IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JA 38/2009

In the matter between:

SAMANCOR CHROME LTD (TUBATSE FERROCHROME)	**Appellant**
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**First Respondent**
JD STAPELBERG N.O.	**Second Respondent**
NATIONAL UNION OF MINEWORKERS	**Third Respondent**
MD NKWANA & R MOHLALA	**Fourth and Fifth Respondents**

APPEAL JUDGMENT

D VAN ZYL AJA:

Introduction

[1] The appellant operates a smeltery at Steelpoort known as Tabatse Ferrochrome. The fourth and fifth respondents (referred to hereinafter collectively as **"the respondents"** or individually as the **"fourth respondent"**

and **"fifth respondent"**) were employed by the appellant at the said plant as a tap floor operator and a crane operator respectively. According to the undisputed evidence a tap floor operator performs his or her functions in an area referred to as the tap floor or tap ramp. A furnace is located on the tap floor from where molten metal is poured into a ladle. Once poured into the ladle the furnace is closed by the tap floor operator with the use of a device called a mud gun. The operator of a crane is then signalled to remove the ladle. It is hooked onto the crane, lifted up above the tap floor and transported across the floor to an area referred to as a **"rabble station"**. The crane operator is seated in a cabin in an area above the tap floor from where he would operate the crane. Once the ladle is hooked onto the crane the operator must sound a siren indicating that the ladle is to be lifted and moved across the tap floor. The tap floor operator is then required to vacate the area.

[2] As a result of an incident which occurred on 15 September 2005 at furnace no.1, where the respondents were on duty at the time, they were charged with misconduct. It was alleged that they were guilty of a serious breach of the appellant's safety rules. The fourth respondent was alleged to have failed to evacuate the tap floor after the crane siren was activated indicating that the ladle of molten metal was to be transported across the tap floor. In failing to do so he was accused of having endangered his

own life and failed to comply with safety procedures. The fifth respondent was accused of endangering the lives of other employees by failing to wait for persons to evacuate the tap floor before moving the ladle across the tap floor.

[3] At an internal disciplinary enquiry the two respondents were found guilty of misconduct and were dismissed. They challenged the substantive fairness of the dismissal in terms of section 191 of the Labour Relations Act 68 of 1995 (**"the LRA"**) and the dispute was referred for arbitration. The second respondent, (**"the commissioner"**) conducted the arbitration. He concluded that the dismissal was substantively fair and refused to intervene.

[4] The respondents then applied to the Labour Court to review the award in terms of section 154 of the Act. The matter came before Molahlehi J who set aside the award and replaced it with an award that the decision to dismiss the respondents was substantively unfair. He directed the appellant to reinstate both respondents retrospectively without any loss of benefits or income. The appellant now comes before this Court on appeal against the judgment of the court *a quo*.

The arbitration proceedings

(a) The evidence

[5] The evidence of the appellant's witnesses, namely De Beer and Cramer was briefly to the effect that while inspecting a new installation on the tap ramp of furnace no.2, they heard the siren at furnace no.1. Because the siren was not sounded in the usual manner, it attracted their attention. They noticed the fourth respondent on that tap floor standing in front of the mud gun. At that stage a full ladle of molten metal was lifted in the air next to the tap ramp. The crane then started moving the ladle across the tap ramp while the fourth respondent was still busy with the mud gun. This, according to the appellant, was in breach of its safety rules which were put in place to ensure the safety of its employees.

[6] The fourth respondent denied that he acted in breach of the appellant's safety rules. He testified that he was not present when the incident occurred at furnace no.1. His evidence was that he had taken a sample to the laboratory and that from there he went to, what has been referred to as the **"white house"**. Whilst he was there he heard that he was called to the control room. The fifth respondent equally denied that was in breach of any safety rule. His evidence was that there was no one on the tap floor when he lifted the ladle and transported it across the floor.

The award

[7] In a careful and well reasoned award the commissioner found that **"…the version of the Respondent** (the appellant) **to be far more probable than that of the Applicants** (the respondents)**. Whereas I found the testimonies of the Respondent's witnesses to be reliable and consistent, the Applicants' testimonies were filled with inconcistencies, improbabilities and what I believe to be out right fabrications."** With reference to the evidence placed before him the commissioner then proceeded to list the reasons for concluding that the evidence of the appellant's witnesses was to be preferred to that of the respondents. He found that the two respondents had acted in breach of the safety standards of the appellant and because a failure to comply therewith **"…holds a high risk of serious injury or death, the dismissal of the Applicants under these circumstances is reasonable."**

The Court *a quo*

[8] In the review proceedings in the Court *a quo* it was contended that the commissioner's findings were not justifiable in the light of the evidence that was placed before him. It was submitted that the evidence established that the fourth respondent was busy with the mud gun and consequently that he was not on the tap ramp as alleged in the charge.

[9] With regard to the fifth respondent it was contended that the commissioner failed to appreciate the content of the rule the fifth respondent was accused to have breached. The submission was that there was no evidence to the effect that the fifth respondent **"… as a matter of fact did see the third applicant** (the fourth Respondent) **on the floor before he moved the ladle. If there was someone, it meant he committed a human error, but that is not [sic] failure to comply with the rule."**

[10] In so far as the sanction imposed is concerned the contention was that the commissioner failed to consider the clean disciplinary records of both the respondents. Further, the commissioner should have considered the fact that the fifth respondent did sound the siren before he had moved the ladle across the tap floor and that he was as a result not in total disregard of the relevant safety rule.

[11] The Court *a quo* approached the issues before it by asking the question whether the commissioner's conclusion that the respondents acted in breach of a workplace rule was a decision which a reasonable decision maker could reach. The Court concluded that there was insufficient evidence to find that the respondents were guilty of not obeying a workplace rule. It found that the evidence of the witnesses De Beer and Cramer could not be relied upon as neither of the two witnesses

took any steps to warn either of the respondents of the impending danger. It was further found that the possibility that the fourth respondent did not hear the siren could not be ruled out.

[12] In dealing with the issue of the guilt of the fifth respondent the Court *a quo* emphasised that on the version of the appellant's witnesses they were busy at the time with the inspection of installations at furnace no.2. Their attention was consequently elsewhere and both were unable to indicate at what point in time of the process of the moving of the ladle across the tap floor, the fourth respondent arrived on the floor. The Court further found that De Beer was not in a position to dispute the possibility that the view of the fifth respondent, from where he was seated in the overhead crane, was obstructed by a panel and that he could not see the fourth respondent at the time when he started moving the ladle across the tap floor. It was further concluded that what the fifth respondent was required to do in terms of the appellant's safety rules was to activate a siren when he was moving a ladle across a tap floor. On the evidence before the commissioner this is what the fifth respondent in fact did and it was concluded that it cannot be said that he was in breach of the safety rule.

[13] With regard to the sanction imposed the Court found that **"even if it is was to be assumed that both applicants** (the fourth and fifth Respondents) **were guilty of the charges, the facts and the circumstances of the respective case do not support the conclusion that the dismissal was a fair sanction. They both did not deny knowledge of the rule or show disrespect for it or questioned its application. From these facts it seems to me that the likelihood of repeat of the offences is very remote. There was also no evidence of the two having committed similar offences in the past."**

The decision that the respondents committed misconduct

[14] It is evident from the issues raised by the respondents in the affidavit filed in support of the application for review in the Court *a quo*, that their challenge was directed at the substantive outcome of the arbitration proceedings. The applicable test for a review of the outcome of a decision about the fairness of a dismissal in terms of section 145 of the LRA has been definitively settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC))(**"Sidumo"**). Navsa AJ explained it as follows:

> **"[106] The *Carephone* test, which was substantive and involved greater scrutiny than the rationality test set out in *Pharmaceutical Manufacturers,* was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly that an**

> **award must be justifiable in relation to the reasons given for it. Section 33 (1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse s 145 of the LRA.**
>
> **[107] The reasonableness standard was dealt with in *Bato Star*. In the context of s 6(2)(h) of PAJA, O'Regan J said the following: "An administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."**

And further:

> **"[119] To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner."**

[15] What is clear from the *Sidumo* judgment is that the function of judicial review as contemplated in section 145 of the LRA is to ensure the legality, the reasonableness and the fairness of arbitration proceedings conducted in terms thereof. The constitutional prescript of reasonableness requires a Court reviewing arbitration proceedings in terms of the said

section to ensure that the decision taken by the commissioner falls within the bounds of reasonableness (See *Sidumo* at paras [109] and [110]). In the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 (4) SA 490 (CC)) (**"Bato Star"**) referred to in *Sidumo*, the Court stated at paragraph [45] that what will constitute a reasonable decision will depend on the context of each case or, as it was put by O'Regan J, in *Bato Star*, **"…on the circumstances of each case much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."**

[16] As stated in *Sidumo*, the statutory scheme of the LRA requires a commissioner to determine whether a disputed dismissal was fair. In this enquiry the commissioner first has to determine whether or not misconduct was committed on which the employer's decision to dismiss

was based. As stated by Navsa J, this is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. The next part of the process is the issue that formed the subject matter of the judgment in *Sidumo*, namely a determination of the fairness of the sanction imposed. (See paragraphs [59] and [62] of the judgment) On the *Sidumo* test, the first enquiry in the present matter is therefore whether the commissioner's decision, namely that the respondents acted in breach of a workplace rule and as a result made themselves guilty of misconduct, falls within the bounds of reasonableness. As stated earlier, the Court *a quo* found that the evidence placed before the commissioner did not support the decision made by him in this regard and that it was consequently not a decision which a reasonable decision-maker could reach.

[17] In assessing the reasonableness of the commissioner's decision that the respondents were guilty of misconduct, and applying the principles enunciated in the *Sidumo* and *Bato Star* judgments, the following considerations are relevant in the context of the present matter: With regard to the nature of the said decision, the respondents' challenge in the review proceedings was directed at the merits of the commissioner's decision relating to misconduct. While it must be acknowledged that an adjudication of this issue may also involve questions of law where

different considerations may apply, in the present matter the respondents' challenge was limited solely to factual issues and the commissioner's evaluation of the evidence and determinations of fact relevant to the enquiry. The second aspect is that it must be acknowledged that the determination of factual issues in relation to the question whether an employee breached a workplace rule is a power or function which the legislature chose to entrust to a functionary with the necessary training and expertise to determine a dispute about the fairness of a dismissal as contemplated in section 191 of the LRA.

[18] Further, in considering the nature of the decision and the factors relevant thereto, it is important to recognise that questions raised by this enquiry are factual and may give rise to more than one acceptable and reasonable conclusion. In this context reasonableness is a deferential standard in the sense that the reviewing Court is not called upon to decide whether the conclusion reached by the commissioner is correct, but rather whether it is an outcome which lies within the scope of reasonable responses open to the commissioner on the material placed before him or her. In the present context the caution expressed by the Constitutional Court in both the *Bato Star* and *Sidumo* judgments, namely that in applying the reasonableness standard the distinction between review and appeal must be maintained, and that the Court must be careful not to

usurp the functions of the commissioner to whom the decision-making power was given by the LRA, must be heeded. (See *Sidumo* at para [108].)

[19] Finally, whilst reasonableness introduces a substantive ingredient to the enquiry requiring an analysis of the evidence or a scrutiny of the merits of the decision by the reviewing Court, such an exercise is not conducted by the Court with a view to forming its own view about the substantial merits of the case and to substitute its own decision for that of the commissioner. It is undertaken for the limited purpose of determining whether the decision of the commissioner falls within the scope of reasonable outcomes which are justifiable or defensible in relation to the reasons provided, the law and the facts on which such decision is based. In other words, whatever the reviewing Court might consider to be a better decision is irrelevant. As stated in *Sidumo*, in applying the reasonableness standard the danger does not lie in careful scrutiny but in **"judicial overzealousness in setting aside administrative decisions that do not coincide with the Judge's own opinions."** (at para [109].)

[20] Turning then to the present matter, in examining the evidence before the commissioner it is, as a point of departure, clear that both the respondents were well versed in the appellant's safety rules and

appreciated their responsibilities in that regard. The rules require employees on the tap floor to vacate the area when the crane siren is sounded and a ladle is transported by the crane across the tap floor. The fourth respondent confirmed that he was aware of the safety rule. In response to questions put to him by his representative he confirmed that he knew the **"tap floor crossing procedure"**. He was asked what it meant to him when the siren was activated to which he replied that it **"… means that I must move away from that area."**

[21] The fifth respondent was similarly aware of the safety rules relevant to crane operators. He was asked by his representative whether he could explain the tap floor crossing procedure. His response was that **"The people that are working there where I have to tap that substance and then after I hooked it I make sure in all aspects that it is safe to do so. Whenever I have seen that it is safe, I then press on a siren to warn everybody for their safety. After I complete the lifted up the crane I then again make sure whether where the crane will cross it is safe to do so before I can do so. Whenever it is clear, there is no one underneath then I cross over but whenever there is someone whom I see, I cannot (inaudible) a cross until that person moves away."**

[22] It is evident from the evidence that the commissioner was faced with two conflicting versions. On the fourth and fifth respondent's version the appellant's witnesses were consequently not merely mistaken

in what they observed, but their evidence was false. The commissioner analysed and evaluated the evidence of the appellant's witnesses and that of the respondents and their witness Bhembe. In preferring the version of the appellant the commissioner found the evidence of its witnesses to be reliable and consistent and their version to be the more probable of the two. He found the fourth and fifth respondents evidence on the other hand to be **"filled with inconsistencies, improbabilities and … out right fabrications."**

[23] On a conspectus of the evidence these findings of the commissioner are in view unassailable. In dealing with the evidence of the fourth respondent the arbitrator found it to be contradicted by De Beer and Cramer who testified that they saw him present on the tap floor. The fourth respondent's evidence was further contradicted by the witness Mohlala who was acting as chief supervisor on the day in question. This witness testified that he confronted the fourth respondent immediately after the incident. The fourth respondent informed him that he was busy with the mud gun and that he did not hear the siren indicating that the crane was moving the ladle across the tap floor.

[24] Further, the fourth respondent gave contradictory versions at the disciplinary and arbitration hearings regarding his presence on the tap floor at the time the ladle was moved across it. The commissioner found

the fourth respondent's explanation for the contradiction to be unsatisfactory, a finding which cannot be criticised. The explanation advanced by the fourth respondent at the internal disciplinary hearing consisted of an admission that he was on the tap floor at the time when the ladle was moved across the floor. However, because the mud gun was still burning he could not leave his station and he thought that the crane operator would see that he was still on the tap floor. This also corresponded with what was put to the witness Cramer during his cross examination in the arbitration proceedings. It was not denied that the fourth respondent was on the tap floor at the time. The version put was rather that he did not hear the siren and that his attention was directed at the burning mud gun. It was also put to the said witness that the reason for the fourth respondent not having heard the siren was because he was wearing **"ear protection"**. This was clearly in direct conflict with the version testified to by the fourth respondent in the arbitration proceedings, namely that at **"The time when this was happening I was not there around. I went somewhere taking away the sample."**

[25] In dealing with the position of the fifth respondent the commissioner found that his version was improbable. Contrary to what was put to the appellant's witnesses by the fifth respondent's representative in cross-examination, the fifth respondent did not claim

that his view of the tap floor was obstructed. His evidence was rather that there was no one on the tap floor at the time when he moved the ladle across it. The commissioner found that given his position in the overhead crane, the fifth respondent would have been able to see a person on the tap floor. The commissioner also found that the unusual intermittent sounding of the siren, which the fifth respondent was unable to explain, lend support to the conclusion that he saw the fourth respondent on the tap floor and that it was because the fourth respondent failed to evacuate the top floor that he continued to sound the siren.

[26] Turning then to the findings of the Court *a quo*, in dealing with the position of the fourth respondent, it was found that his evidence that he was not present on the tap floor at the time was corroborated by the evidence of the respondents' witness Bhembe. This witness testified that when the ladle was transported across the tap floor there was no one on the floor. The commissioner extensively dealt with this evidence in his award. He found it to be improbable and also in some respects to be contradictory to the evidence of the fourth and fifth respondents. A crucial aspect relevant to his credibility is that Bhembe failed to mention when he testified at the internal disciplinary enquiry that the fourth respondent was not on the tap floor at the relevant time. In dealing with his explanation for this failure the commissioner described his

explanation as unsatisfactory. This finding cannot in my view be faulted on the evidence before the commissioner.

[27] The criticism levelled at the evidence of De Beer and Cramer that they took no steps to stop the fifth respondent from continuing to transport the ladle across the tap floor while the fourth respondent was still on the floor, is an aspect that was raised with the said witnesses by the appellant's representative in the arbitration proceedings and was satisfactorily dealt with by them. Mr Makinta, who appeared on behalf on behalf of the fourth and fifth respondents at the hearing of the appeal, in my view quite correctly conceded this to be the position. According to De Beer the incident happened very quickly and there was no time for him to react in the manner as suggested. Cramer's testimony was to the effect that it was impossible in the circumstances to attract the fourth respondent's attention to the moving ladle and that by the time he managed to call the tap floor coordinator, the crane had already crossed the tap floor.

[28] In arriving at the conclusion that the possibility cannot be excluded that the fourth respondent did not hear the siren, the Court *a quo* referred to the evidence of the appellant's witness Cramer who testified that he had assumed that the fourth respondent did not hear the siren. The

relevant portion of the evidence of this witness reads as follows: **"…look it is standing still with the siren going. So I naturally assumed that he had not heard a siren yet and would in a couple of minutes and then come off the third ramp which is standard practice. I mean you know it is a sort of 10 or 15 m length to walk. And before we hear anything else the crane was moving."** In its proper context it is clear from a reading of what the witness said that he did not intend to convey that the fourth respondent was unable to hear the siren. On the contrary, both De Beer and Cramer testified that despite wearing, what was referred to as ear protection, they were still able to hear the siren. According to De Beer the protective **"… ear plugs is not designed not to stop all noise but to filter out damaging noise."** Accordingly, the finding of the commissioner that it was highly improbable that the fourth respondent did not hear the siren when the appellant's witnesses were able to do so from a greater distance, cannot on the evidence be criticised. In any event, as stated earlier, the fourth respondent's version at the arbitration proceedings was not that he did not hear the siren, but rather that he was absent from the tap floor at the relevant time.

[29] In so far as the fifth respondent is concerned, a conclusion that the possibility cannot be excluded that his view was obstructed and that he did not see the fourth respondent on the tap floor when he moved the ladle across the tap floor is in my view not supported by the evidence.

From the evidence it is safe to conclude that the fourth respondent was on the tap floor after the molten metal had been emptied into the ladle, it was hooked onto the crane and before it was moved across the tap floor. The evidence of De Beer was to the effect that his attention was directed to the tap floor by the sound of the siren. He saw the fourth respondent standing in front of the mud gun. He then noticed that the crane started moving. His evidence in this regard was corroborated by Cramer who testified that when he noticed the fourth respondent standing in front of the mud gun the crane was still in a stationary position. It only started moving thereafter.

[30] Further, De Beer's evidence was that the crane operator had a clear view of the tap floor. This not only corresponded with the observations of the chairman of the internal disciplinary enquiry (evidence placed by agreement before the commissioner as part of the documentary evidence), but it was also confirmed by the fifth respondent himself. In cross examination it was suggested to him that he moved the ladle across the tap floor despite the fact that the fourth respondent was still on the floor. His response thereto was **"No, there was no one, (inaudible) even Dannie** (the fourth respondent) **was not there."** He was then asked if he could see clearly to which he responded **"on that day I could see everything including a person."**

[31] The Court *a quo* further found that the decision the commissioner ought to have reached was that the fifth respondent was not guilty of failing to activate the siren when moving the ladle across the tap ramp. The difficulty with this finding is that the appellant's safety rules not only require the crane operator to activate the siren when transporting the ladle, but also to ensure that there is no person present on the tap ramp before doing so. Further, as counsel for the appellant correctly pointed out, the commissioner did not in his award make a finding that the fifth respondent had failed to activate the siren. The reason is clearly the fact that the fifth respondent was not charged with, nor was he found guilty of having failed to activate the siren.

[32] To conclude, in giving due consideration to the findings of the commissioner in the light of his reasoning and the evidential material placed before him, I am satisfied that the conclusion that the respondents were guilty of misconduct is one that a reasonable decision-maker could reach in the circumstances.

The assessment of the fairness of the dismissal

[33] Turning then to fairness of the sanction, the question is whether a reasonable decision maker would have arrived at a conclusion that the sanction of dismissal was fair. (*Sidumo* at para [110]). In deciding the

reasonableness or otherwise of an award in this regard, a Court of review must take the following considerations into account: firstly, the duty to determine whether a dismissal is fair or not rests with the commissioner. **"The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."** (*Sidumo* at para [75]) To this extent a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances. (*Sidumo* at para [79]).

[34] Secondly, the decision whether or not the sanction imposed by an employer is fair in a particular case is a value judgment which the commissioner is required to make on the basis of his/ her own sense of fairness. Thirdly, each case must be decided on its own merits and with due regard to the totality of the circumstances - an objective approach (*Sidumo* at paras [64] and [68]). In doing so the commissioner will "**... necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed a sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his of her**

long service record. This is not an exhaustive list." (*Sidumo* at para [78].) Other factors may include the seriousness of the misconduct and the gravity thereof with relation to the continued employment relationship as well as the employee's previous disciplinary record and personal circumstances, the nature of the employee's job and the circumstances of the infringement. The list is not exhaustive.

[35] In my view, having regard to the material before the commissioner and his reasoning with regard to the fairness of the sanction, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. It is evident from the evidence that there are considerable risks associated with the appellant's operations at the smeltery. It carries a high risk of potential danger to the safety of its employees which in turn may hold serious consequences for the appellant as the employer. The issue of safety and the rules pertaining thereto is accordingly of considerable importance to both the appellant and its employees. At the arbitration hearing, the appellant's representative explained that at **"…Samancor eighty percent of the fatalities of people who die at work is related to (inaudible) or mobile machinery. In other words this is one of the areas where most of the people who die at work (inaudible) and as a company we just cannot tolerate any of our rules which is designed to save peoples lives."** Accordingly, in the context of the present matter, the importance of the safety rules

concerned, the reasons for their existence, and the seriousness and potentially life threatening consequences of a breach of such rules are important considerations that must be accorded due weight.

[36] That the fifth respondent sounded the siren, and to that extent partly complied with his duties as was contended on his behalf by Mr Makinta, does not detract from the seriousness of his failure to ensure that the tap floor was evacuated before he proceeded to lift and transport the ladle across it. The fact that both the respondents had a clean disciplinary record is a factor that count in their favour and is to be weighed against the seriousness of the breach. However, on the *Sidumo* test for review and on a consideration of the fairness of the respondents' dismissal against all the relevant facts and circumstances, I am of the view that there exists no reason to interfere with the commissioner's decision in this regard.

Costs

[37] In all the circumstances of the matter I am of the view that it would be appropriate that no party should bear any costs, either in the preceeding litigation or in the present appeal.

Order

[38] In the result the following order is made:

(a) The appeal is upheld and the commissioner's award is restored.

(b) The costs order in the Labour Court is set aside and substituted with the following order: "No order is made as to costs."

(c) There will be no order as to costs in the appeal.

_____

D. VAN ZYL AJA

I agree.

_____

B. WAGLAY DJP

I agree.

_____

P. TLALETSI JA

Matter heard on	**:**	**17 September 2010**
Matter delivered on	**:**	**26 November 2010**
Counsel for Appellant	**:**	**Adv A. Mosam** **Ms K. Savage**
Instructed by	**:**	**Bowman Gilfillan** **165 West Street** **Sandton** **JOHANNESBURG**

Counsel for Respondent	**:**	**Mr E.S. Makinta**
Instructed by	**:**	**E S Makinta Attorneys** **Suite 504, 5th Floor** **Schreiner Chambers** **94 Pritchard Street** **JOHANNESBURG**