REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 53/11

Labour Court Case no: JR 2819/09

In the appeal of:

BLUE FINANCIAL SERVICES LIMITED **Appellant**

(Applicant in the Court *a quo*)

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

J TSABADI N.O **Second Respondent**

ANDREW WILLIAM PATERSON **Third Respondent**

(Respondents in the Court *a quo*)

Heard: **21 February 2014**

Delivered: **16 May 2014**

Summary: A REFUSAL BY A COMMISSIONER TO ALLOW A PARTY TO CALL A WITNESS TO COUNTER THE UNFAVOURABLE EVIDENCE GIVEN BY ANOTHER WITNESS CALLED BY THAT PARTY WAS UNREASONABLE AND CONSTITUTED A MATERIAL IRREGULARITY. IF THE WITNESS HAD BEEN ALLOWED TO BE CALLED THE OUTCOME OF THE HEARING MAY HAVE BEEN DIFFERENT. THE APPEAL AGAINST A LABOUR COURT ORDER DISMISSING AN APPLICATION TO REVIEW AND SET ASIDE THE AWARD WAS UPHELD WITH COSTS.THE AWARD OF THE COMMISSIONER WAS SET

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ASIDE AND THE MATTER WAS REFERRED BACK TO THE CCMA FOR A HEARING *DE NOVO* BEFORE A DIFFERENT COMMISSIONER.

JUDGMENT

COPPIN AJA

[1] This is an appeal against a decision of the Labour Court (Steenkamp J) dismissing, with costs, an application brought by the appellant to review an award of the second respondent ("*the arbitrator*"), acting under the auspices of the first respondent ("*the CCMA*"), in favour of the third respondent ("*Mr Paterson*"), who had been dismissed by the appellant for making a racist remark, by ordering the appellant to pay Mr Paterson the equivalent of four months' salary.[1] The court *a quo* granted leave to appeal to this Court. Mr Paterson, who is legally represented, is opposing the appeal.

[2] At the outset of the appeal hearing, the appellant applied for condonation for its failure to lodge the appeal within the prescribed period and sought leave to prosecute the appeal. The application was not opposed. The parties addressed the court on the merits. The explanation proffered by the appellant in its condonation application was not criticised at all by Mr Paterson's representative and it is reasonable. For reasons stated in this judgment the appeal is successful.

[3] The following facts are relatively simple and common cause. Mr Paterson, a white person, was employed by the appellant as a Corporate Finance Manager. On 3 March 2009, Mr Paterson engaged in a social conversation with a colleague, a black person, Mr Kevin Kachidza ("*Mr Kachidza*") in an open plan office in which Mr Kachidza was working with others. Mr Kachidza was employed as an Investment Relations Manager. Some of the appellant's staff had just returned from a bush safari where they had engaged in team building. Mr Kachidza did not attend. Within earshot of other employees, Mr Paterson enquired from Mr Kachidza why he did not attend. Mr Kachidza's response was, in essence, that he was not particularly fond of the bush,

[1] Mr Paterson did not seek reinstatement.

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whereupon Mr Paterson uttered these words, which formed the subject of disciplinary charges and which culminated in Mr Paterson's dismissal from his employment with the appellant, "*I thought you jungle bunnies liked that sort of thing*".

[4] Mr Kachidza did not respond immediately to Mr Paterson's statement, but later, on the same day, Mr Kachidza sent an email to Mr Paterson in which he relayed his feelings about this statement that was made. The email reads:

> *'Andrew, I think there is something which we should talk about when you in the office. I'll have you know that it is extremely offensive to call anyone a 'jungle bunny' under any circumstances.*
>
> *In the interest of good relations between colleagues I would strongly advise that you never use that expression again in polite company and certainly never again in front of my corporate affairs team and I.*
>
> *As long as we have an understanding on that I don't think we need to take it any further on this occasion. I look forward to discussing it with you in person.*
>
> *Kind regards,*
>
> *Kevin Kachidza.'*

[5] Shortly after receiving that email, Mr Paterson responded by email to Mr Kachidza in the following terms:

> *'Actually, the phrase I used was 'bush cat' and I am sorry you took it against the spirit in which it was meant. Clearly I was being more familiar than is my place where you and I are concerned and I apologise unreservedly. I look forward to doing so in person and I appreciate you approaching me directly.*
>
> *Cheers*
>
> *Andrew.'*

[6] Notwithstanding Mr Paterson's response, the next day Mr Kachidza forwarded his email to one Mr Reinders, the Group Corporate Affairs Executive, and Mr Van Niekerk, the Chief Executive Officer, together with a message that he

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was "*extremely saddened and outraged*" by what Mr Paterson had said to him and requested an investigation.

[7] Following an investigation, Mr Paterson was charged with the following counts of misconduct:

> '1. Use of abusive/racist language in that you addressed a colleague [in] a well-known racist term.
>
> *2.* Behaviour prejudicial to the maintenance of good order in that your behaviour toward a fellow-employee [breached] your common law duty of good faith to the company.'

[8] In terms of the applicable disciplinary policy, the use of racist and abusive language in the workplace, or engaging in behaviour prejudicial to the maintenance of good order and in breach of the duty of good faith owed to the company, carried a sanction of dismissal.

[9] At the disciplinary hearing, Mr Paterson admitted using the term "*jungle bunnies*" in his conversation with Mr Kachidza. He pleaded guilty to the first charge of misconduct, but denied that his behaviour was prejudicial to the maintenance of good order at the company. He apologised for his use of the objectionable language. Notwithstanding, the Chairperson at the disciplinary hearing, Ms Nolene Petit (Ms Petit), found Mr Paterson guilty on both charges of misconduct and Mr Paterson was dismissed from his employment with the appellant. An internal appeal was unsuccessful whereupon Mr Paterson referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("*CCMA*").

[10] At the subsequent arbitration hearing at the CCMA, the commissioner found that Mr Paterson's dismissal was procedurally fair, but substantively unfair. Relying essentially on the evidence of Mr Kachidza and Mr Paterson, the commissioner found that the appellant had dismissed Mr Paterson for reasons other than those that had formed the subject of the charges against him and that the sanction of dismissal was in any event too harsh given the circumstances. It was the commissioner's view that the dismissal of Mr

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Paterson was for "*flimsy*" reasons. Since Mr Paterson did not seek reinstatement, the commissioner granted Mr Paterson compensation by ordering the appellant to pay Mr Paterson the equivalent of four months' salary (i.e. R240 000) by a certain date.

[11] At the arbitration, Ms Petit, who now presented the case on behalf of the appellant, called Mr Kachidza as a witness. There, Mr Kachidza testified, *inter alia*, that he had referred the incident to Senior Management for investigation, because Mr Paterson had denied using the term "*jungle bunnies*" and was not truly remorseful; that he felt abused and that his conduct in referring the matter was consistent with the appellant's harassment policy. Mr Kachidza testified further that he had offered not to pursue the complaint against Mr Paterson (i.e. "*to drop the charges*") if Mr Paterson apologised openly. However, when he made this offer he was advised by Mr Reinders that the third respondent was, any way, going to be dismissed because of other things. The charges were not dropped, according to Mr Kachidza, because it was seen as a good excuse for dismissing Mr Paterson.

[12] Under cross-examination by Mr Paterson, Mr Kachidza, effectively, conceded that the appellant was retrenching employees under the guise of dismissing them so that it did not have to pay them retrenchment packages. He testified that at the time of the arbitration he was also suspended pending a disciplinary hearing into allegations of misconduct. He denied telling lies or being put under pressure to lie in the arbitration proceedings. He further testified, *inter alia*, in response to a question, in that regard, that he was never informed that Mr Paterson had approached management in an effort to have the issues, relating to the charges, conciliated.

[13] When Ms Petit had to re-examine Mr Kachidza, she effectively cross-examined him. Having been the Chairperson of the disciplinary hearing, who found Mr Paterson guilty, she tried to discredit Mr Kachidza by putting to him her recollection of what he had said or not said at the disciplinary hearing. She further put to him, in essence, that he had since laid a grievance against Mr Reinders and that he had turned "*hostile*" towards the appellant, because of his own dispute with it. Ms Petit also put to Mr Kachidza that his own

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dispute with the appellant was "*clouding his judgment*". Mr Kachidza denied all of this.

[14] At the end of this questioning by Ms Petit of Mr Kachidza, she requested permission from the commissioner to call Mr Reinders to give his side of the story. The commissioner enquired of Ms Petit how Mr Reinders' testimony was going to advance her case. She replied that fairness dictated that he be called to give his version of what he had said, or did not say to Mr Kachidza. She submitted, *inter alia*, that she was not aware of the discussion that Mr Kachidza said he had with Mr Reinders until Mr Paterson's questioning of Mr Kachidza. She also submitted that she had reason to believe that Mr Kachidza was involved in assisting Mr Paterson in the preparation of his case. Mr Kachidza disputed the veracity of her submissions and described them as "*absurd*" and "*ridiculous*". Having heard Mr Paterson on the matter, the commissioner did not grant permission for Mr Reinders to be called, ruling that Mr Reinders' evidence would take the matter no further, because if Mr Reinders contradicted Mr Kachidza, it would be the word of one against the other.

[15] Mr Paterson testified at the arbitration hearing, *inter alia*, that he had approached his own manager and Mr Kachidza's manager to discuss the issues in the hope of conciliation. Both the managers had said to him that Mr Kachidza was not interested in discussing the possibility of conciliation with him. According to Mr Paterson, given the benefit of hindsight, it was clear to him that the appellant's management deliberately avoided the possibility of conciliation. He conceded at the arbitration to using the term "*jungle bunnies*", but testified that he was now aware of the pain and humiliation that it caused. He said that he genuinely believed that he had used the term "*bush cat*", but had since discovered that it was also an objectionable, racist term. He was not aware that Mr Kachidza's perception was that he was trying to deny using a racist term and that he was optimistic that if there had been an attempt at conciliation the matter between him and Mr Kachidza would have been amicably resolved. Mr Paterson further disputed the reasonableness of the sanction of dismissal, given the circumstances, and testified about the

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difficulties he had in finding employment given his profile and the depressed economic circumstances. At the time of his incident he was about to get R100 000 in the form of a bonus, but it was not paid out to him because of his dismissal. He contended that he was treated unfairly and that his dismissal was for ulterior purposes.

[16] The commissioner accepted Mr Kachidza's evidence as being true and dismissed contentions by Ms Petit that Mr Kachidza had become a hostile witness. The commissioner found that both Mr Kachidza and Mr Paterson had approached senior management, albeit separately and without each other's knowledge, to resolve the matter amicably, but their efforts, were thwarted by senior management who, instead informed Mr Paterson that Mr Kachidza did not want anything to do with him. The arbitrator found, in essence, that the reason for management's conduct in this regard was for ulterior purposes and that Mr Kachidza's evidence concerning what Mr Reinders told him, namely that Mr Paterson was going to be dismissed for other reasons, was credible. The commissioner accordingly found that if management did in fact want to dismiss Mr Paterson for other reasons they should have charged him accordingly. Furthermore, the commissioner accepted that given the circumstances, in particular Mr Paterson's apology and show of remorse, the sanction of dismissal was "*too harsh*". According to the commissioner, it was an isolated incident and it had not been shown that Mr Paterson had used the racist statement before.

[17] The commissioner accordingly concluded that the third respondent's dismissal was substantively unfair and found:

17.1 The reason for the termination of Mr Paterson's employment was unfair, invalid, unreasonable and "*not based solely*" on the appellant's "*commercial rationale and is simply capricious*";

17.2 The reason for the termination of Mr Paterson's services "*was not objectively established in a formal disciplinary hearing*";

17.3 The dismissal of Mr Paterson "*was effected without due regard* [for] *the code of good practice: dismissal which emphasises both procedural*

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and substantive fairness when affecting dismissal related to conduct and/or capacity";

17.4 Mr Paterson's dismissal "*does not comply with the provisions of section 188 of the Labour Relations Act 66 of 1995*".

[18] The commissioner noted Mr Paterson's desire not to be reinstated because of the acrimony prevailing in the workplace and that even in those circumstances he had a discretion to order reinstatement. The commissioner, however, decided to exercise his discretion in favour of awarding Mr Paterson compensation equivalent to four months' salary. Payment was ordered to be effected by means of a cheque to be collected by Mr Paterson from the appellant's premises within 14 days of the service of the award on the appellant.

[19] The appellant brought an application to review and set aside the commissioner's award in terms of section 145 of the Labour Relations Act 66 of 1995 ("*the LRA*"). Ms Petit, the deponent to the founding affidavit, alleged that the commissioner had committed multiple material errors and misdirections and that he failed to "*properly, rationally and justifiably apply his mind to the facts and/or law*" and that his award "*is not reasonable*", and his decisions were not decisions that "*a reasonable decision-maker would make*". It was further contended in the review, on behalf of the appellant, that the commissioner, in coming to the conclusion that the appellant dismissed Mr Paterson for other reasons, i.e. used the disciplinary hearing and the dismissal as an alternative for retrenchment, failed to take into account that Mr Paterson, at the time, had only been employed by the appellant for five months and would not have been entitled to a retrenchment package. It was submitted in that regard that if it had been the appellant's intention to retrench Mr Paterson, it could in those circumstances simply have retrenched him and not used dismissal as an alternative. It was further submitted that the commissioner did not take cognisance of the fact that Mr Kachidza had an ulterior motive in "*substantiating*" Mr Paterson's version rather than the appellant's version. In this regard, Mr Kachidza's personal dispute with the appellant was mentioned. It was further submitted that the commissioner had

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erred in not accepting that Mr Kachidza had turned into a hostile witness during the arbitration proceedings and that the commissioner had erred in not allowing the appellant to call Mr Reinders.

[20] Further grounds of review raised against the commissioner's award were the following. It was averred that the commissioner unreasonably accepted Mr Kachidza's testimony, namely that he was told by Mr Reinders that Mr Paterson was going to be dismissed for other reasons anyway; that the commissioner erred in multiple ways in his findings regarding the words that were uttered by Mr Paterson. In this regard, it was, in essence, alleged that the commissioner had erred in not finding that Mr Paterson had not been honest. It was also averred that the commissioner had erred in finding in the circumstances that the dismissal was "*too harsh*".

[21] The Labour Court dismissed all of these points and found that the commissioner's decision and conclusion were reasonable. With regard to the commissioner's refusal to permit Mr Reinders to be called, the Labour Court held that it did not find the commissioner's conclusion that Reinders' evidence would not take the appellant's case further "*so unreasonable as to make the entire award reviewable*". Regarding the commissioner's conclusions, including the conclusion regarding the harshness of the sanction of dismissal, the court *a quo* held that the "*award is comprehensive and well-reasoned. In coming to the conclusion that it did, he took into account the evidence of the complainant, Kachidza. In considering the question of sanction, [carefully considered the context and Paterson's subsequent conduct]. His conclusion is not so unreasonable that no reasonable Commissioner could reach a similar conclusion. It falls within the bounds of reasonableness. This is not a case such as that of Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp*[2] *where the employee said, in relation to black employees, 'los die kaffer – laat hom vrek'. The factors that Commissioner Tsabadi took into account clearly distinguish the facts of the case before him*." The Labour Court accordingly dismissed the review with costs.

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[2] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 498 (LAC).

[22] On appeal, it was submitted that the Labour Court erred in essence, in finding that the commissioner's decisions and findings were justifiable and/or reasonable. The same points of review that were argued in that court were repeated in heads of argument before this Court and it was submitted, in essence, that the court erred in not upholding them and in not reviewing and setting aside the commissioner's award.

[23] As regards the merits, the main submissions of the appellant, in the hearing before us, was directed, firstly, at the commissioner's acceptance of the evidence of Mr Kachidza in the circumstances and in particular at the commissioner's refusal to allow the appellant to call Mr Reinders as a witness. It was submitted that in so refusing, the commissioner committed a gross irregularity which was reviewable because it affected the outcome of the arbitration. The commissioner found, *inter alia*, that the appellant had dismissed Mr Paterson for other reasons, without the benefit of Mr Reinders' evidence and that in deciding on the compensation to be awarded to Mr Paterson, in *lieu* of reinstatement, the commissioner must have taken into account the evidence that Mr Paterson had been dismissed for other reasons.

[24] It was submitted on behalf of Mr Paterson that the commissioner's refusal to allow Mr Reinders to be called, had no material bearing on the outcome, because the commissioner had in fact come to his conclusion that the dismissal was substantively unfair on two bases. The first being that Mr Paterson had been dismissed for other reasons, and the second, that the sanction of dismissal was too harsh. The argument in this regard was that the second basis stood independently and was not linked to the issue of whether Mr Paterson had been dismissed for other reasons, which could, in turn, be linked to the evidence which the appellant intended Mr Reinders to give.

[25] It is now trite that an award of a commissioner would not be reviewed and set aside if it is one which a reasonable commissioner would have made.[3] In

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[3] See *Sidumo and Another v Rustenburg Platinum Mines and Others Ltd* 2008 (2) SA 24 (CC) (also reported in [2007] 12 BLLR 1097 (CC)). The *Sidumo* decision was followed and explained by the SCA in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (3) SA 493 (SCA) (also reported at [2009] 7 BLLR 619).

Herholdt v Nedbank Ltd,[4] the Supreme Court of Appeal, *per* Cachalia and Wallace JJA, summarised the position regarding the review of CCMA awards as follows*: 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable.*'

[26] I now return to the facts of this case. It is not entirely clear that Kachidza had become "*hostile*" since the hearing. In court proceedings a witness is regarded as hostile if he is "*not desirous of telling the truth to the court at the instance of the party calling him*".[5] The mere fact that the witness gives evidence that is not favourable to the party calling him does not make him a hostile witness. The party who is confronted with the situation where his own witness gives unfavourable evidence may apply to have that witness declared hostile in order to cross-examine him (This is usually done by putting to that witness a previous inconsistent statement and then trying to persuade the court to declare the witness hostile), and/or call other evidence to contradict the unfavourable evidence of that witness.[6]

[27] What is clear from an analysis of the proceedings in this case, is that Ms Petit did not follow trial procedure. When she was supposed to re-examine Mr Kachidza she, instead, accused him of becoming hostile and cross-examined him without first seeking permission to do so. She seemingly relied on her own recollection of what the witness said at the disciplinary hearing to try and impeach him and did not proceed to produce a record of those proceedings. So, effectively, while she alleged inconsistency, she never proved it. In my

[4] [2013] 11 BLLR 1074 (SCA) par 25 at 1084.
[5] *S v Steyn en Andere* 1987 (1) SA 353 (W) at 357G-H.
[6] See *The South African Law of Evidence* (2nd Edition) D T Zeffert and A P Paizes pages 901-902 and the cases cited there including *Moothoosamy v Murugan* 1919 (40) NLR 402.

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view, however, the question, whether Mr Kachidza should have been declared a hostile witness, is a "*red-herring*". What is clear is that Mr Kachidza gave evidence that was unfavourable to the appellant. The appellant would have been entitled to call evidence to contradict the unfavourable evidence.

[28] The commissioner did not challenge the appellant's entitlement to call Mr Reinders to contradict Mr Kachidza, but questioned the practicality of calling Mr Reinders in the circumstances. The commissioner's reasoning being that the calling of Mr Reinders would not advance the case of the appellant, since it would be the evidence of Mr Reinders against that of Mr Kachidza. The commissioner appears to have misconceived the enquiry, because of the nature of the test which he applied. The test which he applied was clearly speculative. The commissioner merely anticipated that it would be the word of one against the other (i.e. a kind of "*stalemate*" situation), but failed to take into account that there may have been a number of other possible outcomes if Mr Reinders had been allowed to be called to counter Mr Kachidza's unfavourable evidence. An obvious one is that Mr Reinders may have been believed on the points in issue, but not Mr Kachidza. In my view, the commissioner did not approach this aspect reasonably, since it was not possible to anticipate the outcome, without Mr Reinders having been called. I pointed out earlier that since Mr Kachidza gave evidence that was unfavourable to the appellant, it was entitled to call other evidence to contradict that unfavourable evidence. In the circumstances, the entitlement, to call Mr Reinders, trumped speculations about the practicality of allowing him to be called.

[29] Even though it appears from the commissioner's award that he did not specifically find that Mr Paterson had been dismissed by the appellant to obviate the necessity of retrenching him, the commissioner did find as a fact that Mr Paterson was dismissed for reasons other than those which formed the subject-matter of the charges at the disciplinary enquiry. It may be so that the commissioner also found that the sanction was in any event too harsh because of the circumstances, but in that regard the commissioner also erred in referring to the misconduct, that Mr Paterson had pleaded guilty to, as

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"*flimsy*". Reinders' evidence was clearly material to the first issue, namely, whether Mr Paterson had been dismissed for other reasons. The second basis, according to the argument of Mr Paterson's counsel, was independent of the first basis, but counsel had difficulty showing on the record that Mr Kachidza's testimony, namely that Mr Paterson was to be dismissed for other reasons, did not influence the commissioner's finding on the second basis. Counsel could also not explain what was "*flimsy*" about the misconduct that Paterson was found guilty of, and ascribed this to unfortunate language on the part of the commissioner.

[30] It is clear that in deciding on the compensation to be paid to Mr Paterson, who did not seek reinstatement, the commissioner took into account that Mr Paterson was dismissed for reasons other than his unfortunate use of racist language. The outcome, namely, the commissioner's findings on substantive fairness and compensation, might have been different if the appellant had been allowed to call Reinders and Reinders had contradicted the unfavourable evidence of Mr Kadhidza.

[31] In my view, a reasonable commissioner would not have disallowed the calling of Mr Reinders. The disallowance is an irregularity which is material since it clearly influenced the outcome of the arbitration. The court *a quo* was thus wrong in its finding and conclusion that the commissioner's decisions, conclusions and award were of a kind that a reasonable commissioner could have come to, or have made. Both parties in their submissions conceded that if the award were to be set aside, because of the commissioner's refusal to allow the calling of Mr Reinders, the matter ought to be referred back to the CCMA for hearing to enable the appellant to produce the necessary evidence to contradict the unfavourable evidence given by Mr Kadchiza. In my view, the irregularity is of a kind that vitiates the entire award and fairness calls for a hearing *de novo*.

[32] As regards costs, the appellant has asked for costs in the event of the appeal succeeding. Mr Paterson's counsel has submitted that even if the appeal succeeds there should be no costs order. In my view, given all the facts and

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circumstances, in fairness and in law, no costs order should be made in respect of the appeal or the review.

[33] In the result the following is ordered:

1. The late lodging of the appeal is condoned.

2. The appeal is upheld and no order as to costs is made.

3. The Labour Court's order, dismissing the review application, is set aside and is substituted with the following order:

"*1. The arbitration award of the second respondent under Case No GATW 6055.09, dated 30 August 2009 and issued on 21 September 2009, is reviewed and set aside.*

2. The matter is referred back to the Commission for Conciliation, Mediation and Arbitration for a hearing de novo before a different Commissioner.

3. No costs order is made."

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Coppin AJA

I agree:

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Tlaletsi DJP

I agree:

____

Ndlovu JA

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APPEARANCES:

FOR THE APPELLANT	Adv R G Bowles
	Instructed by Gerhard Botha and Partners Inc
FOR THE RESPONDENT	Adv W J Hutchinson
	Instructed by Fluxmans Inc

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