THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 21/2014

In the Matter between:

ZAPOP (PTY) LTD **Appellant**

and

COMMISION FOR CONCILIATION MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER F W MARITZ N.O. **Second Respondent**

CHRISTINE VALERIE CUNNINGHAM **Third Respondent**

Heard: **15 March 2015**

Delivered: **12 May 2016**

Summary: Appeal against an order of the Labour Court refusing to review arbitrator's decision to hold dismissal unfair and award 4 months compensation and commission earned prior to dismissal and cross appeal against Labour Court's order to refer certain issues about computation of commission back to arbitration.

Interpretation of sections 35(4) and 74(2) of the BCEA considered

On the facts as regards the unfair dismissal dispute, held that arbitrator's award not unreasonable – employee dismissed for disclosure of confidential information to an alleged competitor and for disparagement of her two managers in a private email communication – arbitrator concluding employee

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guilty of the alleged misconduct - in absence of a cross appeal against the decision of the labour court accepting (i)the correctness of the conclusion that confidential information had indeed been disclosed to a person who was indeed a competitor and (ii) the correctness of the conclusion that disparagement of an employer in a private communication not intended for publication could constitute misconduct, the appeal had to be considered on that footing, despite reservations about such findings –

The misconduct had occurred years before and the arbitrator held that the disclosures to the particular competitor, did not expose the employer to any risk because the alleged competitor was a sales agent who exited the business immediately thereafter and the specific prejudice relied on, ie that an unfavourable employment contract with a person recruited from the competitor/agent was caused by the disclosure, was unproven; these factors, and other related considerations, weighed with the arbitrator in assessing that dismissal was inappropriate because it was disproportionate to the gravity of the misconduct - in the absence of a prayer for reinstatement, the unfairness warranted compensation in a sum equivalent to four months remuneration – on appeal it was held that such a conclusion satisfied the *Sidumo* test

The employee also claimed a substantial amount in commission earned before the date of dismissal but which became payable at a time after date of dismissal - dispute of fact about whether her entitlement to payment of such commission was forfeited upon dismissal resolved in favour of a preserved entitlement

The finding by the arbitrator and the Labour Court that the CCMA had jurisdiction to entertain commission claims as part of remuneration as contemplated by Section 74 (2) of the BCEA upheld

The Arbitrator had awarded the sum agreed between the parties as being the sum of compensation due – Labour Court holding that section 35(4) of the BCEA capped the sum awarded to the amount equivalent to the last 13 weeks of employment and the only competent order had to be calculated in terms of that formula, whereupon the issue of computation was referred back to the

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CCMA – cross appeal against such interpretation upheld – no cap exists and an award of an agreed sum is appropriate and in accordance with the BCEA

Costs award - respondent an individual litigant who had been obliged to defend an award obtained - costs of labour court review proceedings and of appeal granted to respondent

Davis, Musi *et* Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This matter involves an appeal and cross-appeal against an order of the Labour Court which, in a review of an arbitrator's award, upheld it in part and set it aside in part, and then remitted certain issues to be heard afresh. There are several disparate issues.

[2] The first main question that went to arbitration was the unfair dismissal dispute. About that there are two controversies.

2.1. The first controversy is whether the third respondent, Christine Cunningham, was guilty of conduct deserving of dismissal. The arbitrator held that she had misconducted herself, but that dismissal was inappropriate. The Labour Court upheld that finding as reasonable on the *Sidumo*[1] test. The appellant employer, Zapop, appeals against that part of the order and the consequent order of compensation, equivalent to four months remuneration, awarded to Cunningham, in terms of section 194(4) of the Labour Relations Act 66 of 1995 (LRA).[2]

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[1] Sidumo v Rustenburg Platinum Mines Ltd [2007] 12 BLLR 1907 (CC)
[2] Section 194 (4) of the LRA provides:
'The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration'.

2.2. The second controversy ventilated in the review application relates to the accusations that the arbitrator committed certain gross irregularities; first, by disallowing Zapop a full and proper hearing by refusing to admit evidence of post-dismissal conduct by Cunningham, and secondly, not paying attention during the hearing.

[3] The second main question relates to the awards of certain money claims. In this regard, four distinct controversies arose.

3.1. The first issue is whether the CCMA had jurisdictional competence to adjudicate about a commission claim, *per se*, a question involving the interpretation of section 74(2) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). The arbitrator held that he did have the competence and that decision was upheld by the Labour Court. Zapop appeals against that decision.

3.2. The second issue is whether, on the facts, having regard to the terms of Cunningham's employment agreement, which were in dispute; had there been proof of an entitlement to payment of commission due and payable after termination of service? The arbitrator held that Cunningham was entitled to claim commission due and payable even after her dismissal. Zapop appeals against that finding.

3.3. The third issue was whether the award for the payment of commission had been computed in a manner consistent with section 35(4) of the BCEA. The arbitrator had made an award for the payment of the commission, supposedly payable, in a sum as agreed between the parties, but the Labour Court held that the competent computation could only be in terms of what section 35(4) required, and held that the quantum had to be limited to an amount equivalent to a 13 week period. The Labour Court thereupon remitted that issue. Cunningham cross-appeals against the Labour Court's decision about the proper interpretation of section 35(4) of the BCEA (which interpretation would have meant a lower sum of commission would have been competent to

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award than what was claimed by Cunningham and awarded to her by the arbitrator) and against the order of remittal.

3.4. The fourth issue concerns the computation of remuneration owed in respect of Cunningham's period of suspension pending her disciplinary enquiry and in respect of accrued leave pay. The arbitrator awarded agreed sums. The Labour Court held that the computation was uncertain and were perhaps not in accordance with section 35(4) of the BCEA, and remitted the issues. Cunningham cross-appeals against that order.

[4] The third main question is Cunningham's appeal against the Labour Court's decision not to award her costs and a prayer for costs of the appeal.

[5] The material hard facts relevant to the unfair dismissal dispute are common cause. The only seriously disputed issue of fact is one related to the money claims, which was about the terms of Cunningham's agreement of employment as regards entitlement to be paid commission sums that fell due for payment after termination of service, and even that turns on an assessment of almost entirely common cause facts. As such, credibility of the witnesses is a peripheral matter. A lot of opinions and grievances were ventilated, at undue length, but the indulgence of witnesses' craving for catharsis is seldom of little help to a court in deciding matters, and this case is a further illustration of that truism.

[6] These disparate issues are addressed in turn.

<u>The Unfair Dismissal Question</u>

(a) The reasonableness of the arbitrator's finding

[7] The rationale for justifying the dismissal of Cunningham was that she had wrongfully disclosed Zapop's confidential information to a competitor, that this disclosure prejudiced Zapop in bargaining over the terms of an employment agreement with Shaelene Dewar, and that Cunningham had breached her duty to respect the directors, Riaan Labuschagne and Cindy Nel.

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[8] The relevant disclosure and the evidence of disparagement of the executives were evidenced by e-mails extracted from Zapop's server. Because the arbitrator found that the disclosure was, indeed, of confidential information, and thus culpable, and the Labour Court did not overturn that finding, in the absence of a cross-appeal on that issue, this Court is obliged to proceed on the footing that the e-mail really did contain confidential information, despite some serious reservations on the facts about the correctness of that factual finding. Similarly, because the arbitrator's finding that Cunningham did culpably disparage her superiors in an e-mail, and the Labour Court did not overturn that finding, in the absence of a cross-appeal, this Court is also obliged to proceed on the footing that such a finding is appropriate.

[9] The critical finding by the arbitrator that constitutes the key controversy is that, despite these transgressions, dismissal was inappropriate. This is the decision that had to be tested by asking whether, on the facts, no other arbitrator could reasonably have come to such a conclusion. In my view, the Labour Court's finding that the arbitrator's decision met the *Sidumo* test is unassailable.

[10] The relevant history starts in about 2006, some four years before the dismissal. In this account only the material facts are recounted.

[11] Zapop is a business known as a "Media Owner". This label denotes it owns the rights to advertise within shops in terms of contracts with shop owners, the so called "Below the line advertising". Labuscagne is the controlling mind of Zapop. He and Cindy Nel are directors. The only other Media House in South Africa, in competition with Zapop for this kind of business, according to the evidence, is Primedia. Cunningham, Mary De Klerk and Dewar were long-time friends. In 2006, they were either owners or employees of, a business called "Expanding Brands" (EB), which was founded in 2001 by De Klerk and Cunningham. EB's business consisted of selling products of media houses in return for a commission, and was known as a "Media Brokerage house"; more simply it was a commission sales agent.

[12] At all relevant times until 1 January 2008, EB was an agent of Zapop, although not working exclusively for Zapop, but nevertheless predominantly its agent and heavily reliant on its custom.

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[13] In 2006, Zapop was established by Labuscagne and in September 2006 he recruited Cunningham from EB to work in-house for it as its national sales manager. The significant feature of her employment agreement was that her income was primarily from commission. Thereafter, Dewar, working for EB, was personally the principal human service provider to Zapop; 98 % of her earnings were derived from Zapop work, and Zapop's work represented 80 % of EB's revenue.

[14] By late 2007, Zapop had expanded and prospered and decided to terminate the EB agency link in order to have the work rendered by EB performed in-house. The effect of this on EB was profound. The end of the relationship triggered a strategic shift in EB's focus and it moved on to undertake a different business model, focussing on human-based promotions within shops, and was no longer an agent for media house products.

[15] Consequent upon Zapop's decision, and as part of the arrangements to terminate EB's services, Zapop invited Dewar to take up a position with Zapop. Her personal circumstances, for the reasons alluded to, were fraught with uncertainty should she not go over to Zapop. She agreed to do so and concluded an agreement of employment with Zapop in December 2007 and began work with Zapop on 1 January 2008, the same date that the EB relationship with Zapop terminated. She negotiated an agreement which included, among other terms, a veto over alteration of her commission rates, and a retention exclusivity in favour of Dewar as regards an important client, Unilever. These were, apparently, unusual provisions which greatly favoured Dewar.

[16] Dewar worked for Zapop until July 2010, i.e. for some two and a half years, whereupon she resigned to work for Primedia, the primary trade rival. The move provoked controversy about the restraint imposed on Dewar in her employment contract. At that time, Zapop plumbed the company server for e-mails relating to Dewar. As a result of that exercise, ostensibly, certain e-mails were fortuitously discovered that had been exchanged in November 2007 and in 2009 between Cunningham and De Klerk, and also between De Klerk and Dewar. These e-mails were relied upon to charge Cunningham with

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misconduct in that she disclosed confidential information that prejudiced Zapop in concluding an employment agreement with Dewar and wrongly disparaged the directors.

[17] The bare facts are these:

17.1. Nel, the Zapop sales director, sent an e-mail to Cunningham on 9 November. The record reflects that Cunningham replied point for point. The contents address an exchange about current clients, the target budgets for the forthcoming year, an intimation that the commission structure was to be changed and some veiled remarks by Nel about Cunningham's commitment to achieving the targets. Cunningham's responses were to the effect that she did not need to be pressurised to achieve targets as she was committed and would appreciate clarity about expectations of her.

17.2. On 14 November, Cunningham shared this exchange with De Klerk.

17.3. On 22 November, De Klerk e-mailed Dewar, and attached the Nel/Cunningham exchange. At the time Dewar was engaged in settling terms of her employment with Zapop. De Klerk's message is plainly a caution:

> ' Hi Shae, Please make sure that you tie Zapop in with your comms BEFORE you sign anything – check this email to Chrissie'.

[18] Zapop claims to be aggrieved at the disclosure of the client list and the budget figures to EB. Moreover, it claims that this disclosure which reached Dewar resulted in a less advantageous agreement with Dewar than might otherwise have been concluded. As such, it is claimed that Cunningham's disclosure "harmed" Zapop.

[19] The arbitrator reasoned that Cunningham had no intention to harm Zapop, accepted her explanation that she shared the e-mail to elicit sympathy from a friend about the battle she was experiencing over her work and commission income. This was, the arbitrator found, in effect a lapse of judgment, but

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despite the potential of such a lapse causing harm, none was actually caused. Thus, reasoned the arbitrator, a dismissal was inappropriate.

[20] In my view, the outcome is manifestly reasonable, even though the reasoning may be a bit wobbly. The relevant considerations are these:

20.1. There were no *mala fides* by Cunningham towards Zapop.

20.2. EB, was an agent of Zapop at the time, and although in the arbitrator's view a theoretical "competitor" it was not and could not be a real threat to Zapop's business. De Klerk's evidence that EB was in a *de facto* partnership with Zapop until 2008 when it exited the business of selling media space for media owners in 2008 was unrebutted and profoundly significant.

20.3. There was no culpable causal link between Cunningham telling De Klerk the contents of the e-mail and De Klerk telling Dewar.

20.4. Dewar was given the same basic data by Nel that appeared in this e-mail.

20.5. Dewar not a competitor.

20.6. Zapop successfully concluded an employment agreement with Dewar, a valuable catch; it did not happen that no agreement could be reached and a prospect of employing a valuable worker, i.e. Dewar, was lost.

20.7. The utility of the information to cause harm in the circumstances was grossly exaggerated.

20.8. The event occurred two years earlier, and since then Cunningham had performed well for Zapop, evidencing no lack of commitment to her employer.

20.9. Upon the discovery of the disclosures, Zapop did not immediately suspend Cunningham, which suggests an ambivalence about the misconduct that diminished credibility of the view Zapop claimed it had taken about its degree of seriousness.

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[21] The disparagement complaint was about episodes in 2007 and 2009, long before the dismissal. These remarks were disparaging of Labuschagne and Nel's business acumen. The business was described as a circus and Labuschagne was the ringmaster. In another e-mail, Nel was accused of unprofessionalism. These remarks were communicated by Cunningham to De Klerk privately. She admitted the remarks explaining that she was sounding off to a friend at the time.

[22] The arbitrator apparently thought that exchange amounted to misconduct. Presumably this was premised on the notion that deference is due to your boss even in private communications. The validity of such a premise has not been challenged in these proceedings. Whatever doubts about the cogency of this notion, it must be accepted as valid for the present exercise.

[23] Nevertheless, the arbitrator held the "disrespect" did not warrant dismissal. In my view, the conclusion was, in the circumstances, reasonable. The relevant factors included:

23.1. The remarks about Zapop and its directors were indeed trivial.

23.2. The remarks were not made for public consumption.

23.3. The remarks were made long ago.

[24] The upshot is that the appeal, as regards the unfair dismissal finding, fails.

(b) The exclusion of evidence about post-dismissal conduct question

[25] The criticism of the exclusion of evidence about post-dismissal conduct about Cunningham handling a confidential document of Zapop is without merit.

[26] Anyone who presides over any fact -finding enquiry must exercise care when admitting evidence of collateral and often tangential episodes. Relevance to the pleaded issue is to be clinically determined. Zapop wanted to admit evidence of Cunningham's supposed appetite for unearthing Zapop's confidential information in 2010, after she had been fired and had gone to work for Primedia, an undoubted competitor, allegedly in breach of her restraint obligations. It is to be inferred that this evidence was thought to

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bolster Zapop's case that Cunningham had an intention to harm Zapop in 2007.

[27] The proposition is preposterous. The conduct of Cunningham in 2007, three years earlier, is explained and the context is wholly distinct from that which prevailed after Zapop had fired her. The evidence could have had no persuasive effect on the relevant question which was the motive and effect of the disclosure in 2007.

[28] In addition, the excluded evidence, it was argued, was pertinent to the quantum of compensation awarded. On these facts that is incorrect. Moreover, the supposed breach of her restraint obligations, including alleged confidentiality breaches, is the subject of other legal proceedings, and does not, on those grounds, constitute appropriate material to be weighed in this case.

[29] Accordingly, the arbitrator did not act irregularly in declining to admit such evidence.

(c) The allegations of the arbitrator's lack of attention during the hearing

[30] The other *ad hominem* accusation against the arbitrator involves the arbitrator not paying attention during the hearing. In the absence of a contemporaneous protest or application for a recusal, such complaints are not susceptible to *ex post facto* examination.

<u>The Question about the Money claims</u>

(a) Does an arbitrator have jurisdiction to adjudicate commission payments?

[31] The principal dispute referred to arbitration was about unfair dismissal. The money claims for pay during suspension, accrued leave pay and commission, were not dependent on the merits of that dispute and were put before the arbitrator pursuant to Section 74(2) of the BECA which provides that;

> 'If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine *any claim for an*

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amount that is owing to that employee in terms of this Act if the claim has not prescribed.' (Emphasis supplied)

[32] The jurisdictional controversy is confined to whether the section contemplates a commission claim. No genuine debate exists that the commission was not part of Cunningham's remuneration. Section 1 of the BECA provides:

> 'remuneration' means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and 'remunerate' has a corresponding meaning;

[33] However, it is argued by Zapop that, having regard to section 74(2), a commission payment is not an amount "*owing [to Cunningham] in terms of this Act"*. This submission is premised on the cited phrase meaning that an entitlement to an "amount" is limited to a statutorily prescribed entitlement. The argument runs that the BCEA does not prescribe an entitlement to "commission", as distinct from entitlements, e.g., to accrued leave pay and ordinary remuneration.

[34] This argument overlooks the fact that it is a contravention of the BCEA to fail to pay an employee remuneration that is due. The legal obligation to pay remuneration, apart from contract itself, is contained in section 32 of the BCEA.[3] Section 32(4) in particular requires an employer to effect payment not later than seven days after the completion of the period for which the remuneration is payable. That period, in Cunningham's case, is when Zapop is paid by the client and the commission falls due to be paid. It is common

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[3] Section 32 provides:
Payment of remuneration
(1) An employer must pay to an employee any remuneration that is paid in money-
(a) in South African currency;
(b) daily, weekly, fortnightly or monthly; and
(c) in cash, by cheque or by direct deposit into an account designated by the employee.
(2) Any remuneration paid in cash or by cheque must be given to each employee-
(a) at the workplace or at a place agreed to by the employee;
(b) during the employee's working hours or within 15 minutes of the commencement or conclusion of those hours; and
(c) in a sealed envelope which becomes the property of the employee.
(3) An employer must pay remuneration not later than seven days after-
(a) the completion of the period for which the remuneration is payable; or
(b) the termination of the contract of employment.
(4) Subsection (3) (b) does not apply to any pension or provident fund payment to an employee that is made in terms of the rules of the fund.

cause that the period elapsed and the commission was due for payment, assuming there was no binding forfeiture provision in the contract of employment by reason of a "policy" change or a "practice", issues addressed elsewhere in this judgment. The ancillary argument that because on termination, an employer must pay all remuneration due to an employee within seven days, and because the "cycle" of events for a commission payment to fall due could occur only after such seven day period somehow supports the notion that commissions could not have been contemplated by section 32 is fallacious. Properly read, the section can be purposively interpreted to encompass entitlements that fall due later than a default period. Self-evidently, the due date for payment triggers the obligation to pay, and the duty of the employer to pay must be fulfilled within seven days of that date.

[35] Revelas J in *Schoeman and Another v Samsung Electronics SA (Pty) Ltd,*[4] held in distinguishing a "benefit" from "remuneration" that:

> 'Commission is encapsulated by the notion of remuneration. Commission payable by the employer forms part of the employee's salary. It is a quid pro quo for services rendered, just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment….'

[36] This must be correct.[5] The fact that the form of the computation of remuneration is in the form of a percentage of sales achieved, or the market value of the harvest as determined by the Co-|Operative, or any other variable is beside the point. The arbitrator had jurisdiction to adjudicate a claim for remuneration, including the commission.

(b) Is there proof of entitlement to be paid commission that became payable post-termination?

[37] The critical question is what the terms of Cunningham's employment agreement provided at the relevant times.

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[4] (1997) 18 ILJ 1098 (LC) at 1102-1103.
[5] Caution should be exercised in reading the *Schoeman* judgment in relation to what is stated about the character of a "benefit" as later jurisprudence has not adopted the stance articulated by Revelas J; see *Apollo Tyres (Pty) Ltd v CCMA and Others* (2013) 34 ILJ 1120 (LAC).

[38] At the time of the conclusion of Cunningham's employment contract in 2007, and retrospectively effective to 2006, no forfeiture term was stipulated, even orally, nor could one have been tacitly inferred from what was agreed.

[39] The agreement included a clause in which policies were incorporated by reference. However, even on the premise that the policies were incorporated, the policy in 2006 did not address forfeiture, and eventually only after Dewar had resigned in 2010, and complained about non-payment of commissions that fell due after her termination, was a forfeiture "policy" added and circulated for staff to acknowledge formally. At best, this innovation might have had prospective effect.

[40] Zapop fell back on a practice of forfeiture to justify non-payment. This must fail too. During the period of Cunningham's employment, the evidence shows that there was no practice of forfeiture, rather, there was a capricious decision-making process prevalent about post-termination payments of commission. It is common cause that Deidre Davel was paid her commission that fell due for payment after her termination. It was common cause that Tina Bailey was also paid her commission. Afterwards, a letter was sent to Bailey saying it was paid in error and asking for repayment. Not fortuitously, the request for a refund was sent only after Dewar claimed payment and was refused. Nothing was done to enforce a refund from Bailey. A passing reference to two other persons not fully and properly identified who had according to Labuschagne not been paid their commissions post-termination was made but no case was advanced that they were indeed owed any commissions. Thus the consistency necessary to found a contention of a practice of forfeiture is absent.

[41] That leaves only the notion that by unilateral decision in adding a policy of forfeiture Cunningham was retrospectively bound, based on the provision in her contract that she was bound by policies. Several problems beset this idea. First, if the mere amendment of the policies on such a matter bound her, why require her to accept it? Secondly, a "policy" *per se* is not self -evidently a term of employment, still less is it plain that by a "policy" an anterior substantive right or entitlement which is indeed a term of the agreement, i.e.

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remuneration, can be amended. Third, even it be taken for granted that the amounts of the targets and the rates of the threshold for commission to be earned could be unilaterally changed in respect of future transactions, the idea of a forfeiture of remuneration already earned is in different class. If it did not exist to begin with, it needed the employee's assent, which was withheld.

[42] Hence, in my view, the existence of a forfeiture term in the agreement of employment binding Cunningham, was not proven. No bar exists to her claim.

(c) What does section 35(4) of the BCEA mean?

[43] Three amounts of pay were claimed: the pay due during the period of suspension, the leave pay accrued and the post-termination commission. The sums owing were agreed. No further evidence was required to compute these sums. The Labour Court nevertheless remitted the calculation of these sums because of its view about section 35(4) of the BCEA, an issue raised *mero motu* by the Court. The text reads thus:

> 'If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during-
>
> (a) the preceding 13 weeks; or
>
> (b) if the employee has been in employment for a shorter period, that period.'

[44] The Labour Court concluded that the computation of the quantum of the award was misconceived because *an agreed sum* was awarded which was not an amount that was "*owing in terms of the BCEA"* (Paragraphs [24] - [27] of the judgment.). It was held that the permissible amount was one calculated in terms of the section only and a court had no competence to award an agreed amount.

[45] This idea is incorrect. Attributing a meaning to the section that it was to override an agreement between litigants about a sum that was owing thereby

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obliging the court to compute independently of the litigants the sum to be awarded would serve no legitimate purpose envisaged by the BCEA. The BCEA exists to secure minimum guarantees of equitable treatment of employees. Where it is necessary to resolve disputes of fact about what is owing, section 35(4) provides a ready impasse-breaker to calculate a rate, no more. A purposive interpretation is inconsistent with a narrow approach that results in purposeless, bureaucratic and mechanical approach.

[46] Accordingly, no sound reason existed to disturb the award in respect of commission and no need arose to remit any question.

(d) The Leave pay and suspension period pay

[47] It follows from what has been already addressed that these awards should stand and no reason exists to remit them.

Costs of suit

[48] The third respondent, Cunningham, has sought her costs in respect of the review and the appeal. In support of that prayer, she refers to the burden of such costs upon her as an individual, the long wait for ultimate relief, some five years, and the fact that she has been hauled to court twice to defend the award granted to her. On behalf of the appellant, it was argued that the review court's order of no costs be sustained.

[49] In my view, the case indeed calls for a costs order in Cunningham's favour. In addition to the contentions advanced in support of that prayer, the persistence by Zapop with so weak a case, through two sets of proceedings, warrants a costs order to properly afford the relief due to Cunningham. The interest that has accrued on the award of R1,806,520.92 calculated from 30 November 2011, will by now be considerable, but that factor does not disturb the appropriateness of a costs order.

The Order

[50] I make this order:

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50.1. The appeal is dismissed.

50.2. The cross-appeal is upheld.

50.3. The Award ordering the appellant to pay to the third respondent the sum of R1,806, 520.92, is confirmed.

50.4. The appellant shall pay the third respondent interest on the sum of R1,806,520.92 at the mora rate as prescribed from time to time, calculated from 30 November 2011, until date of payment.

50.5. The appellant shall bear all the party and party costs of the third respondent relating to both the review application and to the appeal.

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Sutherland JA

Davis *et* CJ Musi JJA Concur in the judgment of Sutherland JA

APPEARANCES:

FOR THE APPELLANT: Attorney Grant Marinus.

FOR THE THIRD RESPONDENT: Adv A De Wet

Instructed by Smit Kruger Inc.

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