
SOUTH AFRICA / JUDGMENT

MTN SP (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR2471/12) [2016] ZALCJHB 120 (18 March 2016) [2016] ZALCJHB 120

COURT

Labour Court Johannesburg

BEFORE

E Bester

CASE / FILE NUMBER

JR2471/12

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR2471/12

In the matter between:

MTN SP (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

First Respondent

MEDIATION AND ARBITRATION

JOSEPH TSHABADI N.O. Second Respondent

COMMUNICATION WORKERS' UNION

Third Respondent

LULAMA MKALIPI

Fourth Respondent

SIBUSISO BANDA

Fifth Respondent

FIKELEPHI MTHEMBU Sixth

Respondent

NICEBA LONI Seventh Respondent

JOHN SEEMELA Eighth Respondent

FANYANA MKWNAZI

Ninth Respondent

XOLELWA MBAKAZA

Tenth Respondent

SIFISO NOMBIKA

Eleventh Respondent

ENOCH PKALALA

Twelfth

Respondent

Heard: 13 January 2015

Delivered: 18 March 2016

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and award of commissioners – decision of Commissioner that employees were fairly dismissed reasonable and one that another reasonable decision maker could reach.

Reinstatement – Unfair dismissal (s194 of LRA 1995) – Commissioner failed to take into account relevant facts relating to restructuring - and retrenchment processes within the Applicant and whether it was reasonably practical to reinstate employees.

Appropriate remedy – insufficient evidence to determine – matter remitted to CCMA for further evidence and determination on appropriate remedy.

E BESTER, AJ

Introduction:

- [1] This is an application in terms of Section 145 of the Labour Relations Act, 66 of 1995 (“the LRA”) to review and set aside an arbitration award (“the award”) made by the second respondent (“the Commissioner”) under the auspices of the first respondent (“the CCMA”) under case number GATW 11214/10 on 1 October 2012. In the award the Commissioner held

that the dismissal of the fourth and further respondents (jointly referred to as “the employees”) by the applicant was procedurally fair but substantially unfair. The Commissioner ordered that the employees, with the exception of the fourth and sixth respondents, be reinstated retrospectively and be paid compensation equal to twelve months’ remuneration. The fourth and sixth respondents were awarded compensation only, in an amount equal to twelve months’ remuneration, based on the fact that they had both found alternative employment and did not wish to be reinstated. The applicant seeks costs in the event of it being successful with its application.

[2] The review application was preceded by an application to dismiss the review proceedings and an application for condonation of the applicant’s late filing of the records of the arbitration proceedings. The respondent’s application to dismiss was however withdrawn at the onset of the proceedings and the applicant’s application for condonation of the late filing of the records of the arbitration hearing was granted.

[3] The review application herein is essentially premised on the following:

3.1 The Commissioner’s continuation of the arbitration in the face of a former ruling by another Commissioner to the effect that the matter may only be set down for hearing again, following a postponement, once the third respondent and/or the employees have paid the applicant’s costs pertaining to the postponement and whilst the said costs had not been paid when the hearing continued.

3.2 The Commissioner’s finding that the employees were members of the third respondent (“CWU”) is in conflict with a ruling by another Commissioner who dealt with the locus standi of the union to represent its members at the arbitration to the effect that the employees were not members of the union.

3.3 The Commissioner’s finding that the employees’ dismissal was substantively unfair in that the applicant failed to prove on a balance of probabilities that the employees were not members of CWU at the time they were dismissed.

3.4 The Commissioner’s order that the employees (except for the fourth and sixth respondents) must be reinstated as well as paid twelve months compensation.

3.5 The Commissioner’s order to the effect that the employees (except for the fourth and sixth respondent’s) must be reinstated on the same terms and conditions as applicable before their dismissals in the face of the fact that the departments in which they used to work were closed down.

Background

facts

- [4] During the latter half of 2009 the applicant embarked on a so-called head count reduction exercise in terms of which it was envisaged that approximately 400 of its employees at the time would be affected.
- [5] The intended headcount reduction exercise resulted in the third respondent approaching this Court for urgent relief based on the applicant's failure to consult with the third respondent. This culminated in an agreement between the applicant and CWU in terms of which agreement the applicant undertook:-
- (1) "...to consult with the applicant (CWU) in relation to the retrenchments that are likely to affect its members employed by the respondent as it is required in terms of section 189" and;
 - (2) "...not to consult individually with the applicant's (CWU's) members in relation to the proposed retrenchments."
- [6] The applicant, on more than one occasion after the said agreement was reached, requested the employees to confirm whether they were members of the third respondent. The applicant also requested CWU to provide it with a list of its members who were to be affected by the headcount reduction and on whose behalf the third respondent was entitled to consult. The employees did not respond to the various e-mails and, although CWU undertook to provide the applicant with an updated list of its members, the list was apparently never provided to the applicant until at least April 2010, when CWU alleges it provided the applicant's attorneys of record with a list of its members.
- [7] The applicant contemplated that the retrenchment process would be concluded at the end of March 2010. During the course of the process it became apparent however, that the process would endure beyond the said cut-off date set by the applicant. The applicant accordingly created a provision in its budget (referred to as a "special dispensation" during the arbitration proceedings in this matter) for the payment of salaries and benefits of those affected staff members who were members of CWU and who had not opted to take voluntary retrenchment packages.
- [8] It is the applicant's case that it thus became imperative for the applicant to establish with certainty the membership of CWU in as far as affected staff were concerned in order for the applicant to budget properly for payment of salaries and benefits of the said members beyond 31 March 2010, by which time, according to the applicant, the consultation process of non-union members and their consequent retrenchments would have been finalized.
- [9] It is apparent that the employees were not consulted individually and that they continued to be paid after March 2010, by means of the so-called special dispensation, i.e. the budgetary provision made for this purpose.

[10] On or about 12 to 17 July 2010, the employees were served with notices of a disciplinary enquiry in terms of which they were charged as follows:

“It came to the Management’s attention that on or about November 2009/March 2010, and during the subsequent investigation you allegedly led MTN [the Applicant] into believing that you were a fully fletch [member of] Communication Workers Union [the Third Respondent], thereby unduly benefitting in the arrangement entered into between MTN Management [the Applicant] and CWU [Third Respondent]. All other employees who were affected by the restructuring process were terminated on/by 31 March 2010, whereas all employees who were members [of] CWU were not pending the finalization of the Labour Court matter.

It is for this reason that the company after careful consideration has decided to institute disciplinary action against you. Management views the allegation against you in a serious light, and if proven, these allegations amount to charges framed as follows:-

Charge 1

You are charged with contravention of clause 7.1 of [the] MTN (Pty) Ltd Disciplinary Code and Procedures in that on or about November 2009/ March 2010 when MTN [the Applicant] was conducting consultation sessions in terms of section 189 of the Labour Relation Act you misled MTN [the Applicant] into believing that you were a member if the CWU [Third Respondent] whereas in the contrary you were not. As a result of your false or misleading statement, you continued to receive a monthly salary from April, May and June 2010 which you were not entitled to. If this conduct is proven, it amounts to gross dishonesty.

Charge 2

You are charged with contravention of clause 7.2 read with 7.4 of the MTN (Pty) Ltd Disciplinary Code and Procedure in that on or about November 2009/ March 2010 you grossly misrepresented the true status of whether or not you were a member if CWU [Third Respondent] during the restructuring process and the subsequent consultation as per section 189 of the Labour Relation Act by stating that you were a member of CWU [Third Respondent] whereas you were not. If this conduct is proven, it amounts to gross misrepresentation.

Charge 3

You are charged with contravention of clause 4.2 of [the] MTN (Pty) Ltd Disciplinary Code and Procedures in that you fraudulently benefited in respect of salaries paid to you between April, May and June 2010, which monthly salary would not have been paid had you not misled the company into believing that you were a member if CWU [Third Respondent]. To which MTN Management [The Applicant] and the Organisation [Third Respondent] have had an out of court settlement staying the consultation with members of CWU [Third Respondent] pending the finalization of the Labour Court matter. If this conduct is proven, it amounts to fraud”.

[11] The employees were found guilty of the charges against them and dismissed on 14 September 2010.

[12] The employees then referred a dispute concerning their alleged unfair dismissal to the CCMA.

[13] On 17 December 2010, the parties argued a point in limine before Commissioner Van Wyk, who dealt with the matter at the time, to the effect that the employees may not be represented by CWU in that they are not members of CWU. On 13 January 2011 a ruling was issued in terms of which it was held that CWU was not entitled to represent the employees. Commissioner Van Wyk, in support of his ruling stated the following:

"I have scrutinized the trade union bundle in exhibit 2 and although it reflects many membership forms, stop order deductions and so forth no stop orders could be found that the nine (9) applicants were indeed bona fide CWU members when dismissed. Again, I could find no union deductions obo CWU for the applicants."

[14] During a later sitting of the arbitration in April 2011, the matter was postponed after application was made for a postponement

following a successful request for legal representation by the employees, in order to allow the employees an opportunity to appoint

a legal representative. The Commissioner dealing with the matter at the time, Commissioner Nowosenetz, granted the postponement request for this purpose however awarded costs against the employees and ruled that the matter may only be scheduled for hearing upon proof of payment by the employees.

[15] The ruling by Commissioner Nowosenetz was taken on review by the employees and the matter was subsequently enrolled for hearing before finalization of the review application and before payment of the wasted costs by the employees.

Reasoning and findings of the Commissioner

[16] The Commissioner makes no reference in his award to the fact that the arbitration hearing was set down in contravention of the ruling that the costs awarded to the applicant in terms of a former ruling of another Commissioner, must be paid before the matter could be set down for hearing again. He instead stated that no preliminary points were raised by either party.

[17] The Commissioner, however, dealt with this issue during the arbitration proceedings. In this regard, and after listening to

comprehensive arguments by both parties in respect of the continuation of the matter in light of the ruling by Commissioner Nowosenetz, he held as follows:

"I have also taken into consideration the fact that the ruling by Commissioner Lawrence (Nowosenetz) (inaudible) on review, on the grounds that the costs order was not warranted in these circumstances, and therefore that is an entirely different process, which should not stay the proceedings of the CCMA. To cut a long story short, it is trite law that proceedings in the Labour Court do not stay proceedings at the CCMA, and now I imagine that it is on that basis that the matter has been set down for arbitration

in this particular case because I am not going to deal with the ruling by Commissioner Lawrence, which is on review in the Labour Court, which is an entirely different forum and it will pronounce itself on that one.

I am only going to deal with the merits of the case, which is entirely separate from the ruling by Commissioner Lawrence. I am therefore going to proceed with arbitration in this matter on the merits of the case...”

[18] In his analysis of the evidence and arguments pertaining to the merits of the matter in his arbitration award, the Commissioner finds that the applicant had failed to prove, on a balance of probabilities, that the dismissal of the employees were substantively

fair. He finds that the probabilities “overwhelmingly” favour the employees and he accepts their version and finds that they were indeed members in good standing of the third respondent at the time of their dismissal. He then holds that, that being the case, they were entitled to be paid their salaries in terms of the so-called special dispensation.

[19] In dealing with the applicant’s case that the employees’ names do not appear on the list of members of the CWU whose trade union subscriptions were deducted from their salaries by means of stop orders, he finds that this contention is displaced by the applicant’s own concession that the applicant experienced problems in processing stop orders as well as CWU and the employees’ “proposition that, as per the trade union’s constitution, membership is acquired immediately upon completion of application and stop order forms and not that trade union dues are deducted from emoluments of members.”

[20] In as far as the applicant contended that CWU and the employees should have provided the applicant with confirmation that the

employees were in fact members of the third respondent, the Commissioner finds that it is not for CWU to “build a case against its members”.

[21] The Commissioner continues to find that he is faced with two mutually exclusive versions regarding whether or not the employees were members in good standing at the time of their dismissal. He states that, where evidence on a particular point is evenly balanced, the rules of evidence suggest that the scale must tip against the party bearing the onus. He then finds that the applicant had nothing concrete to show that the employees were not members of the union in good standing and holds that the applicant’s averments in this regard were spurious in the extreme, without merit and unsubstantiated.

[22] The Commissioner held that the applicant failed to prove that the trust relationship between the parties had been irretrievably damaged in that only a mere statement in this regard was made without this statement being backed up.

[23] The Commissioner then found that, taken into account the circumstances of the case, there is nothing in law or fairness which

prevents him from ordering reinstatement in respect of those of the applicants who applied for reinstatement. He therefore made the following award:

“The Respondent (the applicant in this case) is ordered to pay (all the Applicants) twelve months compensation as stated in the Table A below.

The Respondent (MTN SP (Pty) Ltd) is ordered to retrospectively reinstate all the Applicants as stated in the Table A below except Messrs. Mthembu (The Sixth Respondent in this case) and Mkalipi (The Fourth Respondent in this case) who have since found alternative employment in the meantime.

The reinstatement shall be on the same terms and conditions as those that governed the employment relationship of the Applicants before the termination of their services.

The Respondent shall restore the retrospectively reinstated Applicant’s leave and other privileges as if no dismissal had ever taken place.

All the retrospectively reinstated Applicants shall report for duty at the offices of the Respondent by not later than Thursday, 01 November 2012.

The Respondent shall pay the amounts reflected in the Table below by not later than close of business on Thursday, 01 November 2012.

[24] The Commissioner proceeds to list the names of the employees in a table together with the exact amount payable to each employee in the form of compensation or back pay, as was applicable. The table also indicated which employees were to be reinstated. He then adds the following clause to his award:

“When awarding compensation I took into account current labour law jurisprudence that the underlying rationale behind compensation is not to close the business down. Hence I restricted compensation to twelve months only.”

Grounds of Review

The Commissioner’s continuation of the arbitration in the face of a former ruling by another Commissioner that wasted costs of a postponement must be paid before the matter is set down for hearing

[25] The applicant submits that the Commissioner committed an irregularity and exceeded his powers when he disregarded the ruling of Commissioner Nowosenetz who ordered that the employees must pay the wasted costs pertaining to a postponement of the arbitration before the matter could be set down for hearing again. The applicant contends that the Commissioner undertook to address this issue in his award but failed to do so and instead stated in his award that no preliminary issues were raised by the parties.

- [26] Although the Commissioner did not deal with this issue in his award, he dealt with it in during the proceedings as set out hereinabove. He did, upon request for a ruling in writing, refuse to postpone the arbitration for purposes of issuing a written ruling and instead stated that the ruling will be availed as part of the award. I am however of the view that the Commissioner's failure to then deal with the ruling in the award, does not, per se, render the award reviewable.
- [27] An arbitrator is tasked to conduct arbitration proceedings in a manner that the commissioner deems appropriate in order to determine a dispute quickly and fairly. (Section 138 of the LRA). It would have been inappropriate for the Commissioner in the circumstances to have postponed the arbitration and accordingly not to have determined the substantial merits of the case pending the outcome of a review application relating to a cost order.
- [28] The Commissioner's conduct hereto was not irregular and was certainly not unreasonable. He did not exceed his powers and acted within the powers given to him by section 138 of the LRA.

The Commissioner's finding that the employees were members of the third respondent ("the union") in conflict with a ruling by another Commissioner

- [29] The Applicant contends that the Commissioner was bound to the ruling made by Commissioner Van Wyk to the effect that the employees were not members of CWU.
- [30] In *Sondolo IT (Pty) Ltd v Howes & others* (2009) 30 ILJ 1954 (LC) and [2009] 5 BLLR 499 (LC) Basson J held as follows:

"[14] ...The LRA does not give guidance on what would happen in the event a Commissioner is unable to proceed with the merits of the arbitration whether as a result of death, retirement or for any other

reason (as in this case) or where a commissioner recuses himself from the process. Section 17 of the Supreme Court Act 59 of 1959, provides in respect of proceedings in the High Court that, if at any stage during the hearing of any matter by a full court any judge dies or retires or is otherwise incapable of acting or is absent, the remaining judges (provided that they constitute the majority of the judges before whom the proceedings commenced) will proceed with the matter. If only a minority of the judges or if only one judge remains, the hearing shall commence de novo unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges. This will be the case where a judge becomes unavailable at any stage during the proceedings whether at the beginning or during the hearing or even after the conclusion of argument and after judgment has been reserved (see *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue* 1986 (2) SA 645 (T) at 655D – 656A). Where there is only one presiding judge and that judge is unable to proceed with the trial, the trial will resume de novo before another judge. Where a judicial officer in civil proceedings recuses himself or herself he or she becomes functus officio and can take no further part in the case. In fact, the proceedings become a nullity and the matter will be postponed to another judicial officer for a de

novo hearing. Unless the parties agree that the succeeding judicial officer may have regard to the record of the evidence that had been adduced in the first trial, the trial will commence de novo (see in general Erasmus Superior Court Practice A1-14G) A similar rule applies in criminal matters. Where a magistrate, for example, retires or resigns, the accused will not be entitled to demand a verdict but it is for the prosecutor to decide whether it wishes to proceed de novo. In *S v Suliman* 1969 (2) SA 385 (A) the Appellate Division also confirmed that an accused may be tried de novo where the Judge dies during the criminal trial.

[15] Although the LRA and the Rules of the CCMA do not expressly offer any such express guidance in respect of proceedings before the CCMA, I am of the view that the provisions of section 138(1) of the LRA are sufficiently clear to support a conclusion that a commissioner cannot be bound by the rulings made in respect of the substantive merits of a dispute in earlier proceedings. Section 138(1) and (2) of the LRA make it clear that a commissioner, once seized with a matter, has a statutory duty to determine the substantial merits of the dispute before him or her and in doing so must determine the scope of the merits and rule on what evidence may or may not be admissible in the proceedings before him or her. It is inconceivable (apart from the fact that it is also contrary with practice in the High Court in both civil and criminal matters) that rulings in respect of the substantive merits of the dispute would bind a succeeding commissioner in circumstances where the earlier commissioner is unable to proceed with the arbitration.”

[31] I am in agreement with the reasoning hereto and find that the Commissioner was not bound by the ruling of Commissioner Van Wyk in respect of the membership of the employees in as far as his ruling hereto had a bearing on the substantial merits of this matter.

The Commissioner’s finding that the employees’ dismissal was substantively unfair

[32] The crux of the applicant’s case is that the employees were dishonest by misrepresenting the fact that they were members of CWU when in fact they were not. By allegedly doing so, the employees received an undue benefit by having their imminent retrenchment

postponed and receiving salaries and other benefits from a so-called special dispensation which was exclusive to CWU members at the time.

[33] The applicant takes issue with the findings of the Commissioner hereto. In particular, the applicant contends that the Commissioner

misdirected himself as his findings regarding the employees’ membership of CWU is based on such membership at the date of their dismissal and not at the date on which they made the alleged misrepresentation hereto.

[34] I am of the view that, although the Commissioner’s findings hereto should indeed have been with regard to the employees’

membership as at the date that they allegedly misrepresented their membership and not as at the date of their dismissal, not much turns on this. The Commissioner's reasoning and outcome thereof, in light on the facts of this matter, ultimately would have rendered the exact same result if it was applied to the date of the misrepresentation, as the facts that were applicable in March 2010 were equally applicable in September 2010, when the employees were dismissed.

[35] In as far as the applicant contends that the employees were not CWU members based on the fact that they do not appear as members from the applicant's records, the contention is flawed. The determination of the employees' membership is the determination

of an objective fact. It cannot be done with reference to the applicant's records only.

[36] Unfortunately however, these were the only facts which were available to the applicant at the time. The employees did not provide the applicant with proof that they were members of CWU when requested to do so. I will return to this issue hereunder.

[37] At the disciplinary hearing of the matter, CWU submitted copies of the employees' membership application forms from which it is apparent that the employees applied for membership late in 2009, within days after CWU entered into the agreement with the applicant that their members would not be individually consulted. There is nothing in the agreement that states that employees had to be members of CWU at the time of the agreement in order to be regarded as being represented by CWU and the applicant, correctly so, does not attempt to make out a case that there is. I therefore accept that even if employees joined after conclusion of the agreement but before the agreement were implemented, i.e. when the consultation process were furthered, they were entitled not to be consulted individually but to be represented by CWU.

[38] The applicant however also contends that the employees had to be members in good standing, i.e. members whose membership subscriptions were paid-up, before they could be regarded as members.

The constitution of CWU states the following:

"8 MEMBERSHIP

8.1...

8.2 A worker employed in the industry who wishes to join the Union shall apply to the LEC with jurisdiction over the area where he or she is employed. Upon completion of a stop - order form a worker shall be admitted as a member...."

[39] It is clear that there is no requirement that subscription fees must be made before an employee may be admitted as a member, rather, such fees become payable after admission as a member. Union members, in certain circumstances, may also be exempted from paying subscription fees, such as where they have been unemployed for 3 months. (Clause 10.3 of the constitution of CWU).

[40] In the circumstances, the decision of the Commissioner in this regard is one that another reasonable decision maker could have arrived at based on the evidence in this matter.

The Commissioner's order that certain employees must be reinstatement as well as paid compensation.

[41] Despite the possibly ambiguous terms of the Commissioner's award, it is clear upon a proper reading thereof that it has the effect of reinstating the employees (except for the Fourth and Sixth Respondents) with retrospective effect, on conditions not less favourable than those that pertained prior to their dismissal, save that in regard to back pay, the amounts payable to the individual employees respectively was limited in the exercise of the Commissioner's discretion to an amount of 12 months per employee only. The award in this regard, falls within the parameters of the provisions of section 194 of the LRA and does not constitute an order for reinstatement as well as compensation. It deals with the back pay consequent upon a reinstatement but limits such back pay to a maximum amount of twelve months salary, a decision which in my view falls within the Commissioner's powers.

The Commissioner's order to the effect that the employees (except for the fourth and sixth respondent's) must be reinstated

[42] 193. Remedies for unfair dismissal . . .

- (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-
 - (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.'

Section 193 (2) reads:

'(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee

unless-

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.

- [43] It is common cause that the applicant went through a major reduction in headcount which preceded the retrenchment of approximately 400 employees. It was during the time that this restructuring process was embarked upon that the events which resulted in the employees being dismissed for misconduct occurred.
- [44] It is clear from the records of the proceedings that the applicant reduced many positions and that many employees who were not bound by the provisions of the agreement between CWU and the applicant regarding consultation during the restructuring exercise, were retrenched by 31 March 2010.
- [45] It is common cause that the employees were earmarked for retrenchment and I am of the view that there is at least a very good likelihood that they would have been retrenched or employed in a different capacity on different terms and conditions had they not been dismissed for misconduct.
- [46] There is no indication that the Commissioner considered and/or took into account these facts and probabilities when he decided to order reinstatement of certain of the employees on terms and conditions on the same terms and conditions than before their dismissal. It rather appears that the Commissioner failed to take into account this evidence, which is clearly material for the purposes of deciding an appropriate remedy. Had he properly considered this evidence and the probabilities relating thereto, he would have found that it is not reasonably practical to reinstate the relevant employees on the same terms and conditions than before their dismissal.
- [47] I am of the view that the Commissioner hence committed a gross irregularity in this regard and that his award falls to be reviewed
- and set aside on this basis in as far as it relates to the reinstatement of the fifth -, seventh -, eighth -, ninth -, tenth
- , eleventh - and twelfth respondents.
- [48] This Court is not, however, in a position to determine a suitable remedy in respect of these employees in that the records do not reflect sufficient information in order to determine whether re - employment in an alternative position on different terms and conditions may be perhaps be appropriate. If it is not, it does not follow, in my view, that an award for compensation in the maximum amount permitted by the LRA would be appropriate for the same reasons as set out above. If the employees would have been retrenched but for their unfair dismissal for misconduct, maximum compensation may not be appropriate. It also may not be appropriate taken into account the fact that the employees did not provide the applicant with the required information in respect of their membership when required to do so. If they did, the matter could have perhaps have been resolved at the time. This may have a bearing on any compensation granted to the employees, if applicable. The Commissioner should take account of these material facts when deciding an appropriate remedy.

Costs

[49] In relation to costs, I am of the view that both parties have to some extent been successful in these proceedings and that a cost order would not be appropriate.

[50] For the above reasons, I make the following order:

50.1 The application to review and set aside the award is dismissed in as far as the fairness of the dismissal of the employees is concerned.

50.2 The award is reviewed and set aside in as far as reinstatement or compensation was granted to the employees and the matter is remitted to the Second Respondent for set down before the Third Respondent or, if he is unavailable, another Commissioner to determine an appropriate remedy in respect of all the employees after hearing relevant evidence hereto including evidence in respect of the possible retrenchment of the employees or their transfer to alternative positions on different terms and conditions, if not for their dismissal for misconduct.

50.3 There is no order made as to costs.

E Bester AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv A M Mtembu

Instructed by:

Mashiane, Moodley and Monama Inc

For the Respondents: Mr. T Faku (from Faku Attorneys)

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