REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D1193-11

AIRPORTS COMPANY OF SOUTH AFRICA LIMITED **Applicant**

and

LINDA MTHEMBU **First Respondent**

NEHAWU **Second Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

RICHARD LYSTER **Fourth Respondent**

Heard: **21 May 2013**

Delivered: **18 February 2014**

Summary: Review of arbitration award. Test restated. Arbitrator's flawed reasoning and undertaking an enquiry in a wrong manner. Ultimately, the question is whether the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence.

Reasons for JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The fourth respondent (The Commissioner), acting under the auspices of the third respondent (CCMA), had on 3 November 2011, issued an award under case number KNDB14177-11 in terms of which he had found that the

dismissal of the first respondent (Mthembu) by the applicant (ACSA) was substantively unfair. The Commissioner had ordered that Mthembu be retrospectively reinstated and be paid arrear salary limited to R10 068.00. Aggrieved at the outcome, ACSA had brought this review application and sought an order that the finding of the Commissioner be substituted with one that the dismissal of Mthembu was fair. Mthembu, who was assisted by the second respondent (NEHAWU) opposed the application.

Background to the application:

[2] The old Durban International Airport which was situated on the South Coast had relocated its operations to King Shaka International Airport in La Mercy on the North Coast during 2010. ACSA in consultation with employee representatives had developed a staff relocation policy to ensure a smooth transition from the existing to the new workplace. The policy was designed to support employee relocation with a view of retaining the existing workforce, securing employment and maintaining a stable work environment.

[3] A number of alternative options to alleviate the hardship of relocating that the employees would suffer were captured in the policy. Importantly, and relevant to this case, the employees could only exercise one of the available options. The policy was broad and covered the following instances;

Where employees were forced to look for a new home near the new airport; the granting of paid leave whilst an employee was looking for a new home; travel costs incurred whilst looking for accommodation near the new airport; costs associated with the buying of a new property (including survey fees, transfer and conveyancing fees); costs associated with moving to a new home (furniture removal); paid leave for moving house; payment of relocation costs; accommodation subsidy for non-home owners (rented accommodation); travel and transport costs in respect of employees who elected to remain in their current residence and who chose to commute to the new airport; disbursements for employees who owned their own transport or who used public transport; and lastly, the provision of a shuttle service between the old and new premises. The policy also catered for instances where employees

could approach the Appeals Committee in the event that they wished to change their options.

[4] The policy was well publicised through e-mails, and various forms of guidelines. Accountants from Ernst & Young were brought in to assist with the administration process, and one its employees, Gloria Mosala was responsible for the administration of the policy from February 2010 until August 2010. She was responsible for providing employees with advice on the processes of selection and also the capturing of information in respect of the options employees had made.

[5] Mthembu was employed by ACSA with effect from 12 February 2010 as a security officer. He had attended one of the meetings held on 18 February 2010 where the policy was discussed and had also received a copy of the policy. On 17 March 2010 Mthembu had made a choice to use the shuttle service from the old premises to the new airport. This meant that he had to secure the necessary bus coupons to use this service. In terms of this option, the policy provided as follows;

> "7.5.3 *Shuttle Service:*
>
> *An employee who elects to utilise the staff shuttle service will be entitled to do so free of charge for up to one (1) year after the airport opening. Further usage of the shuttle service beyond one (1) year will be to any employees account. The shuttle service pick up- drop off points will be DIA and the new airport at La Mercy. If safe to do so, the staff shuttle service may extend its pickup drop off points to the major residential establishments located around DIA. Employees contemplating to use the staff shuttle service will be required to pre-register and obtain the necessary authentication to utilise the service (e.g access card or finger print reading)"*

[6] Mthembu was dismissed on 10 March 2011 following a disciplinary enquiry into the allegations that;

> *"You are hereby charged in terms of the disciplinary policy of ACSA in that on the 4th June 2010 and the 21st June 2010 you abused relocation policy by collecting bus coupons when you have relocated, receiving a full rental benefit that supported you to reside closer to the King Shaka Airport"* (Sic)

[7] The renting option was covered under clause 7.4 of the policy which provided that;

> *"In the event of an employee seeking rented accommodation, the company will cover the costs of the first three months rental upon receipt of proof of rental agreement not shorter than 12 months (It was agreed that ACSA would provide a further month's rental)"*

[8] The evidence before the Commissioner was that having initially elected to use the shuttle service, Mthembu had on 23 March 2010, lodged an appeal and indicated that he wanted to use the rental accommodation subsidy option as he had hoped to move permanently to a house near the new airport. There was however a dispute before the Commissioner as to whether the appeal outcome dated 12 April 2010 had reached him. The outcome read;

> *"Your appeal:*
>
> *He will use ACSA shuttle while he is still looking for a place to rent.*
>
> *The appeals committee's decision:*
>
> *Acceptable until the end of May".*

[9] The following events were also common cause; on 24 May 2010 Mthembu had obtained rented accommodation in Verulum and had signed a one year lease agreement on 26 May 2010. The lease was to commence on 1 June 2010 at a rental of R2000.00 per month. On 4 and 21 June 2010 Mthembu had collected books of 20 shuttle coupons valued at R300.00 each and thus continued to use the shuttle service. On 15 June 2010, following Mthembu's completion and submission of a rental claim, Mosala had made a requisition for a cheque in the amount of R8000.00 in respect of the new rented premises. (An employee was thus entitled to receive four times the value of one month's rental upfront in terms of the policy). Mthembu had collected that cheque from ACSA in favour of the lessor in that amount on 29 June 2010, and had relocated to his rented accommodation at the end of June 2010.

The award:

[10] In his analysis, the Commissioner's starting point was to make a distinction between offence of *abuse* of the relocation policy and that of *dishonesty*. This

distinction was based on the evidence of Mosala, who had testified that in misconduct cases relating to the relocation policy, employees were generally charged on the basis of either *abuse of the policy* or *dishonesty*[1]. The Commissioner in making that distinction had also made reference to the findings of the chairperson of the internal appeal hearing and the latter's justification in finding Mthembu guilty on the offence of dishonesty when the charge was that of abuse of the policy. The Commissioner had lamented the fact that ACSA in view of the distinction between the two offences should have drafted a supplementary disciplinary code making employees fully aware of what they could expect if they misconducted themselves in one of the two ways. He had concluded that in the light of the distinction between the two offences, it could not have been in the mind of ACSA to dismiss employees on the basis of the offence of abuse of the policy as it was a lesser charge.

[11] Returning to the facts of the case, the Commissioner had found that Mthembu had only received his rental cheque from ACSA at the end of June and had only used the shuttle service coupons prior to receipt of the rental amount. Mthembu had been told by the HR Manager, Phiwa Zulu that he could use the coupons until such time as he had been paid the rental subsidy. He had further established that the Mthembu had not at any stage used the coupons after 29 June 2010. In regards to whether Mthembu had received the outcome of the appeal or not, the Commissioner had concluded that as Mthembu was not an office worker and had no access to e-mail facilities, he could not have received the e-mail informing him of the outcome of the appeal.

[12] Ultimately, the Commissioner had found that; *"while there was a technical abuse of the policy, the applicant certainly did not do so with any intention of deceiving the company and without any belief that he was acting dishonestly*"[2]. He had concluded that Mthembu should have taken the time and trouble to seek greater clarification on the implications of continuing to use the tickets after he had applied for the rental subsidy on 15 June 2010 and that for that reason, despite ordering retrospective reinstatement, he had limited the arrear salary payment due to Mthembu to two months.

[1] See para 3.33 of the award
[2] At para 3.51 of the award.

The grounds for review:

[13] ACSA's contention was that the Commissioner had committed a gross irregularity or acted in excess of his powers by failing to embark upon a balanced assessment of the credibility, reliability and probabilities associated with the respective versions in finding that;

13.1 Mthembu genuinely believed that he was not doing anything wrong in using the shuttle tickets before he had received the rental subsidy;

13.2 The landlord was expecting a large lump sum from Mthembu and prevented Mthembu from occupying the premises until he had received that lump sum;

13.3 Mthembu did not abuse the relocation policy with the intention of deceiving ACSA and with the belief that he was acting dishonestly; and thirdly;

13.4 There was unchallenged evidence that Mthembu was told by Zulu that he could use the shuttle coupons until such time that he was paid the rental subsidy.

[14] ACSA's further contention was that the Commissioner's analysis was flawed in that;

14.1 He failed to apply his mind to the enquiry whether on the facts, abuse of the policy involved dishonesty or not;

14.2 Had failed to apply his mind to the fact that the evidence at both the internal enquiry and at arbitration referred to deliberate abuse of the policy for personal gain, and that his failure to apply his mind to this aspect led to his conclusion that the charges against Mthembu were lesser and did not involve dishonesty.

14.3 The distinction drawn by the Commissioner between the offence of abuse of the policy and that of dishonesty was inappropriate in that the charge of abuse of the policy involved the element of intention, and that

Mthembu had benefitted financially at the expense of ACSA, and this involved dishonesty.

14.4 The Commissioner was required to decide whether Mthembu's dismissal was substantively fair without deference to the approach of the employer, and that as the proceedings before the Commissioner were *de novo*, it was irrelevant whether the chairperson of the internal appeal sought to draw a distinction between abuse of the policy and dishonesty.

14.5 The Commissioner's decision to reinstate Mthembu despite finding that he did in fact abuse the policy appears to have been based on the erroneous distinction he had made.

[15] According to ACSA, pivotal to the Commissioner's award was his finding that the company did not prove that Mthembu had received the written outcome of his appeal to change from shuttle service to the rental option. The notice granting the appeal was to the effect that Mthembu could not use the shuttle service beyond the end of May 2010, whereas in fact he had continued to do so throughout June 2010. To this end, and based on the evidence presented, it was contended that the Commissioner should have held that on a balance of probabilities, Mthembu had in fact received the appeal outcome and was aware that his shuttle benefit did not go beyond the end of May 2010, and further that his continued utilisation of the shuttle service in June 2010 constituted intentional abuse of the policy and thus a form of misconduct involving dishonesty. In the light of these factors, it was further contended that the Commissioner came to a conclusion on the facts and on the credibility of Mthembu which no reasonable Commissioner properly applying his mind to the evidence ought to have arrived at. Lastly, it was contended that the Commissioner committed gross irregularity or exceeded his powers in that he had ordered reinstatement without properly considering whether, as contemplated in section 193 (2) of the LRA the circumstances surrounding the dismissal are such that any continued employment relationship would be tolerable.

[16] In opposing the application, Mthembu's contention was that;

> Whilst he was charged with abuse of the relocation policy, he was nevertheless dismissed for dishonesty. His dismissal was based on the erroneous assumption that he had been paid a portion of the rental during May 2010 and that he had also drawn and used the bus coupons. It was however clarified at arbitration and as further conceded by ACSA that he was not paid any rental or deposit during May 2010, but that he was given a once off cheque in favour of the landlord for the entire benefit (R8000.00) on 29 June 2010. On the common cause facts, he was neither guilty of misconduct nor was he dishonest as he had not received the benefits simultaneously. He had used the bus coupons until 29 June 2010 upon which he had received the rental benefits, and had the necessary permission from Zulu to do what he did. In the light of the facts before the Commissioner, there were no competing versions on the material issues.

[17] Further contentions made on behalf of Mthembu were that it was common cause that he had received permission from Zulu to continue using the bus coupons until he received payment for the rental; that Zulu was not called upon to controvert this evidence; that in terms of the policy, ACSA was obliged to pay the rental upon receipt of proof of lease agreement, and that it had breached the policy and delayed making payment to Mthembu in that regard. The only material dispute according to submissions made on behalf of Mthembu was whether he had received the outcome of the appeal which indicated that his option to use the shuttle service was acceptable until the end of May. In this regard, it was contended that Mthembu's evidence was that he had not received the document, and that Mosala on behalf of ACSA could not contradict Mthembu's version in this regard as she gave no evidence that the document was delivered to him. Further contentions made on behalf of Mthembu were that the award exhibited no reviewable defect as the Commissioner had appreciated that he needed to make a finding on whether Mthembu was dishonest. On the facts, it could not be said that the award was one that no reasonable Commissioner could have granted.

The legal framework pertaining to reviews:

[18] The test for review is that as laid down in the seminal decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3]. In accordance with this test, a reviewing court must ask what appears to be a simple but always vexed question, i.e., *"Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?"*

[19] Two recent important judgements have hopefully put to rest the debate surrounding the full implications of the *Sidumo test* and the approach to be followed by reviewing courts in applying this test. Cachalia JA's explication of the *Sidumo* test in *Herholdt v Nedbank Ltd*[4] was as follows :

> "That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. … The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence."

And,

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable"[5]

[20] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others*[6] in a decision that was handed down immediately after that of the Supreme Court of Appeal in *Herholdt* stated the following in regard to the *Sidumo* test;

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[3] 2008 (2) SA 24 (CC) at para 110
[4] (701/2012) [2013] ZASCA 97 (5 September 2013) at para 12
[5] At para 25
[6] Case number JA 2/2012 at para 14

> "Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material."

And

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable"[7]

[21] Some of the important principles arising out of these two decisions are as follows[8];

Firstly, although a reviewing court must scrutinise the evidence in order to establish whether the result was reasonable, that fine line between an appeal and a review should be preserved. Secondly, awards should not be set aside simply because the reviewing court would have arrived at a different result. Thirdly, the reviewing court should not adopt a piecemeal approach where each factor that a commissioner failed to take into account is analysed independently and individually because that assumes the form of an appeal. Fourthly, the *Sidumo* test remains stringent, and that awards should not easily be interfered with unless *"the decision was entirely disconnected with the evidence or is unsupported by any evidence and involves speculation by the commissioner"*[9]. Fifthly, Commissioners will commit a gross irregularity in framing their awards if they misconceive the nature of the enquiry or arrive at

[7] At para 16
[8] See Anton Myburgh (The test for review of CCMA arbitration awards: an update. Contemporary Labour Law Vol 23 No: 4 November 2013)
[9] Herholdt at para 13

an unreasonable outcome. Sixthly, in order to succeed with a review based on the commissioner's failure to consider material facts, the reviewing party must establish that this had culminated in the result of the award being substantively unreasonable.

Evaluation:

[22] The Labour Appeal Court in *Goldfields* had given practical guidelines which a reviewing court should adopt in assessing whether the result of an award is unreasonable. Having cautioned against adopting a piecemeal approach, the LAC had favoured an approach in terms of which the review court must pose the following questions:

> "…….. (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[10]

[22] In answering the above questions in this application, it would be appropriate to re-visit the facts of this case as they were placed before the Commissioner. It was common cause that Mthembu had in March 2010, made an election to use the shuttle service, which he had subsequently changed to that of the rental option. It was further not in dispute that having changed his initial option, he had on two occasions in June 2010, obtained bus coupons which allowed him to utilise the bus shuttle. On 24 May 2010 he had obtained rented accommodation in Verulum and had signed a one year lease agreement on 26 May 2010. The lease was to commence on 1 June 2010 at a rental of R2000.00 per month. On 15 June 2010, he had completed and submitted a rental claim. Payment in respect of the rental option was only made on 29 June 2010, and he had taken occupation of the rented premises at the end of June 2010.

[10] At para 20

[23] In adopting the approach elucidated by the LAC in *Goldfields*, firstly, I did not understand ACSA's position to be that it was not given an opportunity to have its say in respect of the dispute in question. Secondly, it was common cause that the charges preferred against Mthembu were that he had on the 4th June the 21st of June 2010 abused the relocation policy by collecting bus coupons when he had relocated, and having received a full rental benefit. Thus what the Commissioner was required to determine was whether on the facts before him, ACSA had discharged the onus placed on it to prove that indeed Mthembu had committed the misconduct in question. The question to be answered then is whether the Commissioner had properly identified the dispute he was required to arbitrate

[24] Section 188 (2) of the LRA provides that;

> *"Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act"*

What this implies is that it was for Commissioner to determine whether Mthembu had indeed abused the policy in the manner described by ACSA. Whether that abuse (if proven) involved dishonesty was a secondary factor which the Commissioner had to consider, more specifically in determining whether the sanction of dismissal was fair. In my view, in order for the reason for a dismissal to be fair, amongst other things, it invariably has to be based on what an employee was charged with or the allegations he had to answer to in the disciplinary enquiry. It follows that if an employee after a disciplinary enquiry is found "guilty" on a charge which was not specified in the "charge sheet" or which he was not confronted with during a disciplinary enquiry, he could not have had an opportunity to answer to it in that disciplinary enquiry. In such circumstances, by all accounts, the dismissal would be unfair. Conversely, in arbitration proceedings, where a Commissioner on the facts miscategorises the charges against a dismissed employee, and concludes that a dismissal was either fair or unfair based on that miscategorisation, it follows that the Commissioner had undertaken a wrong enquiry, or had undertaken the enquiry in the wrong manner. At worst, it should be said that

the Commissioner had misconceived the nature of the enquiry, and as a result, misconceived his or her mandate or duties in conducting the enquiry[11].

[25] ACSA had lamented the fact that the Commissioner's distinction between the offence of *"abuse" of the policy*", and that of *"dishonesty"* was inappropriate in view of the fact that the charge of abuse of the policy involved an element of intention. It was contended that Mthembu had benefitted financially at the expense of ACSA, and thus had acted dishonestly. *"Abuse"* within the context of the policy in question would in my view denote *"misuse"* or *"exploitation"* or even *"manipulation"* of that policy. Invariably, in the light of the financial implications attached to each option exercised by individual employees, it followed that such abuse (if proven) could only be for the sole purpose of gaining some financial benefit for the employee. Alternatively, if the abuse was not intended to benefit the employee, the other end result of the abuse would have been to the prejudice of the employer in other ways.

[25] *"Dishonesty"* on the other hand denotes a generic term embracing all forms of conduct involving deception and an intention on the part of the employee[12]. To the extent that the policy entitled employees to only one option, it follows that firstly, if ultimately Mthembu was found guilty on the charge of "abuse of the policy", the Commissioner for the purposes of determining the fairness of the sanction had to further determine whether the abuse was with intent, thus involving *"dishonesty"*. This was the enquiry that the Commissioner was obliged to undertake.

[26] From his analysis, it is apparent that the distinction drawn by the Commissioner between the two offences was inappropriate, as given the nature of the charge, the two were intrinsically linked. The Commissioner in making that distinction had also inappropriately deferred to the findings of the chairperson of the appeal who had equally made that distinction. At most, if the Commissioner had sought to make that distinction, it could only have been on the basis of the evidence of Mosala as presented to him during the arbitration, and not on the basis of the reasoning of the chairperson of the

[11] See Herholdt Supra at para 10
[12] See John Grogan: Dismissal at p 188

appeal hearing. To this end, it is apparent that the Commissioner undertook the enquiry in the wrong manner, as the issues before him were simply whether Mthembu had abused the policy in the manner ascribed to him.

[27] It is trite that proceedings before the Commission are conducted on a *de novo* basis. This implied that a finding had to be made that contrary to what the policy provided, Mthembu had not only utilised the shuttle service, but had also benefitted from the rental option at the same time. On the facts, having changed his options, Mthembu had only received the rental payment on 29 June 2010 and had occupied his rented place at the end of June 2010. At no stage after 29 June 2010 did Mthembu utilise the bus coupons he had drawn on 4 and 21 June 2010. In my view, the dispute surrounding whether Mthembu had received the outcome of his appeal or not became redundant in that he could not have abused the policy unless the evidence was such that it could be shown that he had received the rental payment and had nevertheless continued to utilise the shuttle service at the same time. The outcome of the appeal was also for all practical purposes, meaningless in view of the fact that as at the end of May 2010, Mthembu's rental arrangements and payment had not been finalised. It can thus not be said that there was abuse when despite having secured a rental place, payment in that regard was only made by ACSA on 29 June 2010.

[28] From the formulation of the charges, it is apparent that abuse of the policy could not have taken place as on 4 and 21 June 2010, and at least until 29 June 2010, Mthembu had only utilised the bus shuttle which he was entitled to in view of the fact that his rental payment had not been processed. To this end, ACSA could not have shown that it was incurring expenses in respect of the two options exercised by Mthembu at the same time in contravention of the policy as clearly this was not the case. Whether the rented place had become available as at 1 June 2010 was equally irrelevant as payment for the rental had not been made. To this end, and on the facts, there was clearly no abuse of the policy, let alone dishonesty on the part of Mthembu.

[29] Other than misconceiving his mandate, the Commissioner had also for reasons that appear unclear, offered unsolicited advice to ACSA by

suggesting that within the context of introducing the new policy, that policy should have made provision for the two different offences already discussed above. The Commissioner had further suggested that ACSA should have drafted a supplementary disciplinary code making employees aware of what they could expect if they misconducted themselves in one of the two ways. As if that was not enough, the Commissioner in considering relief had further suggested to Mthembu that he should have sought greater clarification on the implications of continuing to use the coupons after he had applied for rental subsidy. It is not within the mandate of a Commissioner when determining the fairness of a dismissal to proffer unsolicited advice to parties on what they should and should not have done. In misconduct cases, the task of the Commissioner is *inter alia*, merely to determine whether the misconduct in question took place, and if so and whether the dismissal was fair. Furthermore, the Commissioner had found that there was "technical abuse of the policy" albeit there was no intention to deceive the company. In this case, it was either the misconduct in the form of abuse of the policy had taken place in the manner described by the employer or not. The "abuse" if any, could not by all accounts have been "technical". However, since Mthembu had not brought a cross-review in respect of the relief granted by the Commissioner, there is no basis upon which that aspect of the award can be interfered with.

[30] In the light of the conclusion that the Commissioner had undertaken the enquiry in the wrong way and had further misconceived his duties in conducting the enquiry, the ultimate question is whether, in the light of the issues raised by the dispute at arbitration the outcome reached by the Commissioner was not one that could reasonably be reached. I have already commented on the factual merits of the case and my conclusions in that regard. To that end, and in line with the SCA's decision in *Herholdt*, on the evidence, the issues and other material properly before the arbitration, and notwithstanding the flawed manner and nature of reasons of the Commissioner in coming to his conclusions, it cannot be said that the result reached by the Commissioner is one that a reasonable commissioner could not reach. Put differently, it cannot be said that the flaws identified in the

reasoning of the Commissioner had the effect of rendering the outcome reached unreasonable.

[31] In regards to the issue of costs, there is in my view, no justification for such an order to be made having taken into account considerations of law and fairness. In the result, the following order is made;

Order:

1. The application for review is dismissed.
2. There is no order as to costs

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Tlhotlhalemaje, AJ

Appearances:

For the Applicant:	Adv. C. A Nel
Instructed by:	Norton Rose South Africa
For the 1st & 2nd Respondent:	Adv. M. Bingham
Instructed by:	Instructed by Cheadle Thompson Haysom INC