IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

APPEAL COURT CASE NO: CA 2/07

In the matter between:

NATIONAL UNION OF MINEWORKERS **APPELLANT**
Obo 35 EMPLOYEES

and

ARBITRATOR JOHN GROGAN, N O **1ST RESPONDENT**
DE BEERS GEOLOGY **2ND RESPONDENT**

J U D G M E N T

LEEUW JA:

Introduction:

[1] This appeal, which comes before us with the leave of this Court, is against the judgment granted by Murphy AJ, reported as ***National Union of Mineworkers & Others v Grogan NO & Another*** [2007] 28 ILJ 1808 (LC), in which he dismissed the appellant's application for the review of the arbitration award

granted by the first respondent (the arbitrator) in favour of the second respondent, which was to the effect that the dismissal of the appellant's members (the dismissed employees) was both substantively and procedurally fair. The employees were dismissed by second respondent on the 24th July 2002 after they had been found guilty of misconduct in internal disciplinary hearings on various allegations of misconduct was by conducted.

[2] Subsequent to the dismissal, the dismissed employees referred a dispute of unfair dismissal to the Commission for Conciliation Mediation and Arbitration ("CCMA"), for conciliation. Subsequently, the parties agreed that the dispute be determined by private arbitration in terms of the Arbitration Act No 42 of 1965, (the Arbitration Act). The parties further agreed amongst others, that Mr. John Grogan be the arbitrator in respect of that dispute. The terms of the agreement were the following:

> "2.4 The arbitrator shall have the powers contained in section 14 of the Arbitration Act, 42 of 1965 ("*the Arbitration Act*").
>
> 2.5 The Respondent shall record the proceedings by means of cassette tape recording or such other form of electronic recording as may be necessary.
>
> 2.6 The arbitrator shall finalise and deliver to the parties an award in writing within 14 (fourteen) days from the date of completion of the arbitration proceedings or the delivery of the parties heads of argument, whichever is

the latest. The award shall be deemed to have been published on the date of receipt by the parties.

2.7 The award shall be final and binding on the parties, but shall be subject to review on the same grounds to which parties are entitled to review CCMA arbitration awards in terms of the Labour Relations Act No 66 of 1995 ("the Act") and the Constitution of the Republic of South Africa No 108 of 1996."

[3] The arbitration hearing was held and the award was issued on the 4th August 2003. The arbitrator held that the dismissed employees' dismissals were both substantively and procedurally fair. The appellant (the union) applied to the Labour Court for the review of the arbitration award. As already stated, the application was dismissed by the Labour Court, hence the appeal to this Court. Before I can consider the appeal, it is necessary to set out the background to the dismissal dispute.

Background

[4] The second respondent conducts a diamond mining business worldwide and is a division of De Beers Consolidated Mines, Ltd Companies ("De Beers") and has in its establishment a Department of Laboratory Services. This department consists of two divisions namely, the heavy mineral sorting laboratories (one in Centurion and the other one in Kimberley) and a sample treatment reduction plant unit in Kimberley.

[5] The second respondent provides free geological exploration support services to De Beers globally with clients in Canada, Australia, Africa (Angola), Guinea, Gibbon and Zimbabwe. It conducts joint venture partnerships with them in that they provide samples of indicator minerals to the second respondent's facilities in Centurion and Kimberley for sorting and evaluation. The process of sorting for the presence of indicator minerals assists in establishing the location of diamonds in certain diamond mining areas. The second respondent provides the same kind of evaluation service to private companies at a fee.

[6] The employees were all employed by the second respondent as sorters at its business in Kimberley with the exception of **Viviene Paulse** (Ms Paulse) who was occupying a position of supervisor. Some of the employees' duties were to sort and treat mineral samples collected from the De Beers Companies' partners globally. The present matter concerns mineral samples dispatched from Canada which were first processed at the second respondent's reduction plant in Sudbury, Toronto from where they were then dispatched to both the Centurion and Kimberley laboratories of the second respondent for processing.

[7] The samples collected in Canada which have a standard grain size or concentrate of 0.3 mm, are processed as follows at the Canada reduction plant:

(i) they are separated into smaller portions called aliquots, which vary in weight between 1 gram and approximately 30 grams;

(ii) these concentrates are put into small packets of transparent plastic similar to those used by banks for holding coins;

(iii) each aliquot is tagged with the weight indicated on each packet and is heat sealed;

(iv) the samples are then placed in bins and transported to Kimberley.

[8] On receipt of the aliquots at the Kimberley and the Centurion laboratories:

8.1 the samples are captured by the data processors into the sample processing system, which is a computer system designed for handling samples;

8.2 each aliquot is marked with a barcoded label, recorded into the computer and the samples put in cardboard boxes;

8.3 the concentrate supervisor rechecks the samples by opening the box and checking that the aliquots are correctly screened according to the size fraction required as well as to check whether there is any deterioration in the samples which could have occurred during the shipment of the consignment; he or she checks whether the packets are correctly sealed and the labels properly barcoded and attached to the packets. The supervisor will then sign off before the aliquots are dispatched to the laboratory for sorting;

8.4 the laboratory supervisors collect the boxes from the holding room in the laboratory and distribute the aliquots to the sorters under their control;

8.5 the sorters cut open the plastic packets and pour the contents thereof into a beaker using a funnel.

8.6 portions of the contents of the beaker are then poured into a petrie dish for examination. The examination of the samples is done under a microscope through which they identify five types of minerals from which they extract **"Kimberlitic"** indicator minerals or simply indicator minerals. Kimberlitic indicator minerals are minerals found in a rock brought to the surface through a volcanic eruption and from which diamonds form a constituent

part. It is a rock that contains diamonds and which was brought to the surface through a volcanic eruption;

8.7 the indicator minerals are removed or extracted from the samples with tweezers and placed onto a slide. These are later checked and classified after analysis;

8.8 the sorted aliquots are also checked and rechecked to ensure that indicator minerals have not been missed during analysis;

8.9 the samples usually contain magnetic and non-magnetic grains. The former naturally cling together and may include indicator minerals. The sorting process may be conducted without the magnetic and non-magnetic portions being separated or only after separating the two portions. Once the sorting has been completed and the indicator minerals extracted, the sorter returns the remaining sample to its original packet, reseals it with staples and marks the packet with his or her identity number;

8.10 sorted packets are checked at random to determine whether indicator minerals have been missed during sorting; and

8.11 the samples are then stored after the process has been completed. It would be expected when the whole process is completed, that the samples would have the same weight as that reflected on dispatch from Canada, less the weight of the removed indicator minerals and weight change brought about by the cutting and re-sealing of the packets.

[9] There is another procedure called acidisation and bromoforming to which, under certain circumstances, the indicator minerals would be subjected prior to the sorting procedure:

9.1 Acidisation is a process of cleaning the grains and removing the minerals that are not wanted in the sample. This procedure does not destroy the sample and it would have a very low weight reduction effect to the aliquot to the extent that it would not be necessary to weigh the sample before and after acidisation;

9.2 Bromoforming is a process used for removing the lighter minerals that have not been removed prior to any processing in order to make the sample smaller. The process makes sorting quicker and easier by selecting only those grains that are actually needed. The mass in bromoformed samples will only be reduced if the composition of the light minerals is high. The

bromoformed samples are weighed prior to sorting at the laboratory, which weight would be recorded and used as the final dispatch weight used for calculation.

[10] The allegations of misconduct proffered against the appellants, related to samples dispatched from Canada to the Kimberley laboratory during 2001. The charges of misconduct read as follows:

> "(i) Failure to ensure that the standard operating procedures/instructions regarding the sorting and recovery of heavy minerals were properly followed by inter alia:
>
> ° not adhering to the correct sorting procedures when handling samples with magnetic background materials which potentially contained indicator minerals but to, magnetic illmenities;
>
> ° willful deliberate discarding of part or all of the magnetic fraction of certain consignments;
>
> ° Failing to record or report any losses of concentrate and/or spoiled samples or aliquots whether deliberate or accidental during 2001;
>
> ° Falsely enhancing your efficiency rate (i.e. number of grains missed) and sorting rate (i.e. grams per hour) by discarding sample which may have contained indicators rendering potential losses of indicators undetectable during subsequent checking or rechecking phases.
>
> (ii) Failure to implement/adhere to standard operating procedures/instructions as alluded to above, knowing (or when you should have known) that this would severely compromise the integrity of the information arising from the heavy mineral sorting and recovery processes and the data capture thereof; on which the Company and its partners place great reliance to make important and costly decisions regarding future prospecting and exploration activities.

(iii) Intentional failure to implement/adhere to the standard procedures/instructions knowing (or when you should have known) that this would unfairly advantage you in respect of performance and increases and bonuses."

[11] The second respondent's case was based on the evidence of Mr Rowan Carr, Dr Jack Robey, Miss Victoria Ziegler, Miss Pamela Ellemers and Mr Stewart Brown:

11.1 **Mr Rowan Car r** (Mr Carr) who is in the employ of the second respondent as the Head of the Laboratory Services Department, conducted a preliminary investigation into the irregularities after having received information from Ms Barbara Van der Westhuizen that a considerable amount of grain was being discarded by the sorters at the Kimberley laboratory. Ms Barbara Van Der Westhuizen had previously been employed at the Centurion laboratory. In his preliminary investigation, Mr Carr noted that certain consignments from Canada, which weighed 0.3 grams had recorded very high sorting rates of 21 grams an hour for the entire consignment whereas one would normally have expected a recording of between 5 – 11 grams per hour.

11.2 He subsequently reviewed seven boxes relating to the suspect consignment from the storage department, rechecked and retested them by applying the prescribed

scientific method and repeated the same procedure about twelve times. He realized that there were significant losses of about 80% of the original sample which could not be accounted for. The actual content of the concentrate sample in a packet, though recorded to be high in grams on the packet, was in actual fact lower in grams inside the packet. The irregularities were discovered in samples sorted by employees whose identity codes appeared repeatedly in respect of most irregular consignments. The losses of grains in the packages were discovered in some cases after repeated checking of the packages.

11.3 Mr Carr consequently commissioned **Dr Jack Robe y** (Dr Robey), the company's internal auditor, to investigate the irregularities further. Mr Carr further testified that he requested Dr Robey to speed up his investigation because the irregularities were at an alarming scale and the result of the audit would have an effect on the employees' annual bonuses.

[12] **Dr Jack Ro bey** (Dr Robey), who is a Research Geologist involved in research activities, auditing jobs and training of staff of the second respondent and who also specialised in Kimberlitic and mountain rocks from which the Kimberlitic grains are derived, testified that:

12.1 he received a memorandum from Mr Carr requesting him to firstly investigate the irregularities he had discovered regarding the weight loss of the samples, secondly, to identify the cause thereof or how the loss of the weight of the samples in the packets occurred and, thirdly, and if possible, to identify the persons involved in the irregular practice of discarding sample;

12.2 he, Dr Robey together with Mr Wawik Nordin, who is a geologist specialist in computer activities and other geologists at the Kimberley laboratory, were given a list of consignments which they were requested to audit. 30% of the 0,3 fraction of the samples were from Canada. These samples were received in the year 2000 at the Kimberley and Centurion laboratories and were contained in boxes, with the identification marks thereon. The Canadian samples were in small size packets inside the boxes which also had identification marks or numbers;

12.3 these aliquots were indicated in the size fraction of the grains involved and they ranged between 0,3 to 0,5 millimetres (the 0,3 samples);

12.4 Mr Wawik Nordin and his team were also in possession of the data that was available at the Kimberley laboratories in relation to those samples. Some of the samples had

stickers indicating that they were checked and rechecked and others did not;

12.5 in his investigation he applied tests of a technical nature in accordance with the skills acquired and his scientific knowledge; he tested the calibration of the scales used during the audit so as to establish whether they were in sync with those used by the different ventures, including Canada, in testing the samples; he came to the conclusion that his scales were operating correctly, and that the weight losses in the samples could not be attributed to an aberrant scale;

12.6 Mr Wawik Nordin and his team then tested the samples in order to establish whether there was a possibility of magnetic fractions remaining in the samples. **Magnetic** fraction means that the grains or samples that have been submitted to the laboratory for sorting would in certain cases be found to be significantly magnetic in that there would be a complete spread of magnetic minerals contained in them. The presence of magnetic fraction in a sample would be detected by using a magnetic plunger which they dragged through the sample whilst taking out the magnetic grains and transferring them into a beaker. The magnetic fraction weight and the percentage of the material left in the packet as well as the weight of the non-magnetic fraction, which total calculation would add up to

100%, were recorded in a separate sheet. The investigation revealed that there was a considerable amount of grain lost in the samples from the Kimberley laboratory which loss could have been occasioned by either spillage or deliberate discard of the concentrate caused by selective magnetic removal, in other words, the magnetic grains were not returned to the packets after the final analysis or sorting of the aliquots. The investigating team tested a higher number of samples from the Kimberley laboratory than those from Centurion;

12.7 Mr Wawik Nordin tested approximately 3000 samples and of those samples whose weights were reduced, on the packet of one sample it was written that it had a spilt; there were also about less than five smaller packets containing magnetic fraction in the larger packets of the aliquot;

12.8 further, the amount of grain which was generally left in the box when they took out the material out of the box (the handling loss) was relatively insignificant; it was a total of 0,005 grams when compared to the original sample weight. In the samples which were above the median of 2% the general loss of weight ranged between 30% to 80% which was abnormally high; he, however, stated that, as a geologist, a loss of above 1% would call for concern;

12.9 with regard to the identity of the sorters who were responsible for the irregular weight loss in the aliquots, the samples had the identification code (and not names) of each sorter. They only outlined samples and aliquots that had a loss greater than 2%. In order to apportion blame, they concentrated on all the samples that were first sorted and prepared a data sheet of the sorters involved from every laboratory and passed them on to the laboratory manager to deal with the matter further.

[13] **Ms Victoria Ziegl er** (Ms Ziegler) who was employed at the second respondent's Sample Treatment Centre, (STC) as a section head during the period 2000 and August 2001, testified that:

13.1 during the period 2000 and 2001 she never received reports about spillage of concentrate of the Canadian samples. She said that she used to receive a report from Martha Duschovny who was the head of the sorting section at the Kimberley laboratory. She further stated that samples treated from Canada were of a high standard because their samples were properly cleaned;

13.1 she also explained that prior to the sorting procedure, the aliquots would be sent back to the laboratory for acidisation and bromoforming. Canadian samples were

never bromoformed or acidised because the Canadian environment is a glacial one and that explained the clean nature of their grains. She further stated that she would have known about bromoformed or acidised samples from Canada had she been informed about them.

[14] **Ms Pamela Ellem ers** (Ellemers), who is a geologist with a Bachelor of Science degree in Geology and Bachelor of Arts in Geography from Canada, testified that;

14.1 she worked for De Beers in Canada and she was part of the team that collected samples in certain locations in Canada and took them to De Beers laboratory in Canada for processing; she was involved in collecting samples from the field and geological mapping for more than 8 years and was thereafter appointed as a laboratory supervisor for the De Beers Mineralogical Unit in Canada during 1998; she was not directly involved with the sample treatment laboratory, but did examine samples using the same process as that applied at the Kimberley laboratory;

14.2 she came to South Africa in October 2001 and was appointed as a manager at the laboratories in Centurion and later Kimberley; she stated that she raised concerns about the very high rate at which samples were examined or sorted at the Kimberley laboratory;

14.3 according to her, in Canada, the 0,3 gram sample would generally be examined at a maximum of 7 or 8 grams per hour whereas at the Kimberley laboratory, the rate was at an average rate of 25 grams per hour which is 0,3 – 20 grams per hour for the 0,3 gram which rate was too quick and impossible;

14.4 the problem with a quick sorting rate is that the concentrate contains millions of grains and it is difficult to find the indicator grain because “looking for a needle in a haystack” requires careful and thorough sorting as the indicator grains are very elusive;

14.5 they introduced the “I50 170/25 2000 standard,” which is a quality management system, specifically designed for testing laboratories; through this process, documenting and using data could be shown to clients and regulatory bodies that they had a competent facility which would enable them to have the test results re-examined; this process also indicated consistency in the way they tabulated their data and the procedure applied in processing samples;

14.6 intensive workshops were held in Kimberley and Centurion during 1993 and all the sorters participated in the workshops; they were thoroughly trained on how to

analyse and treat the samples, (sorting in general) and how to avoid spillage of grain in the sample; when a packet arrived at their laboratory from the STC and it had a much less weight than the weight reflected on the label, the sorters were required to report or notify the supervisor thereof;

14.7 in addition to the procedures that were discussed by the sorters at the workshop, there was in 2001 a procedural manual which was in the possession of the supervisors and a copy thereof was kept in the sorting room next to the scanning computer; this procedure manual contained the same procedures that were applied from 1993;

14.8 in December 2001 they received a consignment of samples from Canada which were magnetic; she went to every room of the sorters and alerted them thereof and even requested them to be more cautious during the sorting process; the impression created when she supervised the sorted samples was that not all sorters adequately followed the procedure prescribed for sorting; she decided to remove the magnetic plunger and ordered the sorters to redo the consignments; she explained that one of the possible reasons for discarding the magnetic grains was that during the separation of the magnetic from the non-magnetic grains, “paramagnetic illmenites” were put in the magnetic portion; some examiners would

usually not recover the non-magnetic grains; she asserted that sorters were instructed not to throw away samples or portions thereof;

14.9 that the supervisor, Mr Paulse was not actively involved in the sorting of samples. She, however, ought to have identified the problem in relation to the discarding of sample by the sorters and should have taken appropriate action to curb the loss. She further stated that Ms Paulse worked in the same room with the sorters, and was supposed to have supervised the actual examination of the concentrates and that with her experience, she could have realised that when a 30 gram sample only weighed 10 grams, it signified that there was a problem with the sorting and should have reported it.

[15] **Mr Stewart Brown** (Mr Brown), who was the general manager at the second respondent, testified that he was given a full report by Mr Carr about the irregularities in the laboratory. He was part of the team that decided to instruct Dr Robey to conduct an audit. As a result of the findings of the audit committee, he decided to hold a disciplinary inquiry against the appellants. Mr Brown further testified that:

15.1 an independent chairperson, Mr Barclay, who had no connection whatsoever with the second respondent, save for the fact that he worked at the IR Department at the

Premier Mine, which is a subsidiary of De Beers, was appointed to preside over the disciplinary hearings of the employees;

15.2 Mr Barclay was not subjected to any kind of interference or intimidation by him as a senior, (as was suggested by Counsel for the appellant during cross-examination) and had no authority whatsoever over Mr Barclay as their entities operated independent of each other; he testified that the disciplinary hearing was procedurally fair;

15.3 the irregularities discovered in the sorted of samples had far reaching negative financial consequences on the second respondent's image and business as well as their entire clientele and partners globally. The second respondent's reputation as a specialist in its business was in jeopardy.

The appellant's version

[16] The appellant's case was based on the evidence of the following witnesses:

16.1 **Ms Washiela Kariem** (Ms Kariem), who testified on her behalf and all the other employees in this matter, stated that: (a) she received training for a month on "spiking" samples (which means sorting out samples); (b) she saw

the document on procedures for grain picking for the first time at the disciplinary hearing; (c) Ms Ellemers did conduct workshops but could not shed more light about them because she had not attended any of the workshops;

16.2 Ms Kariem could not say how the samples, which were contained in boxes, were transported from other countries outside South Africa to the Kimberley laboratory;

16.3 with regard to sorting the samples, Ms Kariem stated that a probe was used for sorting and tweezers used for picking the grains. In addition to all other utensils used for sorting the grains, they used a magnetic plunger for separating the magnetic portion from the non-magnetic ones;

16.4 the use of the plunger was discontinued in December 2001 when Zenobia Fredericks, who was a mineral classifier, approached her and Ross Bartis with a green slide. The green slide was used by the supervisor for detecting those grains which the sorter failed to pick up during sorting. The mineral classifier, who is in a supervisory position, would then classify those grains into Kimberlitic or non-Kimberlitic grains and if Kimberlitic grains were discovered in the sample, they counted against the sorter for the end of the year merit appraisal,

that is if the sorter admitted that he or she had made a mistake;

16.5 she further stated that she and Ross Bartis, when they were confronted with the missed grains detected through the green slide, approached Pam Ellemers and expressed their dissatisfaction with the fact that the grains were classified as Kimberlitic when in actual fact they were magnetic. She was not happy with the classification because they were taught that magnetic “illmenites” or grains were always non-Kimberlitic;

16.6 Ms Ellemers told the staff to discontinue using the magnetic plungers, and explained that samples containing magnetic “illmenites” or grains were from a certain area in Canada, which grains were highly magnetic. The sorters were made to redo about 20 consignments which process took them almost three months to complete. They were this time only using a probe which was a non-magnetic instrument, for sorting and removing the magnetic illmenites from the samples. All those samples were from Canada;

16.7 they experienced problems with the Canada samples in that the condition of the plastic containing the samples was of inferior quality; it caused the samples to leak and the packets were not properly sealed. The sorting staff

had reported this to supervisors and the managers but nothing was done about their complaints;

16.8 the weight of the sample was usually reduced into half its original weight when it was re-weighed, especially when the grains were coated and dirty, as was always the position with samples from Canada. The rewashing and the acidisation were done at the Sample Treatment Centre laboratory;

16.9 spillage of the grains was also caused by the fact that the sample was overfilled in the packet from Canada and when they opened it, the grains would be spilled especially in view of the fact that the plastic had some holes; those grains that were split on a clean surface (like on the table) would be recovered and put back in plastic; she also stated that spillage could also occur accidentally and, when it did happen a sticker would be put on the sample and a report made to the supervisor;

16.10 Martha Duschovny and one Frieda, who were supervisors, came to their laboratory in 1999 and conducted an investigation for three months. They inspected the sorters' personal bins looking for discarded magnetic grains but did not find anything;

16.11 Barbara van der Westhuizen came to the Kimberley laboratory in April 2001 and was there until October 2001, when she was transferred to the Kimberley Laboratory; prior to the audit, she had “swapped” grains which were discovered through the green slide to be Kimberlitic; she (Ms Kariem) complained to Mr Carr about what Barbara van der Westhuizen did and she cautioned that, if Barbara van der Westhuizen were to be allowed to do that, then everyone else ought to be allowed to do likewise. Since that incident, Barbara van der Westhuizen accused her and other sorters, including Ms Kariem, of being biased against her and she accused them of having a negative attitude towards her. Barbara van der Westhuizen did not confront her directly about this but she asserted that she, Barbara Van der Westhuizen, could not be trusted because of her “dishonest” conduct of “swapping” grains on a green slide;

16.12 that she had not discarded any grains and that it would not be possible for other sorters working with her in the same room to notice any grains being discarded because of the sitting arrangement at the laboratory;

16.13 the audit results were not correct and said that they could not be relied upon because the employees (sorters) did not participate in the tests conducted for audit purpose;

she also stated that the weight reflected on the samples from Canada was incorrect and unreliable;

16.14 that the supervisors put the samples on the table when they were brought to the sorting laboratory and the grains or concentrate usually spilled on the table and those grains would not be identified to a particular or specific sample; the surface would then be wiped clean and those grains would be discarded; she never told Mr Carr about the leakages because it was the responsibility of the management to report these incidents.

[17] **Shareen Kader** (Ms Kader) testified that:

17.1 she started working for the second respondent in February 1989 as a trainee sorter and was permanently employed as a sorter three months thereafter. At the time of her dismissal, she occupied a position of sorting supervisor at the Kimberley laboratory;

17.2 she was taken to Canada in 1997 with six (6) other ladies and they were working in the sample processing section. She realized that the plastic used by Canada for packaging was of lower quality and that, after heat sealing, there would be holes in the packets which caused the grains to leak;

17.3 when the samples were brought to the Kimberley laboratory, they had to transfer the sample into their plastic packets which were durable and were available at the Kimberley laboratory; it was usually during the sorting that some grains would be spilled because of the poor packaging;

17.4 that it did happen that grains would be spilled to the floor and that those would not be retrieved because they would be contaminated, but this had to be reported to the supervisor;

17.5 she did attend the workshops which were organized by the second respondent; the sealing of packets and the problems of leaking packets were discussed but there were no discussions on the magnetic illmenites; they did not receive any report back from the management about the concerns raised;

17.6 with regard to the audit conducted by Dr Robey, she was also subjected to the interrogation during the investigations conducted at the instance of the second respondent. She was made to sign a document or questionnaire that she had completed. She intimated that the interrogation procedure was unfair as they were not properly informed about its purpose.

[18] **Heidi Holthousen** (Ms Holthousen) testified that:

18.1 she started working at the second respondent in 1997 as a sorter. She underwent training for a year or more on how to sort samples and on how to identify the different kinds of minerals contained in the samples. She was trained with 20 other sorters by Mercia Delport;

18.2 her training entailed identification of different kinds of grains, Illmenites, spines, garnets and chromes. She received training on how to open the packet containing the sample, how to take it out from the packet, how to do the sorting and thereafter take it back into the packet and capture the information in the computer. They were given tests in order to assist them in grasping more knowledge on how to identify the minerals;

18.3 they were not trained on magnetic grains save for stating that the magnetic grains can never be Kimberlitic. She used a magnetic plunger to separate the magnetic grains from the non-magnetic ones, and thereafter put them back into the packet;

18.4 the magnetic grains were usually minimal (less than 10 grams) and she used to throw them away. She first placed them on the petree dish for sorting and whenever there were magnetic grains in the concentrate, she would

throw them away; but, if she found a substantial amount of magnetic grains in a sample, she would put all the concentrate back into the packet for the checkers to sort as they were more experienced than the sorters;

18.5 the supervisor was not aware of the fact that she was throwing magnetic grains away; she threw magnetic grains away as she was sure about the fact that the magnetic grains were less than 10 grams, and that kimberlitic grains would not be found therein; she intimated that she was taught that kimberlitic grains were worthless and she was never told that she could not throw them away.("….ek is geleer Kimberlitic is absoluut niks werd nie en niemand het ooit vir my gese ek mag dit nie weggooi");

18.6 the Canada packaging was not of good quality which resulted in the concentrate or grains being spilled;

18.7 even during the time when they were working with Ms Ziegler, they did receive torn packets from Canada and had to replace them with their packets in Kimberley and they kept tubes in their rooms, in order to reseal the packets;

18.8 the concentrate itself was very soiled and was given to the supervisor to have it cleaned. The cleaning process

had the effect of reducing the weight of the sample. The soiled sample could only be detected through a microscope and not through the naked eye;

18.9 with regard to the interviews or interrogations conducted by Mr Lemmer during the second respondent's investigations on the discarded concentrate, she expressed her dissatisfaction with the manner in which they were conducted. According to her, they were harassed and intimidated by the second respondent. They were not informed of the purpose of the interrogation and were coerced to disclose names of people who allegedly deliberately discarded grains from the samples. She only came to know about the purpose of the interrogations when she was served with a notice to appear at a disciplinary hearing for misconduct;

18.10 the interrogations took place on three different occasions. When she signed the questionnaire which she had completed, she was not aware of the fact that it was a sworn declaration;

18.11 some of the responses to the questionnaire did not correctly reflect what she had said, but she admitted that in one of her responses she had stated that the magnetic grains were important and that it was a normal practice at work to throw away or discard the magnetic grains

because the other sorters also discarded sample, and secondly that discarding magnetic samples made checking easier. She later changed her version and said that the magnetic plunger was used by all the sorters and that she mistakenly believed that they were throwing the magnetic grains away and that is why she had also discarded the magnetic grains. She went further to say that what they were actually discarding were staples and mica removed from the packets;

18.12 Rashida Suleiman, a sorter who was not charged with misconduct, had, on one occasion, discarded the magnetic grains into a bin; she said that she had seen her do it because she was working next to her at the table; she had also made enquiries from Ursula Weyers about discarding grains and the latter had confirmed that she (i.e. Holthouzen) could do it because the magnetic grains were worthless; she explained that she had stated in the questionnaire that she was not aware of any irregularities because she did not know that it was wrong to throw away magnetic grains; she said that she only discovered at a later stage that the use of the magnetic plunger was discontinued during December 2001 when she was on leave;

18.13 Ms Mercier Delport never trained her to separate the magnetic grains from non-magnetic ones; she said that

she learnt it from her co-workers and just did like wise; she stated that she used a magnetic tweezer to sort out the grains, which tweezer she used with one Emma.

[19] **Vivienne Paulse** (Ms Paulse) testified that:

19.1 she started working at second respondent in May 1975 as a sorter; she received two months training at the laboratory; at the time of her dismissal, she was a sorting supervisor; she was appointed to this position in 1991. She trained sorters and was not confined to one room when supervising the sorters;

19.2 with regard to the plastic containing the Canada concentrate, it was very soft and not durable and thus caused leakage of the samples; the packets were also too small, and this caused the sorters to turn the plastic twice around at the top and this also resulted in the loss of sample. The packets were sometimes not properly heat-sealed;

19.3 60% of grains leaked into the boxes containing the samples which she received from the dispatch room. The sorters would also bring the leaking packets to her attention. According to her, the spillages were minuscule.

Arbitration

[20] The arbitrator dealt fully with the evidence presented by the parties and the issues raised by them in argument and came to the conclusion that the dismissal of the employees' was appropriate and reasonable in the circumstances of this case and consequently held that the employees dismissals were both substantively and procedurally fair. I will deal fully with his analysis of the evidence and the reasons for his findings at a later stage in this judgment.

Labour Court

[21] The appellant took the decision of the arbitrator on review in the Labour Court which was said to be in terms of **"section 145 of the Labour Relations Act, No. 66 of 1995, read with section 23 (1) and 33 (1) of the Constitution of the Re public of South Africa, 1996".**

[22] The grounds of review, as stated in the founding affidavit of Phillip Tlali, a shop steward of the appellant (the union), were as follows:

22.1 the arbitrator granted an arbitration award which "was not constitutionally justifiable/reasonable in relation to the evidential material before him";

22.2 the arbitrator committed gross irregularities during the proceedings in that:

22.2.1 he erred in accepting the results of the audit as being accurate and reliable as well as treating Dr Robey's evidence as that of an expert witness, despite the fact that it was hearsay in view of the fact that he was not physically present, in certain instances when the audit was conducted;

22.2.2 he erred in accepting the Canadian weight of the Canada samples which were indicated on the packages as accurate, even though Shereen Kader had testified that the Canadian sample process was unreliable;

22.2.3 he made a finding that the employees deliberately discarded sample and failed to take into account or give due weight to the fact that a significant amount of spillage or leakage of the sample occurred during the transportation of the sample from Canada as well as during the sorting process at the Kimberley laboratory;

22.2.4 he erroneously found that the sorters failed to report the spillage or leakage of the sample which occurred during the transportation from Canada to Kimberley laboratory to their supervisors and erroneously held that Viviene Paulse failed to properly perform her duties as supervisor;

22.2.5 he accepted the evidence of the second respondent's witnesses as being reliable even though they had contradicted themselves;

22.2.6 he erred in finding that there was a standard rule which allowed employees who had lost less than 2 grams of sample not to be disciplined and overlooked the fact that the second respondent arbitrarily decided to apply this rule only after the audit was completed;

22.2.7 he made a finding that the relationship between the employees and the second respondent had irretrievably broken down whereas such breach of trust in relationship could not be found in respect of those employees who were still employed and had lost less than 2 grams of sample during sorting;

Judgment of the Labour Court and its reasons

[23] The Labour Court dismissed the application for review and gave the following reasons in its analysis of the issues:

23.1 that there is a distinction between the standard to be applied on review in relation to private arbitration awards as against the test applied in reviews based on Section 145 of Labour Relations Act No 66 of 1995 (LRA) which the Court stated, was **"Whether t here is r ational objective basis justif ying the connection made by the decision maker bet ween the mater ial p roperly available to h im and the conclusion he or she eventually arr ived at,** ***Carephone (Pty) v Marcus NO*** (1998) 19 ILJ 1625 (LAC)"; The Court further stated that the grounds of review referred to in paragraphs 22.2.2 and 22.2.3 above were grounds of appeal and not of review;

23.2 with regard to the Court's powers of review as prescribed in the LRA and the Arbitration Act, the Court stated: "**The rationality review requir ement in r elation to CCMA arbitration awards arises b y virtue of such ar bitration being compulsory. The arbitration award in this case, though, is not one to whic h the par ties have be en compelled. They ag reed to the process. The difficulty though is that the ar bitration agr eement**

sought to bes tow on the La bour C ourt a ratio nality review standard. The powers of the Labour Court ar e established an d circumscribed by statute and no party in litigation can confer additional powers on the court or add, v ary or am end the power given to the court b y legislation…..I am of the view that I am limited to r eviewing th e arbitrator's a ward in accordance with the provis ions of section 33 of the Arbitration Act. Therefor e the question to be asked and answered is wh ether in r eaching his conclusion that the dismissals were subs tantively fair, the arbitrator commi tted mi sconduct or was guilty of gross-irregularity in the conduct of the arbitration";

23.3 the Court went further to analyse the evidence presented at the arbitration proceedings and the findings made by the arbitrator and concluded that the **"rationality review standard"** was not applicable in this review;

23.4 with regard to the audit conducted by Dr Robey regarding the loss of samples, the Court held that Dr Robey's audit findings were not seriously challenged during the arbitration proceedings because the appellant's defence mainly sought to explain how the spillage occurred whilst denying responsibility, but did not dispute the fact that there was in fact loss of sample or concentrate;

23.5 regarding the leakage of the packets from Canada, in which the arbitrator made a finding that the evidence of the appellant's witnesses in that regard was unsatisfactory, as well as his finding on the quantity of the spillage of the concentrate, and the employees' failure to report same to the supervisors, the Court decided that the arbitrator's conclusions and his reasons were unassailable. The Court consequently dismissed the application with costs.

The Appeal

[24] The appellant approached this Court on appeal on the same grounds relied upon in the Labour Court**.** In addition, the appellant contended that the Labour Court erred by:

(1) holding that the justifiability/reasonableness/rationality test pertaining to CCMA arbitration awards did not apply to the arbitration award in this case, which is a voluntary as opposed to a compulsory arbitration;

(2) concluding that the arbitration agreement merely specified the terms of reference of the arbitrator but that it was not within the powers of the parties to confer jurisdiction on the Labour Court by giving the Labour Court a ground of review which it otherwise does not have in terms of the statute.

Submissions:

[25] Counsel for the appellant argued that the fact that the arbitration was held in terms of the Arbitration Act did not mean that the test which required **"reasonableness"** or **"justifiability"** did not apply to the review under consideration.

[26] He further submitted that the Court ***a quo*** erred and misdirected itself in confining itself to the grounds of review stipulated in section 33 of the Arbitration Act and nothing further despite the fact that:

(a) Section 23 (1) of the Constitution provides that: **"(1) Every one has a right to fair labour practices"**;

(b) Section 157 (3) of the LRA, grants exclusive jurisdiction to the Labour Court "in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court," which provision, so continued the submission, has the effect of ousting the jurisdiction of the Civil Courts from reviewing labour related arbitration awards, even though such arbitrations were conducted in terms of the Arbitration Act, and that where the Labour Court performs its review jurisdiction in terms of section 157 (3), it does so either directly on the basis of section 145 of the LRA or indirectly in terms of section 33 of the Arbitration Act;

(c) since the wording of the provisions relating to the grounds of review in section 33 of the Arbitration Act and those in section 145 of the LRA were similar, there was no "acceptable rationale for dealing with labour reviews in terms of the Arbitration Act on a more exacting basis than LRA reviews;" that reasonableness was the test to be applied in such reviews;

(d) by agreeing that the resultant arbitration award could be reviewed on the grounds set out in section 145 of the LRA, the parties incorporated those grounds of review into their arbitration agreement.

[27] Mr Redding, for the respondent, argued that arbitration awards issued pursuant to private arbitrations in cases of labour disputes may only be reviewed by the Labour Court in the exercise of its powers and grounds laid down in section 33 of the Arbitration Act.

[28] Mr Redding further submitted that, if parties, as in this case, were to be allowed to incorporate in their agreement what the grounds of review should be, it would amount to a dictation to the reviewing court (the Labour Court) to exercise powers of review not granted to it by statute, especially because, on Mr Redding's submission, the Labour Court has no common law powers of review. He referred to ***Telcordia Technologies Inc v***

Telkom SA Limited 2007 (3) SA 266 at 292 A-C, where Harms JA (as he then was) held that parties "… by agreeing to arbitration …. (they) limit interference by the courts to the ground of procedural irregularities set out in s 33 (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "Common Law" or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court." Mr Redding further submitted that it is trite law that the interpretation of section 33 of the Arbitration Act remains unaffected by section 33 (1) of the Constitution. In support of this he referred to ***Total Support Management (Pty)Ltd v Diversified Health System (SA) (Pty) Ltd and Another*** 2002 (4) SA 661 (SCA) at 674 A. Section 31 (1) provides that:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[29] He submitted that the appellant, confined itself to the ground that the arbitrator committed gross irregularities and that this should be the only issue to be argued in this Court.

[30] Mr Redding, however, submitted that in the present matter regardless of which standard of review was applied, the result would be the same on appeal, namely that the arbitration award is not susceptible to review.

Consideration of the appeal

[31] The issues which arose before us were:

(a) firstly, whether the grounds of review applicable to CCMA arbitration awards under section 145 of the LRA applied to this case or whether it was only the grounds of review set out in section 33 of the Arbitration Act that applied.

(b) secondly, whether it can be said that, based on the material presented before the arbitrator, his "conclusion was one that a reasonable decision-maker could not reach". (See in ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*** 2008 (2) SA 24 (CC) at 61 par [119].)

Is it the grounds of review contained in sec 33 of the Private Arbitration Act or those contained in sec 145 of the LRA which apply in this case?

[32] As indicated above, the parties differ on whether it is the grounds of review set out in sec 33 of the Arbitration Act or those set out in sec 145 of the LRA which apply in this case.

This issue arises simply because in their arbitration agreement the parties included a provision to the effect that the resultant arbitration award could be reviewed under sec 145 of the LRA which is a section of the LRA applicable to CCMA arbitration awards. The grounds of review set out in sec 145 of the LRA are the same as the grounds of review set in sec 33 of the Arbitration Act. The only difference is that there are Court decisions which have interpreted some of the grounds of review set out in sec 145 of the LRA to include certain grounds of review taken from the Constitution whereas, as far as I know, there is no decision of any court which has interpreted sec 33 of the Arbitration Act to include any grounds of review that are not explicitly expressed in sec 33 of the Arbitration Act. Of course, I am, in this regard, referring to the grounds of review of unjustifiability of CCMA awards articulated by this Court in ***Carephone (Pty) v Marcus NO supra*** of the irrationality of CCMA awards as articulated by the Court in ***Shoprite Checkers (PTY) Limited v Ramdaw NO*** [2001] 22 ILJ 1603 (LAC) as well as that of the unreasonableness of CCMA awards imputed to sec 145 of the LRA by the Constitutional Court in ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others supra***.

[33] I am inclined to agree with Counsel for the first respondent that, on the facts of this case, it would not matter whether one used the standard of review applicable to CCMA awards as stipulated in sec 145 of the LRA or one used the standard of review contained in sec 33 of the Arbitration Act as the result

would be the same. However, in so far as it may be necessary to decide the issue, I am of the view that the respondent's Counsel is correct that, since this is a review of a private arbitration award, it can only be reviewed on the grounds set out in sec 33 of the Arbitration Act and not in terms of the grounds set out in sec 145 of the LRA as extended by the judgments of this Court in Carephone and Shoprite Checkers and by the judgment of the Constitutional Court in Sidumo. In my view, while parties to a dispute are able to give an arbitrator powers which he otherwise does not have in resolving their dispute, they cannot do the same with regard to a court such as the Labour Court which has statutory power to review arbitration award issued by such arbitrator. Parties to a dispute such as the parties in this case cannot confer on the Labour Court powers to review a private arbitrator's award on grounds which it otherwise has no power to rely upon to review such an award. It would be different if there was a provision of the LRA which conferred upon the Labour Court the power to review such an award on any grounds upon which the parties to a dispute may agree. That is not the case here. Accordingly, I hold that the grounds of review applicable in this case are only those grounds set out in sec 33 of the Arbitration Act on which the appellant has relied in its papers. In this regard the appellant relied upon gross irregularity.

[34] It is appropriate at this stage to deal with the merits and the challenge of the arbitrator's award on review with reference to the reasons provided by the arbitrator.

34.1 The arbitrator held that, when one has regard to the method applied by Dr Robey in collecting data and the interviews conducted as well as the questionnaires completed by the employees during the investigation, the results of the audit conducted by him concerning the loss of concentrate at the Kimberley laboratory were reliable;

34.2 The arbitrator further found, with regard to the electronic scale used in weighing the samples during the audit, that Dr Robey had satisfied himself that the calibre of the scale used for the audit was synchronous with that used at the Canadian laboratory. He further stated that the only basis on which it could be said that there was a weight loss of the concentrate from Canada could either be occasioned by the Canada laboratory having recorded an incorrect weight or that the aliquots were incorrectly weighed in Canada. This would however not enhance the appellant's case since most of the weights recorded by the audit at the Kimberley and Centurion laboratories correlated with the weights recorded in Canada;

34.3 Dr Robey's concession that some samples from Canada had increased in weight, which gain in weight was

inexplicable, would also not affect the reliability of the audit, because the tables in which the percentage losses or gains of the various sorters' samples were recorded, were below 1%;

34.4 With regard to the possibility of the loss of concentrate being caused by the poor packaging of the plastic prior to the handing over of the aliquots to the sorting laboratory, the arbitrator found the evidence of Ms Ziegler more probable and accepted her version that there was no significant spillage of concentrate when the consignment was delivered from Canada during 2001;

34.5 The arbitrator rejected the appellant's assertions regarding the loss of sample which, according to the dismissed employees, was due to poor packaging of the Canada consignment. He made a finding that the dismissed employees contradicted themselves with regard to the quality of the Canada plastic containing the samples as well as the volume of concentrate lost;

34.6 He treated the appellant's evidence with caution because, appellant did not present any convincing evidence to prove that the spillage was reported to the supervisors or the sorters' line management. He found that both Ms Ziegler and Ms Ellemers corroborated each other with regard to the fact that the Canada plastics were of good

quality and further that the evidence of Ms Ellemers, which remained unchallenged, was that a single consignment from Canada which was found to have had a leakage during 2002, was immediately reported to the Toronto STC. He further found that Ms Paulse, who was a supervisor, did not confirm receiving the report of leakage or spillage on a regular basis from the sorters. He decided that there was no significant spillage of the concentrate;

34.7 The arbitrator stated that although it was admitted by Ms Ziegler and Dr Robey that loss of weight of sample would usually occur during bromoforming, they nevertheless stated that the aliquots would be re-weighed and the weight recorded at the laboratory, which evidence was not challenged by the appellant. He accepted Dr Robey's evidence that concentrate which was detected in the boxes was minimal. He took the view that the appellant had the opportunity of calling its own expert to gainsay Dr Robey's audit. He concluded that the loss of concentrate occurred in the laboratory sorting rooms when the samples were in the possession of the sorters;

34.8 He held that the second respondent was entitled to conduct an investigation or audit into the irregularities which were brought to its attention by Ms Van der Westhuizen, who was the informer, and that the nature of the misconduct necessitated the kind of audit conducted

by Dr Robey, which audit was of a scientific nature wherein a mathematical process was applied and that the employer was entitled to embark on this exercise without involving the dismissed employees. He further stated that the appellant's counsel was allowed to cross-examine Dr Robey on his audit report and that the appellant was not denied access to the audited material for re-auditing. He further held that failure by the second respondent to include the employees' representative in the audit process in itself did not constitute a violation of the ***audi alteram partem*** principle, as was had argued by counsel for the appellant.

[35] Counsel for the appellant attacked the audit that has been referred to above on the basis that since it was conducted in secret without the appellant or dismissed employees being represented there, the subsequent dismissal was procedurally unfair and the arbitrator's failure to so hold was unjustifiable and/or unreasonable. In my view there is no basis for this attack on the audit. The audit was part of an investigation that the employer conducted before it could take a decision whether or not there were reasonable grounds to initiate disciplinary charges against the relevant employees. The ***audi alteram partem*** rule had no application at that stage. The employees would be given an opportunity to be heard in subsequent disciplinary inquiries. At that stage the affected employees would have an opportunity to do their own audit in order to be

able effectively to challenge at the disciplinary inquiries the findings made pursuant to the employer's secret audit. In the light of this I reject the appellant's contention that the arbitrator's failure to find that the employees were entitled to attend the audit was unjustifiable or unreasonable or constituted a gross irregularity.

[36] Counsel for the appellant also attacked the finding made by the arbitrator that the audit procedure and results had "the requisite integrity and reliability." He submitted that such finding was not one that could reasonably have been reached. In support of this Counsel pointed out that Dr Robey was the sole witness of the employer on how the audit was conducted and that he did not conduct the entire audit himself, that Dr Robey and Mr Brown contradicted each other as to who collected the data on which the audit was based and when it was collected. Counsel for the appellant also submitted that during Dr Robey's demonstration in the arbitration proceedings of how the secret audit had been conducted, Dr Robey spilled eight grains even though he said that he had spilled three grains. Counsel for the appellant submitted that, if the way in which the secret audit was conducted resulted in a spillage of eight grains right before the arbitrator and the parties to the dispute in the arbitration, there must have been a lot of spillage of grains that occurred during the secret audit when the employees were not represented. I have considered what the arbitrator said about this in the relevant paragraphs of his award and I am not

persuaded that on review his finding falls to be reviewed and set aside. On the contrary it seems to me that the fact that eight grains were spilled during the demonstration in the arbitration is no indication that a sufficient spillage occurred during the secret audit to undermine the integrity or reliability of the audit.

[37] Counsel for the appellant submitted that it was unfair to the dismissed employees that when the second respondents' witnesses gave evidence in the disciplinary enquiries, they did so in the presence of all the employees whereas when each of the employees gave evidence, the other employees were not allowed to be present inside the room where proceedings were conducted. The arbitrator found nothing wrong with the procedure followed and held the view that the employees' representative did not object to the procedure during the disciplinary hearing. He found no merit in the submission. This issue was not persued by Mr Cloete in this Court and I find no merit in this allegation.

[38] It was further submitted by Mr Cloete that the involvement of Mr Brown, who questioned the witnesses after he had testified at the disciplinary hearing, was an interference with the independence of the chairperson. The arbitrator held that none of the witnesses or their union's representatives had indicated that any of the employees concerned felt intimidated by Mr Brown's conduct. He however, said that the chairperson of the

disciplinary inquiry did indicate to Mr Brown during the proceedings, that he was not supposed to interfere with the hearing in the manner he did. I find no merit in this submission because Mr Brown was not the chairperson of the enquiry and had no power to make any finding against the employees.

Sanction

[39] Mr Cloete submitted that the chairperson of the disciplinary hearing had already made up his mind about the sanction of dismissal despite the fact that Mr. Carr had recommended that any sanction other than dismissal could be imposed. The arbitrator held that the fact that the chairperson of the disciplinary hearing disregarded some of the submissions made by the initiator, especially the one on dismissal, in itself indicated that the chairperson was impartial and independent in adjudicating over the matter. In my view there is no evidential basis for Mr Cloete's submission in this regard.

[40] He further submitted that the dismissal was unfair in that the employees who had admitted to discarding magnetic samples were not dismissed, whereas the appellants were dismissed for the same misconduct, which disparate sanction is unfair to the dismissed employees. Mr Cloete further submitted that there was no existing standard rule which prescribed a sanction other than dismissal in respect of those employees who discarded less than 2% of the magnetic sample.

The arbitrator held on these issues:

40.1 that the intentional disposal of samples by the sorters or employees demonstrated a gross disregard of the **"fundamental aspect of their work and the interest of their employer and colleagues"**. He further stated that the sorters' conduct, including that of Ms Middleton, Mr Ruawerda, Ms Holthousen and Ms Le Grange, who had admitted to have discarded magnetic sample, caused the second respondent incalculable harm;

40.2 he further indicated that with regard to the rest of the sorters, the dismissed employees in this case, it would not be possible to determine with certainty as to who amongst them failed to follow the laboratory procedures prescribed for sorting mineral samples, but he held that distinguishing between the two categories would be academic because the evidence indicated that **"they either threw away sample or consciously neglected to report spillage".** He further indicated that in this case, when the discarding of sample was discovered, the losses had escalated so considerably over a year prior to the discovery that the integrity of the second respondent's laboratory findings was in jeopardy;

40.3 he further held that the dismissed employees gave dishonest explanations to the second respondent as the employer, for the repeated loss of a substantial percentage of sample attributed to them, which conduct resulted in the employment relationship between the employees and the second respondent becoming **"irreparably compromised ".** Mr Cloete's submission with regard to this finding was that if, indeed, there was a breakdown of the employment relationship between the employer and the dismissed employees, such breakdown should also apply to the other employees who admitted that they had discarded the magnetic portion of the sample but were not dismissed for such misconduct.

[41] In my view, none of Mr Cloete's criticizms of the award established a gross irregularity which is a ground of review that he had to show in order to succeed in this matter. Indeed no misconduct on the part of the arbitrators has been shown either. I am satisfied that the appellant failed to show that Labour Court erred in any way. In those circumstances, the appeal stands to be dismissed.

In the premises I make the following order:

[a] The appeal is dismissed.

[b] There is no order as to costs.

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M M LEEUW JA

_____

ZONDO JP

_____

DAVIS JA

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