REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 2013/42

IN THE APPEAL OF:

NATIONAL UNION OF MINEWORKERS,

ON BEHALF OF SZD BOTSANE **Appellant**

and

ANGLO PLATINUM MINE (RUSTENBURG SECTION) **Respondent**

Heard: **18 February 2014**

Delivered: **15 May 2014**

Summary: Principles about not introducing new issues on appeal restated- Review of arbitration award- employee dismissed for gross negligence- employees in managerial position expected to show a certain degree of judgment in the exercise of their duties- employee failing to do so- employee grossly negligent in carrying his duties- approach to complaints of inconsistency in discipline stated - arbitrator upholding dismissal- arbitrator's award reasonable- Labour Court judgment upheld- appeal dismissed with costs

Coram: Waglay JP, Molemela and Sutherland AJJA

JUDGMENT

SUTHERLAND AJA:

Introduction

[1] The appellant was dismissed. The dismissal was arbitrated and held to be fair. An application to review the award failed. This appeal is against the review court's judgment upholding the award. The allegations are that the arbitrator, in several respects, committed irregularities and failed to apply his mind to the true issues. The question before this Court is whether the review court was wrong to have concluded that the award was one that a reasonable arbitrator could make. (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), *Heroldt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)*; Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

[2] On appeal, the judgment and award were challenged on only two grounds that were pressed in argument. First, whether a case, materially different to the case with which he had been charged with misconduct was presented in the arbitration and illegitimately entertained; and second, whether the sanction of dismissal was inappropriate because sanctions for the alleged misconduct were inconsistently applied to all involved in the acts of misconduct.

[3] The allegation of misconduct was formulated thus:

> 'Gross negligence–in that you failed to comply with the S and SD initiative of `the company, relating to safety operations of battery locomotives (Locos).'

He was also alleged to have been dishonest, but on that charge, no award was made and it has fallen away. The cryptic allusion to 'S & SD' refers to 'safety and safety devices'. Despite a complaint that the full reach of this 'initiative' was not revealed, there is no need to plumb its potential depths. The gravamen of the charges were plain to all; ie the failure to secure completion of the fitment of proximity motion sensors to the locos in the Brakspruit shaft over which the appellant exercised managerial control as the Resident Engineer. The appellant described himself as the Managing Engineer. He took charge in about September 2006. In October 2006, he was formally appointed in terms of section 65(7) of the Mine Health and Safety Act 29 of 1996, and Regulation 2.13.1 of schedule 4, promulgated in terms of that

Act, which rendered him statutorily responsible to maintain safety as regulated under the statute, more especially as regards all the machinery in the mine under his control. Prior to his taking this position, the appellant says he had 15 years of experience.

[4] As the Resident Engineer, he was the manager in control of two shafts. His immediate superior was the Mine Production Manager, but ancillary thereto, in respect of engineering matters involving machinery, he was accountable to the Engineering Manager, Hough. Under the appellant were two shaft engineers, and then down the hierarchy, four foremen, about 35 - 40 artisans, and the crews of mineworkers of about 2500 people in total. On each level of the mine there was a workshop where maintenance of the machinery, including the locos, was performed.

[5] The mine used battery operated locos on each level to convey ore. There were more than one loco on each level. Collisions often occurred and workers were killed. In late 2006, the Management decided to address the risk of collisions, spurred on by what was called 'a spate of fatalities'. The means chosen was the fitting of the proximity sensors which would be triggered by movement up to 70 metres away and flash a light to alert the drivers. It was common cause that the appellant was responsible to achieve the fitment to all the locos in his mine. The process commenced from about December 2006, the exact date not being stated, probably because no record appears to have been made. When a collision, which killed one man, occurred on 5 May 2007, was investigated, it was revealed that four locos were non-compliant. One consequence was the disciplining of the appellant for neglect, as formulated in the charge, cited above.

[6] The arbitrator found the appellant guilty on his own version. The discrepancies between his evidence and that of the Engineering Manager Hough, which were few, are thus unnecessary to explore.

<u>The basic facts relevant to the allegation of gross negligence</u>

[7] The evidence, though not unequivocal, suggests that the instruction to the appellant to deal with a programme of fitment took place in November 2006,

around the time an email was sent by Hough to the Mine General Manager and copied to the appellant. The email set out a programme of fitment from December 2006 to May 2007. Hough, nevertheless, maintained that the deadline was 31 January. However, the issue of a so-called deadline is a distraction and can be ignored for reasons which are addressed later on in this judgment.

[8] The progress of fitment is revealed in the evidence, principally, by the exchanges that took place between Hough and the appellant about the matter.

[9] Apparently, Hough frequently asked about progress on the fitment programme, along with queries about other safety matters. One significant enquiry was in February 2007; a precise date was not stated. Hough telephoned the appellant whilst the appellant was in a meeting with his subordinate engineers and foremen. Hough asked about progress, the previous report to him having been that about six locos were still to be fitted. The appellant did not know if any further progress had been made. He then asked the assembled persons what was the status quo. The shaft engineer, Goitse Tshwabi, said he did not know. They then asked the foremen who were present. It is not obvious from the evidence that all the foremen were present. The 'foremen' gave the assurance that all had been fitted. The appellant relayed that to Hough.

[10] In March, again on a date unstated by the appellant, but is strongly suggested as being about 11 March, Hough and the appellant were underground in the Brakspruit shaft, ostensibly to do spot checks on several matters, and came across two locos that were not fitted. The appellant instructed the engineer to get it done at once. Later, he got an oral assurance that the two locos specified were now fitted. No reference is made to any further enquiry as to why wrong information was furnished to the appellant. No call was made for a general check and confirmation that there were no other locos unfitted. Hough made a report on 12 March to the General Management, representing that the programme was completed and copied the appellant who confirmed he got a

copy. Not then, nor later, did the appellant ever contradict the impression that the programme was completed in any report to Hough.

[11] On a Sunday in March, date unknown (the appellant says about 2-3 weeks later, but this seems to be a wild guess), the appellant went underground with Tshwabi and he came across yet another unfitted loco. He says he was enraged. He cautioned Tshwabi about the failure and says he threatened dismissal. Later he got an oral assurance that the loco he had spotted in an unfitted state was now fitted. No other verification exercise was ordered. No updated report was furnished to Hough.

[12] At about this time (it is to be inferred) the appellant says the shaft engineer, Tshwabi, told him that the operators were meddling with the light fittings of the sensors because its flashing was an irritant. Notwithstanding this explanation for defective sensors, the appellant does not say he did anything about addressing the abuse which was self-evidently undermining the safety system.

[13] The appellant says he, by then, lacked confidence in the information being transmitted to him by his subordinates. On or about 13 April he spoke to one Tsetse, a Mechanical foreman. Tsetse was to do several checks on mechanical aspects of machinery, including the locos. In principle, the electrical foreman and his staff were responsible for the sensors. However, owing to the lack of confidence alluded to, he asked that Tsetse checked on the sensors too. On the Saturday following this request Tsetse called the appellant. He relayed that his boilermaker artisans told him that 5-6 locos were unfitted. He asked which ones but that detail was not known. He asked for amplification from Tsetse who said he would try. However, Tsetse was from the next Monday off the mine on a training course.

[14] After this, at a time unstated, the appellant confronted Van der Walt, the electrical foreman with the allegation emanating from Tsetse. Van der Walt was adamant that every loco was fitted. The appellant says he 'believed' Van der Walt, on the basis that it was likely that he would know better than a mechanical foreman what was happening about the electrical aspects of the

machinery. The appellant says also, he was keen not to cause conflict and this influenced his decision to 'believe' Van der Walt.

[15] In cross-examination, the appellant claimed to have especially put the shaft engineer and foreman on night shift to attend to getting the locos into optimal operating condition and that this exercise included the fitting of sensors. Unhappily no indication is offered about when this occurred in the period between February and May. Nor are the fruits of that exercise divulged.

[16] After speaking to Van der Walt, nothing further was done, the appellant having adopted the view that the programme was complete. No attention was given to the allegations of the abuse of the equipment, alluded to above, and whether it remained ongoing. Time passed.

[17] Then came the collision of 7 May. The post-accident investigation produced for the first time, from an engineer, Steynberg, a schedule identifying every loco and a verification of whether it was fitted and operational. Of the 42 locos listed, three had not been fitted and one was in need of a replacement controller. It is assumed the list excludes the two locos involved in the collision, one of which was illegitimately in use and the other, though fitted, had a defective sensor light which defeated the purpose of the sensor alert system.

The nature of the neglect

[18] The most prominent unanswered question in the account described above is why and how could the appellant think it was prudent to have preferred the protestations of Van der Walt over the reports from Tsetse when he was already aware that the oral feedback he got from his subordinates was unreliable and had been previously proven to be blatantly false? Second, why did he do nothing to address the abuse of the equipment that rendered it dysfunctional?

[19] The appellant confessed to being ignorant of the number of locomotives and on how many levels they operated, of being uninformed about the status of the receipt of the sensors, and also confessed to not keeping a log of the

locos to enable him to monitor which were fitted and which were not. He says he concerned himself solely with what he called 'quantities' using a spreadsheet Hough gave him. Further, as to the steps he took to inform himself, he was quite content to resort to random ad hoc oral and informal reports from his subordinates. He justified his conduct on the basis that Hough communicated with him on that footing. He claimed that this was the 'system' he used which was in keeping with the 'system' in use by the mine. Somewhat irreconcilable with this assertion, is his acknowledgment of the extensive record keeping system for maintenance purposes of the machinery and equipment under his control.

[20] The appellant's stance in denying culpability for gross negligence betrays a lack of grasp about the nature of his job. He was a manager and was responsible *to manage* the programme of fitment. To this end, ie the management of the programme, he failed to properly apply his mind. Despite the acknowledgement in his testimony that he was required to use judgment, he failed to do so. An inappropriate combination of ignorance of the hard facts that he needed to manage effectively and an undue deference to feedback he knew to be unreliable demonstrates his lack of judgment. He conducted himself like a functionary not as a manager. He misconstrued the practice of the reliance by one manager on another manager for assurances, given orally and informally, and upon which further decisions are made. Such a practice occurs within a particular context of a managerial ethos built upon a high sense of accountability and use of discretionary judgment. That sort of ethos does not exist in respect of a manager holding non-managerial personnel to account; it is wrong to ignore the distinction. His timidity exhibited in his exchange with Van der Walt hints at an unwillingness to assert his authority, a critical element of his function as a manager.

[21] The standard of care the appellant was obliged to meet was high because he was responsible for the safety of the workers underground. It is not obvious that he really digested the implications of that responsibility. The case for the appellant included a contention that the statutory duties of the appellant had nothing to do with the allegations of misconduct and it was unfair to make

findings on whether he fulfilled them. This contention is an exaggeration, inspired, it is fair to note, in part by the superfluous and exaggerated allusions to the statutory duties in the reasons offered by the arbitrator. In truth, however, the real significance of the statutory duties is limited to an understanding of the standards expected of a resident engineer, a dimension of his function which has a direct bearing on the importance that the appellant ought to have attached to the fitment of sensors quickly and effectively, and ultimately to his use of judgment to achieve that end.

[22] A vain effort was made to suggest that if the programme was due to be completed only in May, the incomplete status on 5 May exonerated the appellant from the charge of gross negligence. This contention misses the point of the charge. The evidence of how the appellant mismanaged the programme, regardless of whether the deadline remained pending, is the gravamen of the charge. Moreover, the misrepresentations, albeit *bona fide*, to Hough that the programme was complete and his own 'belief,' based as it was on the unjustifiable premise that the programme was complete, form the foundation of the gross negligence proven against him. Also, it was never his case that he was still working towards completion on 5 May 2007.

<u>The notion of a different case being presented</u>

[23] The generic contention is advanced, correctly in our view, that at a hearing into misconduct before the CCMA, the employer is limited to defending its decision to dismiss upon the grounds it relied upon to do so, and may not introduce a new charge not initially relied upon to justify the dismissal. If the employer discovers a basis to dismiss an employee not known to it when it dismissed the employee, it must convene a hearing into that charge afresh, not tack it onto any proceedings in defence of the initial dismissal. (Cf: *Mndaweni v JD group t/a Bradlows* (1998) 19 ILJ 1628 (LC) at 1631-1632) This is an example of an important difference between the common law, where the opposite is true, and modern Labour law. The only question that arises here is whether as a fact the line was crossed.

[24] The contention that a 'materially different case' to that with which the appellant had been charged was presented before the arbitrator and that it was on that different case that he was found guilty is mistaken. The notion rests on the criticism levelled at the appellant that he failed to put 'systems' in place to manage the programme. Undeserved emphasis has been placed on this aspect of the evidence and the supposed significance of the terminology of 'systems' has been much exaggerated. What the appellant was required to do was to use common sense, commensurate with the judgment expected of a person of managerial rank; ie to conduct himself as would the proverbial reasonable man in the position of the Resident Engineer, mandated to manage the fitment programme. This implies that he ought to have informed himself of the relevant facts, as alluded to above, which the evidence discloses he remained ignorant, and to have troubled himself to track the progress of fitment in a meaningful way, of his own choosing, which could empower him to hold his subordinates to account for effective delivery. To flatter this with the label of 'a system' in common parlance is, in truth, to say very little indeed. The detailed criticism of the appellant did not stray from the charges and no unfairness resulted from the adducing of evidence about the general monitoring systems in place or from the criticism that by the application of managerial judgment he would have enabled himself to do precisely what he failed to do; ie *effectively manage* the fitment programme. The evidence of a shaft Engineer, Steynberg, who was tasked with compiling an inventory after the 5 May collision that showed every loco, it location and its status, an exercise performed within a day or so, illustrated how simple the effective management of the programme could be in practice. That testimony served merely as an example of what could be done, not a prescription.

The notion of inconsistency in discipline

[25] The idea of inconsistency in employee discipline derives from the notion that it is unfair that like are like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.

[26] It has application in two respects. Mainly, it is a recognition of the unfairness of the condemnation of one person for genuine misconduct when another indistinguishable case of misconduct by another person is condoned. The second application is the recognition of the unfairness that results when disparate sanctions are meted out for indistinguishable misconduct to different persons.

[27] In this case, the flaw in the argument that alleges the presence of inconsistency is the failure to recognise and digest that the appellant was alone responsible, within his area of managerial control, *to manage* the fitment programme.

[28] As regards the dereliction of duties by his subordinates, if any acts of misconduct were to be proven against any particular individual, it remains plain that they had no *managerial role* and it is illogical to draw a comparison as contemplated by the factor of inconsistency. Moreover, it would be a paradox if the appellant could legitimately invoke the failure of the very subordinates he was accountable to manage effectively to exonerate or mitigate his managerial neglect by managing them ineffectively. There is no room to contemplate the factor of inconsistency of discipline by invoking the probability that no subordinates were not disciplined (or that it is unknown whether they were disciplined) for their infractions. The reason for this is that if it is assumed that a cogent concrete basis could be put up to identify which persons acted irresponsibly in relation to their specific functions and responsibilities, it would still not be a failure by them to manage the fitment programme and be conduct comparable to the misconduct committed by the appellant.

[29] As regards the idea of inconsistency as between the appellant and his superiors, a similar absence of a proper basis for comparison exists. On the evidence adduced, the Production Manager, Horn, to whom the appellant reported is not shown to have been responsible for the fitment programme, and indeed, the reporting accountability of the appellant for the programme was plainly to the Engineering Manager, Hough, the exercise falling into the technical specialism of which Hough was in overall charge. Hough testified.

Nothing adduced in his testimony points to a comparable culpability for the mandate that the appellant correctly concedes was his, legitimately delegated to him by Hough, and to whom he was liable to give reports, the content of which the appellant was content to compose from ad hoc, relayed feedbacks from persons who he knew to be unreliable.

[30] As regards the ruling given by the arbitrator which excluded the notion of inconsistency from the hearing, no cogent criticism can be sustained.

[31] The parties had in preparation for the hearing met and conferred on the scope of the dispute to be put to the arbitrator. A Minute was produced. Significantly, the Minute is silent about the issue of inconsistency. The record shows that at the arbitration it was raised only after the appellant had testified and after Hough had testified for the respondent and been cross-examined. The arbitrator refused to 'entertain' an application to introduce it. What the arbitrator meant by this phrase is addressed elsewhere in this judgment. The respondent objected to the issue being introduced. It alleged prejudice in as much as that was not a defence covered by the terms of the pre-hearing conference, as evidenced by the Minute, and no preparation had been devoted to addressing any evidence pertinent to such case. The arbitrator's refusal to consider the issue was premised on this perspective of prejudice.

[32] When the award upheld the dismissal to be fair, the review application was initiated in the customary fashion upon a founding affidavit deposed to by the appellant. That affidavit is devoted to articulating a thesis that the dismissal was unfair because the appellant was found guilty of misconduct that was not covered by the charge put to him. The notion of inconsistency is glaringly absent. Only a year later was a supplementary founding affidavit put up containing a number of additional contentions, among which was a complaint that the appellant was the only person disciplined. The answering affidavit, predictably, alleged that this notion was not an issue initially put up for adjudication.

[33] In the appeal proceedings against the review court's dismissal of the review, the notice of appeal is again spectacularly bereft of any allusion to

'inconsistency'. At the appeal hearing, counsel for the appellant orally raised it and that theme became the main thesis of the appellant's case.

[34] This survey of the progress of affairs illustrates the promotion of the notion of inconsistency from a peripheral point to centre stage. Two aspects warrant attention. First, did the arbitrator deal with the application to introduce the issue appropriately, and secondly, is there a foundation to advance the argument.

[35] The passages in the record and the ruling, made at that time and re-iterated in the award contain the rather odd expression by the arbitrator that he refused to 'entertain the application'. A literal reading of this remark might suggest he refused to hear the application. This would be incorrect. Mr Hulley, for the appellant in the hearing, [644] plainly and fairly, stated that he sought to 'include' a further ground of unfairness, ie "...not all the workers were dealt with in the same way", to which the arbitrator appended the label of 'inconsistency'. Mr Hulley disavowed an intention to amend anything. He specifically acknowledged that the pre-hearing conference Minute did not make provision for the ventilation of such an issue. The application to introduce the new issue was, in this way, presented to the arbitrator. Mr Short for the respondent, objected on three grounds; first, it was late in the proceedings after the main witnesses for both sides had completed their testimony, second, the introduction of a new ground violated the agreement struck to define the issues as evidenced in the pre-hearing minute, upon which footing the management had prepared its case to rebut the complaints alleged by the appellant and therefore had neither prepared on such a topic nor had cross-examined the appellant on such an issue when he had testified, and third, there was 'obvious prejudice' to the respondent. A unilateral departure from agreement as to the issue as recorded in such a minute is not permissible.(See: *NUMSA v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC) at [89]; *Filta- Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614 B – D)

[36] In response, Mr Hulley made reference to some remarks indeed made in evidence by the appellant about being singled out. He addressed the

arbitrator, on the premise of those remark, as to why the introduction of the new ground was appropriate. There was, however, no hint that further evidence was to be adduced to amplify what the appellant had stated, and although not expressly mentioned in this exchange, no further evidence was to be adduced to amplify the remarks made by Hough in evidence, who had said that he was unaware whether any other persons had been disciplined, his ignorance stemming from the fact that he had been transferred soon after the episode and was ignorant of subsequent events at Brakspruit.

[37] The arbitrator, thereupon, considered the matter overnight and refused to allow the introduction of an 'inconsistency' ground. What he intended is plain: he refused the application. It would be short-sighted to interpret the vocabulary of lay arbitrators literally. The rationale given by the arbitrator was that it would be unfair to the respondent. (See: [R649-653] and the Award:746 – 747]). He bolstered his finding by alluding in the award to the main focus of the enquiry being on the appellant's 'legal obligations' and that the other allegedly culpable or potentially culpable persons, ie all subordinates, were in roles dissimilar to the appellant in that regard.

[38] In my view the arbitrator is not subject to cogent criticism for refusing to expand the scope of the issues from that delineated in the pre –hearing minute. The matter might have been dealt with in a tidier fashion, but the key consideration remains whether a fair outcome was produced by a fair process. The arbitrator's decision was reasonable.

[39] Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalised allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush–like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See: *SACCAWUand Others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at [29]; also see*: Masubelele v Public*

Health and Social Development Bargaining Council and Others [2013] ZALCJHB JR 2008/1151] which contains an extensive survey of the case law about the idea of inconsistency in employee discipline.)

The Review Court's decision

[40] Although it might be observed that the arbitrator tended at times in his award to over-elaborate the rationale in support of the conclusions, the review court, wholly appropriately, concluded that the arbitrator grasped that the misconduct with which the appellant was charged was his neglect in managing the fitment programme effectively. The allusions to the statutory duties were pertinent to the standard of performance to be expected from the appellant. The evidence about systems was undeserving of the controversy it attracted and was pertinent to the how and why of the appellant's performance as a person of managerial rank.

[41] As addressed more fully elsewhere, the conclusion that the appellant was grossly negligent was manifestly established. The arbitrator's finding was therefore indeed one to which a reasonable arbitrator could come.

Sanction

[42] Mr Van der Riet pressed on us that, upon a holistic appreciation of the facts and circumstances, dismissal was too harsh. Weight was due, so he contended, to the short time the appellant had been in charge, his *bona fides*, and most importantly, that on the probabilities, but for the fatal accident of 5 May, for which he was not culpable, the fitment programme would have been quietly completed, eventually, and no discipline would have occurred. Indeed, it was submitted that the appellant was a scapegoat to alleviate the embarrassment of the respondent in the wake of the accident.

[43] In our view, these are points that, generically, would have warranted consideration. It is also perhaps appropriate to remark that the several revelations which emerge from the evidence, not necessarily directly pertinent to the culpability of the appellant, point in the direction of the Management of this mine as having much to be embarrassed about. This perspective derives

from not only the dereliction evidenced by the conduct of the appellant himself, but from the fact that a fatal accident occurred when two locos collided when the one loco had not been commissioned for service and its driver was uncertified as competent to have control of it.

[44] However, if victimisation of this nature was indeed the appellant's case it was deftly obscured at all times when it could appropriately have been advanced. The pleas *ad misericordium* alluded in his testimony remain just that, rather than the laying of a platform to present an argument.

[45] On the debit side, moreover, is the manifest seriousness of slackness in relation to an important safety measure. The fact that the measure was introduced in the wake of a 'spate' of deaths is not a fortuitous coincidence. It ought to have served to elevate the sense of urgency with which to complete the programme and to do so effectively. Also, the appellant's purported inability to appreciate his culpability is to be weighed in whether dismissal is appropriate because it points to his inadequate appreciation of the function of the job. His regret at the ineffectiveness of his efforts is axiomatic and adds little to the conspectus of considerations.

[46] However, perhaps the most important factor to consider by this Court is that the notice of appeal did not include the contention that the sanction was too harsh, and nor did the written heads of argument mention it. Moreover, the review application never raised it either. It was raised orally only during the argument on appeal. An issue cannot be properly the subject of an appeal against a dismissal of the review if the issue had not been put to that review court as a ground of review. Thus, even if a contention that, on a balance, the sanction was too harsh, had enjoyed merit, which, in our view, it cannot, it is not open to the court of appeal to entertain it.

[47] The review court ordered costs against the appellant and it is appropriate that a similar order be made on appeal.

Order

[48] The appeal is dismissed with costs.

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Sutherland AJA

I agree

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Waglay JP

I agree

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Molemela AJA

APPEARANCES:

FOR THE APPELLANT:	Adv J Van der Riet SC
	Instructed by K D Maimane Inc
	Ref Mr Maimane.
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