer") to pay the first respondent ("employee") compensation in an amount of R300 000,00 plus costs.

[2] The employee referred an unfair dismissal dispute to the third respondent ("the CCMA"), alleging that his dismissal on the grounds of poor work performance was both procedurally and substantively unfair. The dispute was arbitrated by the second respondent ("the commissioner") under the auspices of the third respondent. The commissioner found that the dismissal was both procedurally and substantively unfair and awarded the employee compensation amounting to R600 000.00, which represented six months' salary. The employer then applied to the court *a quo* for the review of the commissioner's award on the grounds that the latter had not conducted a balanced and equitable assessment of all the evidence, had failed to take material evidence into account and also failed to correctly apply the law, resulting in her making a decision that no reasonable decision-maker could reach. The court *a quo* found that the employee's dismissal, although not procedurally unfair, was substantively unfair and replaced the commissioner's award with one ordering the employer to pay the employee

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compensation in the amount of R300 000,00 which represented three months' salary, plus costs.

Summary of salient facts

[3] On 19 June 2008, the employer employed the employee as a Chief Operations Engineer on a three year contract, commencing on 1 July 2008, at a salary of R100 000.00 per month. The employer was in the business of consulting and construction-monitoring of projects involving roads, bridges, housing and water. In terms of the employment contract, the employee would be under probation for a period of six months. The employment contract further stipulated that during the probation period, the employee's performance progress would be monitored on a monthly basis and if there was no substantial progress at the end on the second month, the employer would review the appointment. The employment contract also contained a clause setting a performance target of R100 million per annum for the employee, inclusive of cost of sales.

[4] In terms of the employment contract, the key performance area of the employee was the securing of new infrastructure projects. Subsequent to the conclusion of the employment contract, the chairman of the employer company, viz Mr Dlamini, indicated that before the employee could commence his employment, he (employee) first had to submit a business plan showing how he (the employee) would reach the agreed upon target of R100 million per year. The employee did not submit such a business plan. He was subsequently advised not to report for duty. After intervention of the employee's attorney, the employee reported for duty on the scheduled day for the commencement of employment, i.e. 1 July 2008. The employer held a meeting with the employee and provided him with a document, with the heading "Annexure "C", setting out varying monthly targets that totalled the agreed upon annual target of R100 million. The employer instructed the employee to sign Annexure C, which was to form part of his employment contract. The employee refused to sign this document but sent an e-mail in which he agreed that the amounts reflected on Annexure C could be used

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for performance management to assist in reaching intended targets. In terms of Annexure C, the total fees to be generated by the employee for the first three months of employment was an amount of R1 million per month, followed by an amount of R4m per month for the next two months.

[5] On 15 July, the employee was informed that his first performance evaluation would be held on the first of August 2008. Further performance evaluations were held for the months of August and September 2008. In September 2008, a meeting was held during which the employee's performance for the month of August was evaluated. It was noted that the employee had failed to reach his monthly targets. After three monthly performance evaluations, an enquiry pertaining to poor work performance was held. The chairperson of the enquiry recommended that the employee be granted time until March 2009 to achieve a percentage of his target. The employer did not accept this recommendation and instead gave the employee until the end of December 2008 to meet 22% of his annual target. When this did not materialise, the employee was dismissed.

[6] It is common cause that the employee's employment was subject to probation for a period of six months. The relevant clauses of the employment contract stipulated that during the probation period, the employee would, *inter alia*, be evaluated on his willingness to conform to the company ethos, standards and rules.

<u>The arbitration proceedings</u>

[7] At the arbitration hearing, the employee conceded that a target of R100 million per annum was achievable. He also conceded that by the time of his dismissal, he had personally only generated an amount of R375 000.00 for the employer's company. He testified that the reason he could not bring any new business to the employer was due to the lack of tools of the trade like up to date computer software, business cards, telephone and fax facilities, office furniture, operating budget and a lack of human resources in the form of engineers. He testified that the afore-mentioned resources would have assisted him in reaching his target.

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He further testified that one of the factors that hamstrung him in his performance was the fact that a tender process could take approximately five months to complete. He conceded, under cross-examination, that the fact that he was using an older version of MS Word programme did not, in itself, prevent him from bringing in new business. He testified that his main obstacle was being provided with additional personnel. Under cross-examination, he conceded that the lack of tools of trade accounted for only 10% of his problems.

[8] The employer contended that although there were problems with a fixed telephone line in the employee's own office, the employee had access to other personnel's offices which had a fixed line and all the necessary office equipment. It was also pointed out that if the employee was not content to use the fixed line in the managing director's office, he could have used his personal cellular phone and then claimed the cost of such calls from the employer, as the employment contract made provision for submission of a claim for a refund in respect of any business use of the employee's personal cellular phone. Mr Dlamini testified that the standard industry practice was only to obtain additional engineers and technologists once the award of a tender had been obtained. The employer testified that monthly targets were necessary because the company would not be sustainable if it allowed the employee to achieve his annual target only on the last day of the year. The company needed to generate income that would sustain its operations throughout the year. The employee was placed on a six month probation period so that the company could not be exposed to a risk for the full term of the contract. As at the time of the arbitration, no projects had emanated from the employee's division at all. The employer would not have dismissed the employee if he had failed to reach his targets but generated reasonable levels of income. According to the employer, the employee's monthly of R100 00.00 per month was based on the employee achieving the annual target that he agreed to. The employee had represented that since he was "well-connected", he would be able to achieve that target.

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[9] Under cross-examination, the employee conceded to having drawn up a business plan in which he personally reflected his target for the month of August as R1 million. This was after the employee had become aware of the challenges in respect of tools of trade and human resources. In a subsequent business plan, he again reflected his target for the month of September as R1 million.

[10] In her award, the commissioner found that the lack of tools of trade and lack of human resources collectively impacted on the employee's performance. She also found that the employer had "failed to challenge the applicant's claim with regards to tools of trade" She further stated that "the onus was on the employer to conduct a due diligence before employing such an expensive employee." She also found that the employee's work was dependant on various factors, i.e. available contracts, capacity to apply for contracts and that the employer's business lacked the capacity to attract big contracts. She further found that the employer was unconcerned about obtaining a fair outcome to the performance evaluations that were held.

<u>The findings of the court a quo</u>

[11] In its judgment, the court *a quo* considered the employer's contention that the employee, being a senior employee, did not need the degree of regulation or training that lower skilled employees required to perform their functions. It also considered the employer's submission that an employer's duty to avoid a dismissal of an employee that is not performing to standard is less onerous when the employee in question is still under probation. The court *a quo* found that "whilst the employer may be afforded some leeway insofar as the reason for the dismissal during the probationary period, there remains a duty to effect a substantively fair dismissal."

<u>The appeal</u>

[12] The basis of the appellant's appeal is that the court *a quo* erred in finding that there was no justification for interfering with the commissioner's finding in respect

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of substantive unfairness of the dismissal. According to the appellant, the commissioner's conclusion resulted from her failure to take material evidence into account, particularly regarding the fact that the employee was an experienced senior employee who had agreed to the targets set for him by the appellant but failed to achieve them. Furthermore, that the court *a quo* failed to consider that since the employee was still within the six month probationary period at the time of his dismissal, the grounds for dismissal were less compelling than would ordinarily be the case of a dismissal that occurred after the employee had already completed the probationary period.

Analysis of arguments

[13] It was argued on behalf of the employer that the court *a quo* erred in finding that the commissioner's award warranted no interference. It was further argued that the court *a quo* erred in failing to acknowledge the commissioner's failure to consider Mr Dlamini and Mr Rashid's evidence to the effect that the employee would not have been dismissed if he had only managed to generate reasonable levels of income instead of the agreed target. It was also contended that the court *a quo* had failed to realise that there was no legal basis for finding that the employee's evidence was more probable than the corroborated version of the employer.

[14] Furthermore the employer argued that the court *a quo* erred in finding that "for interference to be justified the commissioner's conduct during the proceedings must be so irregular so as to prevent a fair hearing of the matter". Placing reliance on the case of *Herholdt v Nedbank,*[1] the employer argued that the court *a quo* ought to have found that the applicant would have to establish no more than that the award may (and not would) have been different if the commissioner had properly acquitted himself.

[15] It is trite that a court hearing a review is not called upon to decide whether the commissioner acted correctly, but whether the commissioner committed

[1] (2012) 33 ILJ 1789 (LAC).

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misconduct, gross irregularity or exceeded his powers within the meaning of section 145 of the Labour Relations Act 66 of 1995 ("LRA"). The court in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] found that the question that a court faced with the review of an arbitration award needs to ask is whether the decision made by the arbitrator is one that a reasonable decision-maker could not reach on the available material. As to what constitutes gross irregularity, the court in that case stated the following:

> '[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[16] The *Sidumo* test has been aptly restated as follows in a recent judgment of this court:[3]

> "*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act[4] (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct,[5] gross irregularity in the conduct of the arbitration proceedings,[6] and/or excess of powers [7] will not lead automatically to a setting

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[2] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) at para 268.
[3] *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* unreported case No JA2/12 (4 November 2013) at para 14.
[4] 66 of 1995.
[5] S145(2)(a)(i) of the LRA.
[6] S145(2)(a)(ii) of the LRA.

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> aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material."

[17] The court *a quo'*s view that the employer's intention from the outset was to dismiss the employee and that he was set up for failure from the very beginning of the employment relationship must be viewed in the context of the conspectus of the evidence. The following undisputed evidence is very significant, in my view. The employee agreed to a target of R100 million per annum and believed it to be achievable. This target was set out in Annexure C and was attached to the employment contract signed in June 2008. On his first day at the workplace (1 July 2008) he was required to sign a document with the heading "Annexure C" (second Annexure C), which embodied monthly targets. He refused to sign this document and pointed out that signing it would be tantamount to signing a new contract whereas he had already signed a contract embodying the first Annexure C. He nevertheless agreed that the monthly targets embodied in the second Annexure C could be used by the employer for performance management. Whereas the second Annexure "C" stipulated the target for July 2008 as R1 million, Mr Dlamini admitted that he told the employee that he had to generate a fee of R2.8 million per week for that month. At the arbitration proceedings, the employer's managing director, Mr Rashid, conceded that such a target was unrealistic.

[18] One of the employee's key performance areas was the acquisition of new projects totalling R100 million, especially from municipalities. In the eight months preceding the employee's employment, the employer had not been awarded any contracts and had lost business due to lack of capacity. New business from

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[7] S145(2)(a)(iii) of the LRA.

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municipalities was, in the main, acquired by being awarded a tender. It took an average of five months for a tender to be awarded. From 25 October 2008, the employer no longer had a valid tax certificate. All tenders had to be submitted together with a valid tax certificate. In order for the employer to be considered as a company having capacity to attract big business, it had to have at least three engineers in its employ.

[19] The employee emphasised that human resources was the most important resource he needed. There were no technologists in the employer's employ. While Mr Rashid was a qualified engineer, he was not a registered engineer and his role was apparently confined to that of a managing director in the company. The only other engineer in the company had resigned shortly after the employee's appointment. The employee further pointed that he was hamstrung in his achievement of the targets because he lacked tools of the trade. His frustrations regarding the general administration of the employer's company are evident from the record. Fixed lines were sometimes not operational due to non-payment of the service provider's account. The employee's evidence that it was a hassle for his cell phone claim to be processed is undisputed. Under cross-examination, he conceded that the lack of the tools of trade was minor. It accounted for 10% of his challenges and did not in itself preclude him from acquiring new business. He pointed out that apart from tools of trade, he also needed access to a marketing environment, an operational budget and human resources. The evidence that the amount of R2000.00 that the employee personally paid for tender documents was not refunded to him is also uncontested.

[20] It is apposite to refer to the following exchange between the employee and the employer's counsel (Vol 5 p463 line13 - p 468 line 16):-

> "Mr Cook: No, Mr Ngcobo, what you are trying to do is make up feeble excuses for your dismal failure and these are not valid excuses, you had a working cell phone, your laptop was provided to you, all these excuses are just excuses. You constantly use this word tools of trade as if it has some heavy

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importance, when you break it down it is nothing more than feeble excuses. …You were a senior person being paid R100 000.00 per month, these are not valid reasons for you not achieving your targets.

Mr Ngcobo: I gave you the total package of the reasons, I did not give you one by one, that is why I put them together to say to you for example to go and get a contract you do not need a cell phone per se but you need human resources, cell phone is part of it- they form a minor part for example, you know, but the biggest issues, that is what I'm trying to say, that you were trying to choose- you are trying to separate things that are not separated, these things are just together.

Mr Cook: So you will concede this is a minor part?

Mr Ngcobo: No, it is not- as compared to a Human Resource it is a minor part if you compare them, you know.

Mr Cook: Now, the Human Resource element, you heard the evidence of Mr Rashid quite clearly that in this business you do not hire 50 engineers and hope to get a project, you first get the work then you hire the engineers.

Mr Ngobo: That is not correct. Mr Rashid does not even understand the local conditions from Tanzania, for example. Mr Dlamini is from Swaziland, both of them are not nationals- they do not understand the environment we are working in. Here in South Africa we have very stringent procedures and regulations, we do not- corruption although it is here, we try to- we do not do those things because we do not first sell a project and then when you get the money go and buy one, what you do there you go and say look I have got a company of attorneys here and I want work from the government. They will come and have a look- report there because they just want to give you work, at least you must have a basic minimum, not to have 50, at least you must have three.

Mr Cook: Let us work on your analogy there... A firm of attorneys, a one man practice, they get approached by a multinational corporation, that multinational corporation, that firm of attorneys are not going to have 50 attorneys on brief waiting for this contract, when they get the contract, that

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attorney who has got the network and the contracts will then brief the 50 advocates and will do the work, do you understand that analogy?

Mr Ngcobo: No, you are putting words in my- let me be clear to you. It is not 50, I am talking about 3.

Mr Cook: Well three.

Mr Ngcobo: Let us for example, for argument's sake if you go to the government, Department of public works or Department of Homes, you say I want to do these homes here in Market street, they will ask you how many engineers have you got, if you say we do not have an engineer they will not give you the job because I cannot do it.

Mr Cook: Are you an engineer?

Mr Ngcobo: Yeas, I am.

Mr Cook: Is Mr Rashid an engineer?

Mr Ngcobo: Yes

Mr Cook: So at the time you were there how many engineers were there working with you?

Mr Ngcobo: Mr Rashid was not working as an engineer. He was working as…

Mr Cook: Was he?

Mr Ngcobo: No, no…

Mr Cook: Is he an engineer?

Mr Ngcobo: He was not employed there as an engineer.

Mr Cook: Is he an engineer?

Mr Ngobo: Yes, but working as an engineer, he is not now going to be now the President of South, I am there working as the president of the country. What I

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am trying to say Mr Rashid was not there as an engineer, he was there as a managing director first then he was the head, he was more of a manager, playing a manager's role. The same with me, I was reporting to him. Under me, I am supposed to have an engineer reporting to me.

Mr Cook: Was there no other engineer who resigned?

Mr Ngcobo: There is an engineer who resigned. That is the only engineer who was there.

Mr Cook: No, no. Was there another engineer that resigned?

Mr Ngcobo: Not another one. The only one.

Mr Cook: No, no, your interpretation. Mr Rashid is an engineer. You are en engineer and there was somebody else that was an engineer.

Mr Ngcobo: No, no, Mr Rashid was not, never did- I will tell you why he never did, there are several reasons for that. In our profession we do not use engineers to do small jobs, it becomes too expensive for clients.

Mr Cook: Now when you…

Mr Ngcobo: Mr Rashid was there as a manager, a senior manager.

Mr Cook: When you joined the company did you know how many people were working there?

Mr Ngcobo: Yes, I did ask them so many times. In fact I asked them several times.

Mr Cook: And you knew. Did they lie to you about how many people were…

Mr Ngcobo: They lied, I only found that when I went in.

Mr Cook: What did they say?

Mr Ngcobo: They said they had nine engineers.

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Mr Cook: Yes, and this was put to our witnesses.

Mr Ngobo: They said they had nine engineers and went I went in there was one engineer." (*sic)*

[21] I am of the view that the evidence adduced at the arbitration hearing justified the commissioner's finding that the employer's business was dependant on various factors, including available contracts and capacity to apply for contracts and that the shifting of goal posts, insufficient support staff and lack of tools of trade collectively impacted on the employee's ability to bring in new projects. The employer's contention that the court *a quo* placed excessive weight on evidence relating to the employee's alleged difficulties in obtaining tenders, arising from an alleged lack of human resources and operating and marketing budget is thus unfounded.

[22] With regards to probationary employees, Item 8(1)(e) of the Code of Good Practice: Dismissal ("the Code") stipulates that during the probationary period, the employee's performance should be assessed and an employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. Item 8(1)(h) of the Code enjoins the employer to dismiss an employee or extend the probationary period only after the employer has invited the employee to make representations and has considered any representations made. Item 8(1)(j) of the Code provides that 'any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on the expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.'

[23] The conspectus of the record shows that the performance appraisals that were held by the employer deviated from the norm. While the employee's employment contract stipulated 12 key performance/evaluation areas, his alleged non-performance was based on the assessment of only one key performance area,

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i.e. the achievement of the set target. The employee had complained about the format of the evaluation form, pointing out that it did not make provision for the listing of the aspects that he considered to be hampering his performance and was not measurable. Notwithstanding the recommendations of the chairperson of the hearing that was held in October 2008, the employer did not change the format. The latter's recommendation that a third person should be involved in such evaluations fell on deaf ears. Only Mr Dlamini was invited to observe the process. It is clear from this evidence that the performance evaluations conducted by the employer do not qualify as reasonable evaluations intended to allow an employee an opportunity to render a satisfactory service as contemplated in item 8(1)(e) of the Code of Good Practice. Neither did the employer pay any serious consideration to the representations made by the employee at the enquiry that investigated his alleged poor performance.

[24] Although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets. The acceptance of less compelling reasons for dismissal in respect of a probationary employee as contemplated in item 8(1)(j) of the Code does not, in my view, detract from the trite principle that the dismissal must be for a fair reason. Even though less onerous reasons can be accepted for dismissing a probationary employee, the fairness of such reasons still needs to be tested against the stipulations of item 8(1)(a)-(h) of the Code of Good Practice. At the end of the day, the *onus* rested on the employer to prove that the dismissal was substantively fair. The conspectus of the evidence proved the opposite, that the dismissal was substantively unfair.

[25] I am satisfied that the court *a quo*'s remark that "the perpetual changing of targets and the refusal to provide the employee with an efficient office in all probability were meant to frustrate the employee's future in the company…" was

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not unfounded and has been borne out by the evidence which amply demonstrates an acrimonious relationship. It is evident from the commissioner's award and the court *a quo*'s findings that the employee's failure to achieve targets was attributed to the employer. The court *a quo* correctly accepted that the employee's access to contacts was thwarted by the numerous challenges he faced. Under such circumstances, he could not be expected to reach the monthly targets that he agreed to be evaluated upon.

[26] The employer made much of the fact that the court *a quo* disregarded Mr Dlamini and Mr Rashid's evidence that the employer would not have dismissed the employee if he had generated "reasonable levels of income". This evidence cannot be considered in isolation and must be viewed against the whole conspectus. In my view, this evidence is simply improbable, considering that despite the challenges highlighted by the employee at the poor performance enquiry held in October 2008, the employer disregarded the chairperson's recommendations and continued to expect him to generate 22% of the annual target by 11 December 2008, which was significantly higher than the R13 million total fees for July-December 2008 as indicated in Annexure "C". Furthermore, given the damning, undisputed evidence canvassed in paragraph 17 - 20 above, I cannot agree with the employer's contention that there was no basis for preferring the employee's version.

[27] I do agree that the court *a quo*'s comment (that "there is much to be said against companies that are awarded tenders but do not have the capacity to fulfil the tender mandate due to lack of resources, the result being that work is outsourced to other skilled entities and the initial cost of the project is increased which the tax payer bears") was not supported by any evidence. This unjustified comment was clearly made in passing and does not, in my view, constitute a reviewable irregularity.

[28] Having considered all the afore-mentioned circumstances, I cannot agree with the contention that the arbitration award does not account for all the evidence

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that was adduced or that the court *a quo* erred by placing too much emphasis on certain aspects of evidence. In my view, the commissioner's decision falls within the range of decisions that a reasonable decision-maker could reach. The court *a quo*'s finding that the award pertaining to substantive fairness warranted no interference is correct. Consequently, I am of the view that the appeal ought to be dismissed. There is no reason to depart from the general rule that costs must follow the result. I would therefore make the following order:

Order

[29] The appeal is dismissed with costs.

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Molemela AJA

Acting Judge of the Labour Appeal Court

I concur.

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Waglay JP

Judge President of the Labour Appeal Court

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I concur.

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Francis AJA

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT: Mr A L Cook

I instructed by Fullard Mayer & Morrison Inc

FOR THE FIRST RESPONDENT: Mr P J L Venter

Instructed by L J de Jager Attorneys

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