IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA07/15

In the matter between:

NTSHATSHELI NOGCANTSI **Appellant**

and

MNQUMA LOCAL MUNICIPALITY **First Respondent**

MALUSI MBULI NO **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Third Respondent**

Coram: Coppin *et* Landman JJA, Phatshoane AJA

Heard: **13 September 2016**

Delivered: **22 November 2016**

Summary: **Review of arbitration award – employee's confirmation of employment subject to the outcome of the vetting exercise – the vetting outcome negative for the employee – employer invoking the automatic termination clause and terminating employee's contract of employment. Arbitrator finding that employee failing to prove the existence of a dismissal – Appeal – arbitrator seized with a dismissal case and not with a jurisdiction issue. Arbitrator entitled to determine the merits of the case. *Barnard* and *Mampuele* distinguished – employee not dismissed as a result of an act by the employer – it is the fulfilment of the resolution condition that triggered the**

termi nation clause – automatic termination clause consonant with the LRA and not precluding the employee to exercise his rights. Employee freely agreed to the vetting exercise. Appeal dismissed with costs.

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Van Niekerk J) in which the appellant's application to review and set aside an arbitration award issued by the second respondent ("*the arbitrator*"), acting under the auspices of the third respondent, was dismissed with costs.

[2] The arbitrator had found that the appellant had failed to prove a dismissal as required in terms of section 192(1) of the Labour Relations Act No 66 of 1995 ("*the LRA*") and that the appellant was, accordingly, not entitled to the relief he claimed, namely, reinstatement and further relief. The Labour Court confirmed the arbitrator's award.

[3] The appellant submits that the arbitrator was wrong and that the court *a quo* erred in dismissing his application for review.

[4] The first respondent ("*the municipality*") advertised two positions of close protection officer to the municipal manager, in the municipal manager's office, in a local newspaper. On 8 January 2014, the appellant applied for one of those posts. He was duly invited to an interview and interviewed.

[5] On 19 February 2016, the appellant accepted in writing the offer that was conveyed to him by the municipality in an appointment letter dated 31 January 2014. In terms of this consequent written agreement, he was appointed to the position of close protection officer of the municipal manager in the municipal manager's office for a fixed term – effective from 3 February 2014 to 3 February 2018. In terms of clause 1.1 of the agreement, his appointment was "*subject to* [a] *vetting and screening process*" the municipality was conducting

at the time and, in this regard, it was provided that "*should the revealed outcomes become negative your contract will be automatically terminated*".

[6] Of some further relevance, the agreement provided that it was subject to a probation period of six months from the date of his appointment whereafter it was to be confirmed depending on "*satisfactory services*" being rendered.

[7] It is common cause, *inter alia,* that by letter dated 11 March 2014, the municipal manager, on behalf of the municipality, informed the appellant, *inter alia,* as follows: that his appointment was subject to the vetting and screening process conducted by the municipality and that the outcome of that process revealed negative information about the appellant and that, consequently, his employment was terminated with immediate effect as contemplated in clause 1.1 of the appointment letter (i.e. the agreement).

[8] The letter further mentioned that it was regrettable that the appellant did not disclose the negative information and that, on its own, "*displays dishonesty*". It went on to state that the termination was effective from the date the appellant received the letter and that the appellant was expected to vacate the municipal premises.

[9] It is further common cause and not disputed that the negative information referred to was information provided to the first respondent by the South African Police Services ("*SAPS*"), where the appellant was previously employed. This was contained in a letter dated 10 March 2014 and written by the Station Commander of the SAPS at Tabankulu, Colonel T E Nomfazi, to the municipality.

[10] The letter from the SAPS is headed "*Pending cases against: Mr N Nogcantsi: Tabankulu*". The body of the letter reads as follows:

> '*1. This serves to inform your office that there is a pending case against the above the ex-member of the SAPS which occurred on the 27/7/2012 at Mt Frere.*
>
> *Mt Frere Cas 193/07/2012 refers, which reflects the following charges:*

(i) Defeating the ends of justice.

(ii) Interfering with the police while on duty.

(iii) Attempted murder.

(a) Mt Frere Cas 228/6/2013 – GBH.

(b) Tabankulu Cas 23/5/2010 – Attempted murder.

(c) Tabankulu Cas 127/7/2010 – Attempted murder.

3. All the above cited cases are still pending at court.

4. As a result of departmental case which emanated from Mt Frere Case 193/7/2013 he was found guilty and dismissed on the 26-07-2012 from the SAPS, pending his appeal from our head office."

[11] It is common cause and not disputed that these facts were not disclosed by the appellant to the first respondent. The appellant to date has not proffered a version concerning the charges and information provided by Colonel Nomfazi, although he complains that he had no opportunity to do so. However, that aspect will be considered in more detail later in this judgment.

[12] It is further common cause that the appellant referred a dispute to the third respondent. Arbitration followed an unsuccessful conciliation. The appellant contended in his written referral to the third respondent that he was dismissed and that his dismissal was both procedurally and substantively unfair. He contended that it was procedurally unfair because he was not informed of the reason for his dismissal and that he was dismissed with immediate effect. He also contended that it was substantively unfair because he had disclosed "*all*" that he was obliged to disclose during the interview.

[13] The arbitration hearing took place on or about 23 October 2014 and the arbitrator submitted his award on 4 November 2014. The arbitrator reasoned and found, *inter alia,* as follows in his award (the appellant is referred in the award as "*the applicant*"):

'*42. It is clear and not disputed by the applicant that clause 1.1 of his contract of employment is applicable and binding on him. This fact is evident on the contract that has been signed between the applicant and the respondent and the subsequent binding pre-arbitration minute signed by both parties.*

43. It is also not disputed that the applicant was subjected to a vetting and screening process and the results of that process were negative. Clause 1.1 clearly and unambiguously states that should the results of the vetting and screening process be negative, the applicant's contract will be automatically terminated.

44. The effect of the negative outcome of the applicant's vetting and screening process rendered his contract of employment null and void and that the applicant's contract of employment had to terminate automatically through operation of law.

45. This means that the applicant was not dismissed by the respondent but his services had to terminate automatically through operation of law.

46. The applicant therefore has failed to discharge his onus to prove that he was dismissed by the respondent in terms of section 192(1) of the Act.

47. In the circumstances I therefore make the following award:

AWARD

48. The applicant has failed to prove an existence of dismissal by the respondent.

49. The applicant is therefore not entitled to any relief.

50. I make no order as to costs.'

[14] Unhappy with the award of the arbitrator, the appellant instituted review proceedings in the court *a quo*. In his review application, the appellant averred as follows, under the heading "*Grounds of review*":

'*20. Given that the Arbitrator in essence found that he had no jurisdiction to entertain the merits of my unfair dismissal claim (he found that there was*

no dismissal at all), I am advised that because jurisdiction is something which must be established objectively the test on review is simply whether the Arbitrator correctly found that he was not possessed of the necessary jurisdiction to entertain the merits of my claim.

21. I accordingly aver that the Arbitrator incorrectly concluded that I was not dismissed and that the bargaining council lacked jurisdiction to entertain the fairness or otherwise of my dismissal.

22. Insofar as it may be necessary to do so I aver, in the alternative, that the Arbitrator's conclusion that I was not dismissed was, in any event, a conclusion to which no reasonable decision maker could have come.

23. I submit that the Arbitrator incorrectly concluded that I was not when in truth I was dismissed.

24. I submit that having regard to the evidence placed before the Arbitrator and in particular the evidence by letter dated 11 March 2014 (attached hereto and marked page 22.).

25. From the said letter it is clear that:

25.1 I was dismissed as close protection officer.

25.2 My contract was automatically terminated.

25.3 My termination was effective from receipt of this letter.

26. Furthermore, the Arbitrator misdirected himself in not attaching any or sufficient weight to the stated case that my dismissal had, in fact, taken place.

27. From the stated case the following is apparent:

27.1 That my services were terminated (paragraph 11).

27.2 The reasons for the termination were outlined (paragraph 14).

27.3 I was dismissed without being afforded a pre-dismissal hearing (paragraph 15).

27.4 I was dismissed without having committed any misconduct or an account of wrongdoing on my part (paragraph 16).

27.5 I filed an application with the bargaining council to challenge the fairness of my dismissal (paragraph 19).

27.6 My services were automatically and immediately terminated (paragraph 26).

28. The Arbitrator in effect, incorrectly found that parties can contract out of their right to a fair dismissal.

29. In the last regard the Arbitrator made a material error in that he failed to consider parties' dispute according to the stated case.

30. I respectfully submit that given the findings and award made by the Arbitrator, it is incorrect in relation thereto for the Arbitrator not to have concluded that my dismissal was established.

31. For the reasons set out above I submit that the award issued by the second and third respondent falls to be reviewed and set aside.'

[15] The court *a quo* concluded as follows:

'[8] I am not persuaded that the arbitrator was incorrect in concluding that the applicant had failed to establish the existence of a dismissal. The authorities on which the applicant relies, including SA Post Office v Mampuele (2009) 30 ILJ 664 (LC); (2001) 31 ILJ 2051 (LAC), establish the proposition, in general terms, that parties to an employment contract cannot contract out of the protection against unfair dismissal. In doing so, the courts have relied on s 5(2)(b) and s 5(4) of the LRA. In Mampuele, that principle was applied in circumstances where the employment contract provided for an automatic termination of employment in the event that the employee was removed, for any reason, as director of the company. In Mahlamu v CCMA and Others (2011) 32 ILJ 1122 (LC) the Labour Court had reached a similar conclusion, on the same basis, in respect of a contract that provided for automatic termination when the client of a labour broker (the employer) no longer required the services of the employee for any reason.

[9] In Mahlamu, the court qualified the approach it had established and said the following:…

[10] In my view the present instance is not one that falls into the category of the unacceptable. To provide, in the contract of employment of a security officer, that his appointment is conditional on a positive vetting and that the contract will terminate automatically should the vetting not be positive, does not serve to deprive an employee of the right to security of employment in the same sense as the examples cited above. In the present instance, the applicant agreed to the terms of the contract, and did not dispute that he understood that should he not be positively vetted, his employment contract would terminate. The vetting process was not in the hands or control of his employer – the letter listing the pending charges against the applicant and the fact of his dismissal was generated by the SAPS. The case is therefore not one like Mampuele, where the minister as shareholder took a decision to remove Mampuele as a director knowing full well that the clause in question providing for automatic termination would be triggered. The present instance is not unlike one where a clause in an employment contract provides that a person engaged as an airline pilot must produce proof of a pilot's licence, or a chauffeur proof of an unqualified driver's licence, failing which the contract will terminate. I am unaware of any decision to the effect that such provisions, where the condition is not met, deprive the employee of the right to security of employment.

[11] For these reasons I am not persuaded that the Commissioner's finding was incorrect. The application stands to be dismissed. Finally in relation to costs there is no reason having regard to the interest of the law and fairness, why costs should not follow the result.'

[16] The court *a quo* seemingly accepted the parties' agreement that the approach that should be applied is that referred to in *S A Rugby Players Association v S A Rugby (Pty) Ltd and Others*[1] and it summarised that approach as follows:

'*The reasonableness of the arbitrator's award is not in issue – the court must establish from the record whether there existed facts which would serve to confer jurisdiction on the arbitrator.'*

The court *a quo* expressed the view that this approach has been applied in at least two subsequent decisions by this Court. In argument before us, the

[1] (2008) 29 ILJ 2218 (LAC).

appellant's counsel seemingly persisted with the point that the arbitrator's award in effect was a ruling on jurisdiction.

[17] It is apparent from the arbitrator's award that the arbitrator made no reference to jurisdiction and I am not persuaded that the issue before him was a jurisdictional issue. In *Gcaba v Minister of Safety and Security* ("*Gcaba*"),[2] which this Court followed, it was held that jurisdiction is determined by the pleadings (properly construed) and from the substantive merits of the case.[3] In *Monare v South African Tourism and Others* ("*Monare"),*[4] this Court held that the referral to the Commission for Conciliation, Mediation and Arbitration (CCMA) could be likened to pleadings. By analogy, the referral documents to the third respondent (i.e. Bargaining Council) could also be regarded as pleadings in that forum. In his referral to the third respondent, the appellant alleged that he was unfairly dismissed. That allegation, in line with the decision in *Gcaba* and this Court's decision in *Monare,* established the Bargaining Council's jurisdiction. The Bargaining Council was entitled to proceed and determine the matter on its merits. There is nothing on the record to show that the Council's jurisdiction was specifically objected to or that jurisdiction was specifically raised as an issue.

[18] The appellant bore the *onus* to prove that he was dismissed. The arbitrator found that he did not prove a dismissal and, on that basis, the arbitrator issued his award.

[19] In any event, the main issue for determination before the arbitrator was whether the appellant was dismissed and on review the court *a quo* had to determine whether the arbitrator's finding in respect of that issue was reviewable and liable to be set aside.

[20] As regards the merits of the review, the court *a quo* held that the arbitrator was not incorrect in concluding that the appellant had failed to prove a dismissal. The court *a quo* distinguished the Labour Court's decision in *S A*

[2] 2010 (1) SA 238 (CC).
[3] See at 263 para 75.
[4] (2016) 37 ILJ 394 (LAC).

Post Office v Mampuele[5] and this Court's decision in that same matter,[6] as well as a similar decision of the Labour Court in *Mahlamu v CCMA and Others* ("*Mahlamu"),*[7] to the effect that in terms of sections 5(2)(b) and 5(4) of the LRA, parties to an employment contract cannot contract out of the protection afforded in terms of the LRA against unfair dismissal.

[21] Having quoted a passage from *Mahlamu* where the Labour Court had identified some instances where the occurrence of specified events had "*unacceptably*" converted a substantive right into a conditional right, such as for example, a defined act of misconduct or incapacity – or the decision of a third party that resulted (consequently) in the termination of appointment (as had occurred in that case)[8] – the court *a quo* held that what occurred in the appellant's case did not fall into the category of events that were unacceptable. The court *a quo* held that the condition contained in the appellant's employment contract "*does not serve to deprive an employee of the right to security of employment in the same sense as the examples*" cited in *Mahlamu*.

[22] The court *a quo* distinguished the appellant's case from the unacceptable instances, *inter alia*, on the basis that the appellant "*agreed to the terms of the contract and did not dispute that he understood that should he not be positively vetted, his employment contract would terminate*". Further, on the basis that "*the vetting process was not in the hands of his employer – the letter listing the pending charges against the* [appellant] *and the fact of his dismissal was generated by the SAPS*".

[23] The court *a quo* distinguished the facts in *Mampuele* from those in the appellant's case on the basis that in *Mampuele,* the Minister decided to remove Mampuele as a director of SAPU employer "*knowing full well that the clause in question providing for automatic termination would be triggered*".

[5] (2009) 30 ILJ 664 (LC).
[6] Reported as *S A Post Office v Mampuele* (2010) 31 ILJ 2051 (LAC).
[7] (2011) 32 ILJ 1122 (LC).
[8] In *Mahlamu,* the contract of employment provided for automatic termination when the client of a labour broker (the employer) no longer required the services of the employee for any reason.

[24] The court *a quo* likened the appellant's instance to those in which a clause in the employment contract provides "*that a person engaged as an airline pilot must produce proof of a pilot's licence or a chauffeur proof of an unqualified driver's licence, failing which the contract will terminate*" and remarked that the court was "*unaware of any decision to the effect that such provisions where the condition is not met, deprive the employee of the right to security of employment*". In the light of those rulings, the court *a quo* dismissed the appellant's review application but gave leave to appeal to this Court.

[25] The appellant's grounds of appeal, summarised, were that the court *a quo* erred in finding that it was reasonable for the arbitrator to find that the appellant had not been dismissed; in finding that the contract had terminated automatically, whereas, according to the appellant, it had terminated as a result of a decision taken by the employer (i.e. the municipality) that its vetting and screening process had yielded a "*negative*" outcome; that the court *a quo* erred in not applying the approach laid down by this Court in *Nulaw v Barnard NO and Another* ("*Barnard*")[9] and in *Mampuele* in particular, that even if a contract of employment is terminated by operation of law, but the termination was as a result of an act of the employer, the termination would constitute a dismissal; that the court *a quo,* in any event, erred in not finding that a condition (or termination clause) in the employment contract was invalid in light of sections 2(2)(b) read with section 5(4) of the LRA, alternatively that it was void for vagueness, since there is no objective basis for determining whether the outcome of the vetting was "*negative*".

[26] The appellant alleged further that the employer's reliance on the automatic termination clause was "*impermissible*" since the clause did not empower the employer to terminate the contract for non-disclosure, or dishonesty, or on the basis of representations made by a third party (in this instance the SAPS) and that the court *a quo* erred in failing "*to appreciate*" that fact. The appellant raised several other grounds which on closer analysis are permutations or elaborations of the main grounds. In essence, the appellant complained that the outcome of the screening was determined by the municipality and that he

[9] [2001] 9 BLLR (LAC); (2001) 22 ILJ 2290 (LAC).

was not given an opportunity to make representations in respect of the allegations made about him by the SAPS. Further, that the court *a quo* misapplied the decision in *Mahlamu*. Additional grounds raised by the appellant were that the court *a quo* erred in failing to distinguish between a suspensive and a resolutive condition and in treating the condition in his employment contract as a suspensive condition, whereas it was a resolutive condition. In this regard, the appellant alleged that the court *a quo* had erred in equating the condition in his contract with the condition in a contract employing a pilot or a driver where the production of a valid licence was required. The appellant also attacked the court ***a quo's*** decision on the costs.

[27] In argument before us, counsel for the appellant persisted with these grounds. The main submissions made were, in essence, firstly, that the court *a quo* erred in failing to appreciate "*that the so-called automatic termination clause was in truth a misnomer for the reason that the clause itself envisages the municipality making the decision*" and, secondly, that the court *a quo* failed to appreciate that the automatic termination clause was "*in any event unenforceable because it constituted a transparent attempt to contract out of the provisions of the LRA*". Lastly, the argument regarding costs was that this was not a case where costs should have followed the result – particularly if the employer's conduct was taken into account.

[28] At the outset, counsel for the appellant argued (as a setting for his main argument) that the outcome of the vetting "*was a conclusion reached by the municipality without any input let alone an agreement*" from the appellant. According to this argument, the SAPS merely provided the employer with information – and it decided that that information was negative and on that basis took a decision to dismiss the appellant. In relation to the latter, the appellant's counsel relied on a *dictum* in *Mampuele,* in which agreement was expressed with the finding of the court of first instance in that case, that "*dismissal*" means any act by an employer which results "*directly or indirectly in the termination of an employment contract*".[10]

[10] In *Mampuele,* the court referred to *Barnard* where this Court, in considering whether the termination of employment due to a voluntary winding-up was a dismissal, held that the key-point in interpreting

[29] According to the appellant's counsel, the employer or the municipality "*by coming to a resolution that the vetting and screening process had yielded a 'negative' outcome, must merely, in the words of this Honourable Court, have 'caused the contracts to be terminated'*".

[30] If the decision in *Barnard* and the aforementioned *dictum* from *Mampuele* are applied to the facts of this case, it was not the act of the employer (the municipality) which produced a negative vetting result and, consequently, caused the resolutive condition to be fulfilled, resulting in the automatic termination of the agreement. The negative outcome of the vetting is constituted by the information supplied to the municipality by the SAPS, for whom the appellant previously worked. The information is patently, and if objectively viewed, negative of and concerning the appellant.

[31] It is the negative information that caused the condition to be fulfilled and that ended the employment relationship. Similarly, it is not a third party (SAPS) that made the information negative. It was inherently and objectively negative.

[32] The act referred to in *Barnard* (and *Mampuele*) must also be understood as a "*deliberate*" or "*intentional*" act. The employer (or the third party) in performing the act that results in the termination, must, at least, have directed its will to causing a dismissal. The latter consequence must have been the object, of its act.

[33] So, on the objective facts, in light of the decision in *Barnard* and the *dictum* in *Mampuele,* there was no dismissal – since the automatic termination was not caused by any decision or act of the municipality or SAPS, which had as its objective the termination of the appellant's employment contract. The appellant bore the *onus* to prove a dismissal on a balance of probabilities, and failed to discharge that burden.

[34] The second question to be answered, following the finding that there was no dismissal, is whether clause 1.1 (i.e. the condition or termination clause) was

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the phrase in section 186(a) of the LRA, namely, "*an employer has terminated the contract of employment with or without notice*", is whether the employer performed any act which brought the employment contract to an end in a manner recognised as valid by the law.

valid and enforceable in light of sections 5(2)(b) and 5(4), read with sections 85(a) and 88 of the LRA.

[35] The argument of the appellant's counsel is ultimately premised on the view that the production of a negative vetting result was tantamount to an allegation of misconduct in respect of which the appellant,(in terms of the LRA and in terms of section 23(1) of the Constitution, which grants to everyone a right to fair labour practices) was entitled to a fair hearing. The premise is fallacious. It is not misconduct, because there is no breach or alleged breach of a term of the employment agreement, which is what misconduct, in the final analysis, constitutes. A condition is not a term of a contract. While a condition is an external fact on which the existence of an obligation depends, a term relates to the nature of the obligation.[11]

[36] A conditional contract of employment is a commercial reality. The LRA is not against such contracts. The appellant, seemingly, agrees that that is so, but confines the acceptability of such contracts to those where the condition is suspensive, rather than resolutive, as is in this case. The main argument being that with a suspensive condition there is no employment contract pending the fulfilment of the suspensive condition.[12] But in the case of a resolutive condition, a contract exists, but comes to an end upon fulfilment of the resolutive condition and the contract is regarded as if it never existed.[13]

[37] The appellant's counsel accordingly and while accepting that the employment contract of a driver (i.e, be it a pilot or chauffeur) may, permissibly, contain a suspensive condition that a valid driver's licence be produced, submitted that it would not be permissible for such requirement to be contained in a resolutive condition -thus, the argument that the court *a quo* ought to have distinguished between suspensive and resolutive conditions in contracts of employment.

[11] See *Resisto Diary (Pty) Ltd v Auto Protection Insurance Ltd* 1963 (1) SA 632 (A); *Premier of the Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); L T C Harms "*Amler's Precedence of Pleadings*" (LexisNexis Butterworths; 6th edition) 89.
[12] See *Palm 15 (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A).
[13] See *Faith Hill Holdings (Pty) Ltd v Sothiros* 1976 (4) SA 197 (T) at 199D; and *Amoretti v Tuckers Land and Development Corporation (Pty) Ltd* 1980 (2) SA 330 (W).

[38] In my view, that criticism of the court *a quo* is not valid. It does not matter whether the condition is suspensive or resolutive. What does matter is whether the condition prevents the employee from exercising any right conferred by the LRA, which is what section 5(2)(b), read with section 5(4) of the LRA, is set against. The enquiry should be whether the agreement entered into prevents the employee from exercising any of such rights, and not whether the condition is suspensive, or resolutive.

[39] As in the case of a condition requiring a person appointed, say to the position of driver, to produce a valid driver's licence, the vetting condition in this case, did not prevent the appellant from exercising any right conferred on him by the LRA. Therefore, the court *a quo* did not err by likening the cases of a pilot and a chauffeur to that of the appellant.

[40] In an effort to bolster the appellant's argument that the condition in the employment agreement was impermissible, the appellant's counsel submitted that the condition precluded him from having a hearing. Elaborating on this argument, counsel for the appellant submitted that a hearing "*may have revealed*"[14] the following: that the appellant did in fact disclose his past history and that the municipality was aware of it at the time it employed the appellant; that the reliance by the municipality on the probity check was for an ulterior purpose in order to dismiss the appellant for arguing with the municipal manager; that the criminal charges had been withdrawn at the time the appellant commenced his employment and that the allegations in the charge sheet were baseless because the appellant was out of the country; that the disciplinary findings at the SAPS "*had been overturned on appeal*" or were "*trumped-up*" or "*were politically motivated*" or "*were baseless*".

[41] The appellant's counsel was pointedly asked whether any of this was in fact the case and was required to indicate where on the record and on oath in his application for review, or anywhere else, the appellant had given such a version, or explained the position in those terms. The response was clear that those were merely speculations raised for the first time in argument. To date, the appellant has not explained the position. He has given no version

[14] Emphasis added.

concerning the facts stated in SAPS letter. In any event, as for a hearing, or of being afforded an opportunity to give his background and history (including the explanation of those matters dealt with in the SAPS letter), the appellant chose not to avail himself of the opportunity to do so at the time of his interview or at any time before the vetting. Instead, he chose not to disclose, or explain those matters. He failed to explain them in response to the letter form the municipality and he similarly failed to explain them in his affidavits filed in support of the review application, or in his replying affidavit in those proceedings and to date has failed to explain them, choosing instead to rely on speculations in that regard made by his counsel in argument.

[42] Significantly, the appellant freely and voluntarily agreed to a vetting and to an automatic termination, if the vetting yielded a negative result. This was material to the appellant's suitability for the position he was employed in. As was pointed out earlier, the result was patently and objectively negative of and concerning the appellant's suitability, which resulted in the automatic termination of the employment contract. The termination was not triggered by an act of which the aim and object (whether primary or secondary) was to end the employment relationship. Further, the condition in the agreement was not impermissible in terms of the LRA.

[43] In my view, the court *a quo* rightly came to the conclusion that there was no basis upon which to review the award of the arbitrator and in consequently dismissing the review application.

[44] As regards the costs, this Court can only interfere if it is shown that the court *a quo,* in making the costs order, had exercised its discretion wrongly. I cannot find accordingly. The court *a quo* took into account all the relevant facts, the law and fairness and concluded that costs should follow the result.

[45] Regarding the costs of the appeal, the first respondent's counsel has submitted that the appeal should be dismissed with costs, including the costs consequent upon the employment of two counsel. I am not convinced that two counsel were required. Taking into account the facts, law and fairness including the appellant's gratuitous attack on the outcome of the vetting –

without disclosing his version concerning his employment history and the allegations made by SAPS in its letter – there is no reason why costs should not follow the result of the appeal.

[46] In the result, the appeal is dismissed with costs.

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P Coppin

Judge of the Labour Appeal Court

Landman JA *et* Phatshoane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	P N Kroon SC with him M Thys
	Instructed by Mbewana Attorneys
FOR THE FIRST RESPONDENT :	R P Quinn SC with him N Simoyi
	Instructed by Sonamzi& Mkata Attorneys