REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

D 1148/12

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA **First Applicant**

KW PILLAY **Second Applicant**

SC TEMBE **Third Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT **First Applicant**

SECTORIAL BARGAINING COUNCIL

COMMISSIONER G. GERTENBACH **Second Applicant**

DEPARTMENT OF HEALTH KZN **Third Applicant**

Heard: 27 May 2014

Delivered: 21 August 2014

Summary:

JUDGEMENT

SHAI, AJ

Introduction

[1] This is an application by applicants in terms which they seek the review and setting aside, or alternatively correction of the arbitration award handed down by the Second Respondent dated 28 November 2012 under case no. PSHS394-09/10 and 354-09/10, acting under auspices of the Third Respondent, in terms of which the Second Respondent found the Second and Third Applicants' dismissal were both substantively and procedurally fair.

The facts

[2] The matter relates to the dismissal of the Second and Third Respondent from the Third Respondent's employment.

[3] The Second and Third Applicant were dismissed for the following:

> 'It is alleged that you contravened the provisions of the acts of misconducts as laid down in annexure "A " of Resolution 1 of 2003 in that:
>
> a. On the 17th of February 2009, utilising an ambulance KZN 22958 (A1A), you uplifted a female patient, Nokuvela Zindela, from Inkosi Albert Lithuli Central Hospital, who was diagnosed as suffering from multiple ring enhancing intracerebral lesions and you neglected this patient alone in the patient compartment from Durban to Port Shepstone.
>
> b. You abandoned this patient at Port Shepstone base by parking the ambulance with her inside and knocked off.
>
> c. You permitted your crew mate to sit in front with you whilst having a patient on board.'

With regard to Charge C, each applicant was charged with permitting the other to sit with himself in front whilst having a patient on board.

[4] It is common cause that the Second and Third Applicant had been requested by the doctor at Nkosi Albert Lithuli Hospital in Durban to transport a patient to Murchison Hospital. It is the contention of the applicants that the said patient had missed the minibus provided by the hospital to transport discharged patients of the hospital. According to them, the patient at that time was relatively well as he was to have travelled by conventional transport.

The Third Respondent however, contended that the said patient at that time suffered from intracerebral lesions causing obstructive hydrocephalus and was HIV positive with CD count of 4 amongst others.

[5] While transporting the said patient to Murchison Hospital, the Second Applicant contended that he received a call which informed him that his son was experiencing an asthma attack, and at that time he was 5 km from Port Shepstone Base, which is approximately 15 kms from Murchison Hospital.

[6] Due to these unforeseen circumstances, the Second Applicant elected to return to the Port Shepstone EMRS base and hand over the patient and ambulance for the oncoming shift at 19h00.

[7] The issue in this matter is whether the Applicants in fact neglected the patient in the back of the ambulance and thereafter abandoned the patient at Port Shepstone base without a handover.

[8] The arbitrator after assessing the evidence confirmed the convictions of the applicants on all counts and imposed a sanction of dismissal.

[9] It is this decision that is sought to be reviewed or set aside or alternatively corrected.

Application for condonation

[10] The factors that are relevant for consideration in determining whether condonation application should be granted or not were stated in the well-known case of *Melane v Santam insurance Co Ltd*[1] as follows:

[1] 1962 (4) SA 531 (A).

> 'In deciding whether sufficient cause has been shown, the basic principle is that the court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospect of success there would be no point in granting condonation, Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be flexible discretion. What is needed is an objective conspectus of all the facts .Thus a slight delay and a good explanation may help to compensate prospect which are not strong .Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'

[11] The respondent filed the answering affidavit late by nine days which I regard as not excessive. The explanation is that it was due to the applicants having filed incomplete record. I find the explanation reasonable. Further that, the respondent has demonstrated fair prospects of success and the granting of condonation will not prejudice the applicants, I therefore grant condonation of late filing of the answering affidavit.

Grounds for review

[12] The applicants contended that the arbitrator in conflict with the benefits of the Act, handed down an award which a reasonable and objective decision maker could make, failed to apply his mind, misconducted himself, committed gross irregularity, exceeded his powers by acting unreasonably or unjustifiably in:

12.1 Failing to take into consideration that the Second and Third Respondent's version was improbable and unreliable and by implication would constitute wearing 'metaphorical marks'.

12.2 The arbitrator failed to take into consideration the fact that the Third Respondent's defence could have been proven on a balance of probabilities had the Third Respondent elected to call the female patient, Nokulvela Zindela, to testify or alternatively submit the video footage from the cameras on the Port Shepstone Base confirming that

the Second and Third Applicants were seated in the front of the ambulance and thus having neglected the patient in the rear.

12.3 The arbitrator has further accepted that the Third Respondent approached the CCMA with clean hands but has not taken into consideration with respect to relief of reinstatement considering that the Second Applicant had been employed with the Third Respondent since 1979, a period of more than 30 years of service.

12.4 The arbitrator has furthermore found that the Third Respondent's main and material witness, Stoffels, conceded in a statement and submitted after the alleged incident and again during his testimony during the arbitration proceedings that he had told his co-supervisor, Khumalo (who had hearing difficulties, that Pillay had advised him that there was a transfer of a patient to Murchison Hospital. Stoffels, however, qualified his statement and testimony that he was not told that the patient in the vehicle is that patient.

12.5 The arbitrator failed to take into account on a balance of probabilities of the circumstances of 17 February 2009 at 9h00, the only possible transfer was that of Zindela, the patient in the ambulance. There is no plausible other transfer save for the one that the Second Applicant referred to. The arbitrator does not consider and apply his mind to Stoffels evidence in perspective. The Third Respondent led no evidence insofar as what other transfers the Second Applicant may have been referring to;

12.6 The arbitrator failed to take into account that Stoffels, the co-supervisor of the Third Respondent, conceded that the appropriate sanction, if guilty, was a final written warning. This is an indication that the trust relationship was not irretrievably broken down.

12.7 The arbitrator failed to apply himself to the testimonies during the cross-examination. The arbitrator found Stoffels to be an excellent witness and similarly the Third Respondent's other main witness, Khumalo, to be a good witness, notwithstanding that only one of their

versions can be correct. Stoffels's version is that he encountered the Second Applicant in Khumalo's office, however, cannot recall the discussion, whereas Khumalo denied encountering or engaging the Second Applicant in her office on the 17 February 2009 at or around 19h00.

12.8 The arbitrator found the Third Respondent's witness Lushaba who testified he does not check or inspect incoming vehicles, however, check or inspect out-going vehicles. The witness would therefore not have checked the ambulance and would not have been in a position to testify with regard to the front of the ambulance when it entered the Port Shepstone Hospital. In addition, 19h00 is a busy time of the day due to vehicles and staff going in and out during shift change.

12.9 The arbitrator failed to deal with the incident of 17 February 2009 at around 19h00 on the Port Shepstone Base, the time of the change-over. It is common cause that a crewman who was scheduled to take over the ambulance from the applicants was in fact requested to leave the base as a result of being intoxicated and the misunderstanding of the said transfer, was not dealt with by the arbitrator.

12.10 The arbitrator also failed to consider the evidence of Mr Rungasamy who testified that there is practice to do verbal hand over and that it had been done so in the past.

12.11 The arbitrator failed to take into account the issue of consistency insofar as abandoning a patient. Mr Rungasamy testified that he had on one previous occasion abandoned a patient and was charged and given a sanction of a final written warning. The sanction imposed on Applicants is inconsistent with the sanction imposed on Rungasamy.

12.12 The arbitrator in his award confused the charges with one another when he made reference to Charge C, that of "permitting your crew mate to sit in front with you whilst a patient is on board". The only evidence pertaining to Charge C is that of Lushaba, the security guard. However, the commissioner refers to the evidence of Khumalo, who

inspected the ambulance after the Applicants have left; therefore Khumalo's observations are irrelevant to Charge C.

12.13 The arbitrator found the version of the applicant could be true, however, rejected the Applicant's version due to the fact that he was of the view that the Third Respondent had four credible witnesses, notwithstanding clear contradictions of the Respondent's two main and material witnesses, Khumalo and Stoffels. The commissioner failed to give reasons why he decided that the Third Respondent's version outweighed that of the Applicants.

[13] The Applicants have supplemented the above grounds of review. However, many of them are related and connected to one or more of the above grounds and I will therefore not repeat them here.

Test for review

[14] The test for review of arbitration awards is now accepted as the one enunciated in the well-known case of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*.[2] In this case, the Court held that the review grounds set out in section 145 have been suffused by the constitutional standard of reasonableness, and that an arbitration award of the CCMA or Council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

[15] In *Sidumo*, Ncgobo J, as he then was, was of the view that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard of a reasonable decision maker, a litigant who wishes to challenge the arbitration award under section 145(2) must found his or her cause of action on one or more of these grounds of review.

[16] Regarding gross irregularity as a ground of review Ncgobo J said the following:

[2] 2008 (2) SA 24 (CC) at paras 106-110.

'[263] The basic principle was laid down in the often- quoted passage from *Ellis v Morgan [Ellis v Morgan, Ellis v Dessan* 1909 TS 576] where the court said:

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."'[3]

[17] The Court went further to say that:

'In *Goldfields [Goldfield investments Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551], Schneider J distinguished between patent irregularity that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and 'latent irregularities'', that is, irregularities that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given on the decision maker. In the case of latent irregularities one looks at the reasons not to determine whether the results is correct but to determine whether a gross irregularity occurred during the proceedings. In both cases, it is not necessary to show intentional arbitrariness of conduct or any conscious denial of justice…'[4]

[18] This view was adopted in a number of cases. For example, in the case of in *Southern Sun Hotel Internationals (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,[5] the Court acknowledged the test for review of Commissioner's award as enunciated in the *Sidumo* decision (reasonable decision maker test) but said the following:

'Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner's process related to conduct is found wanting. Of course,

[3] *Ibid* at para 263.
[4] *Ibid* at para 265.
[5] (2010) 31 ILJ 452(LC).

> reasonableness is not irrelevant to this inquiry – the reasonableness requirement is relevant to both process and outcome.'[6]

Further that the Court In the case of *Herholdt v.Nedbank Ltd*,[7] , the court summarised the test as enunciated in the *Sidumo* case and as also as interpreted in the cases such as *Gaga v Anglo Platinum Ltd and Others*,[8] , *Afrox Healthcare Ltd vCCMA and Others*[9] , *Herholdt v Nedbank Ltd*[10] and *Fidelity Cash Management Services v CCMA and Others*[11] as follows:

> '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.'

Analysis

[19] Looking at the grounds of review, it is clear that the decision of the commissioner is challenged from many angles. I propose to deal with them as follows:

[20] It appears to me that one of the main complaints of the Applicants is that the commissioner did not apply his mind to the evidence of two main witnesses of the Third Respondent, Mr Stoffels and Khumalo in terms of contradictions of their evidence and the context in which the incident happened. If he did so, so it is argued he will not have reached the decision he reached.

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[6] *Ibid* at para 14.
[7] [2013] 11 BLLR 1074 SCA; (2013)34 ILJ 2795 (SCA) at para 25.
[8] [2012] 3 BLLR 285 (LAC).
[9] [2012] 7 BLLR 649(LAC); (2012) 33 ILJ 1381 (LAC).
[10] [2012] 9 BLLR.857 (LAC).
[11] [2008] 3 BLLR 197 (LAC).

[21] The Applicants were charged of three offences namely; (a) for leaving the patient alone in the patient compartment whilst driving from Durban to Port Shepstone; (b) abandoning the patient inside the ambulance and knocking off; (c) Permitting a crew mate to sit in front of the ambulance whilst having a patient on board.

[22] The Applicants were found guilty and a sanction of dismissal imposed on both of them.

[23] I propose to deal with the second charge of abandoning a patient at Port Shepstone.

[24] We know that Mr Stoffels testified that he received a call from his mother about his sick son who was experiencing asthma seizure. He then decided to return to Port Shepstone Hospital instead of proceeding to Murchison Hospital where he was supposed to deliver a patient.

[25] It is common cause that he met with Mr Stoffels. It is also common cause that the Second Applicant, Pillay informed Mr Stoffels about repatriation to Murchison Hospital. What is in dispute is whether he also informed him that the patient he was talking about was in the ambulance.

[26] Mr Pillay testified that he told Mr Stoffels twice, that the said patient was in the ambulance viz. while they were alone and also in the presence of Mr Khumalo, the supervisor (who had a hearing problem and was assisted by Mr Stoffels). Mr Stoffels in his evidence confirms that Mr Pillay spoke to him while there were alone and also when they were in the presence of Mr Khumalo. Mr Khumalo, however, denied that he was ever in the presence of both Pillay and Khumalo on that day and also that Pillay did not mention the issue of a patient in the ambulance at all. According to him, he came to know about the patient when Mr Hleza came to inform him about the patient in the ambulance.

[27] This contradiction is my view material since it is at the heart of charge two: whether Pillay informed both of them about the patient in the ambulance or not. I will come to this later.

[28] The commissioner accepted the evidence of the Third Respondent that Stoffels was only informed of repatriation of a patient to Murchison Hospital and was not informed of the patient in the ambulance, in other words that patient was in ambulance.

[29] Mr Stoffels' statement at page 37 of Index of Record-Review (volume 1) reads as follows:

> 'I Clydis Robert Stoffels state hereby that on the above-mentioned date at approximately 19h00 I was informed by Mr K Pillay that there was REPAT from Inkosi Albert Luthuli. I was under the impression that he meant that a patient was to be returned from I.A.L.C.'

[30] In his evidence Stoffels said the following at page 104 of the record, paragraph 10:

> 'I was on duty at 6:00 p.m. assisting Mr Khumalo. Pillay walked in, it was after seven o'clock, and he said there was a transfer or a re-pat sent to another hospital from the Albert Luthuli Hospital. Pillay left.'

[31] Returning to the contradiction between Khumalo and Stoffels on whether Pillay spoke to Stoffels in the presence of Khumalo, this clearly cannot be an immaterial contradiction because it is at the heart of the dispute.

[32] When one analyses Mr Stoffels' statement one finds that he used the 'was' and from ("I was informed by Mr Pillay that there was re-pat from Inkosi Albert Luthuli"). In my understanding it means that patient was already there, otherwise he would have used the word "at", meaning that the patient is still there and needs to be collected there.

[33] At page 106 of the record Stoffels says the following 'I understood him to say a re-pat needs to be fetched from Albert Luthuli'.

[34] At paragraph 15, the following question was put to him:

> 'The Applicant will say the case sheet and trip sheet. Were all documents put together?'

[35] His answer was:

'I did not understand that these were for the patient in the vehicle.'

[36] At paragraph 20 of the same page, the following question was put to him:

'Question: With reference to Pillay's statement he says, I advised Mr Stoffels and Ms Khumalo that there was a patient in the vehicle

Answer: I agree that there was a report from Albert Luthuli. Pillay arrived at approximately 7h00.'

[37] At page 107, the evidence went as follows:

'Question: What happens if you have not been advised by the outgoing crew?

Answer: Pillay was the only person who told me about a re-pat. Pillay was entitled to handover to me. He told me that there was a re-pat from Durban, he did not say there was a patient in the ambulance. If Kunene got involved we would not have been here."

In addition to this, Ms Khumalo at page 96 of the reconstructed record said the following:

"Question: What happened on that evening involving Pillay and Tembe?

Answer: I was at the office to sign on. Mr Hleza who works on my team came to ask me which vehicle he was to use on his shift. I told him which vehicle and I gave him the trip sheet and a checklist. He went to the car , approximately three minutes later he came back and said: 'How can I check the vehicle when there is a patient inside? 'I said I did not know about the patient. I went to the vehicle and saw the patient lying on the stretcher inside. I called Mr Stoffels, he also did not know anything about the patient in the vehicle. Stoffels had said there was a transfer in the vehicle and Stoffels also said that Kenny said there was a transfer to Murchison Hospital, but did not say the transfer was a patient in the vehicle. He thought that the Control Room would report.'

[38] For the first time, Ms. Khumalo let slip the fact that Stoffels was informed of the patient in the vehicle; secondly, that he was informed of the re-pat to Murchison Hospital and had informed of her this but that he was not informed

that that patient is the one who was in the vehicle; thirdly, that he thought that the Control Room would report.

[39] The foregoing clearly shows to me that Pillay did inform Stoffels and Ms Khumalo of the patient in the ambulance and they were given the relevant documents. With this evidence and with proper consideration thereof there is no way the Applicants could have been found guilty of the second charge of abandoning the patient in the ambulance.

[40] Whether Stoffels and Ms Khumalo understood Pillay is another matter. Even if I am wrong on this angle, the above indicate that there may have been a miscommunication between the two, Stoffels and Second Applicant. It appears to me that Stoffels misunderstood what Pillay told him. This appears to extent to the documents he received from Pillay as he says he did not understand that they were for the patient in the ambulance.

[41] The Applicants are charged of abandoning a patient in the ambulance. In my view, the word 'abandoning' denote an intentional act. In other words, the applicants in doing what they did they did so intentionally hence the intention element needs to be proved.

[42] Since it appears that there was a miscommunication between the two as to what was communicated and as to what was understood by the recipient of the report, it cannot be said that the Applicants abandoned the patient since there are clear steps that they took but there was misunderstanding of these steps.

[43] A finding of guilt on the second charge in the light of the misunderstanding that happened on the fateful day is unsustainable and hence the commissioner reached a conclusion that a reasonable decision-maker could not have reached.

[44] I now turn to the first and third charges:

a. Leaving the patient alone in the patient compartment whilst driving from Durban to Port Shepstone and;

b. Permitting a crew mate to sit in front of the ambulance whilst having a patient on board.

[45] The main complaint of the Applicants in this regard is that the Second Respondent accepted the evidence of the Third Respondent as credible, whereas on the other hand, he said the evidence of the Applicants or on behalf of the application could be true but rejected it on the basis that they had a reason for wearing a 'metaphorical mask'.

[46] The commissioner dealt with this at page 31 paragraph 23 as follows:

> 'Both employees based their cases on the submissions that Tembe was in the back of the ambulance with the patient and that Stoffels and Khumalo were advised of the patient who was in the back of the ambulance. On the face value, their version could be true, but is rejected for the following reasons. Their evidence is outweighed not only in substance but also by credible witnesses. Moreover, the dictum of Mgengwana case (Supra) when the court referred to the difficulty in observing the demeanour of witnesses who wear masks, needs consideration and can come to my assistance.
>
> On a balance of probabilities I find that the Employees and witnesses were not telling the truth and in order to put a credible version of what happened on the day in question before me, they wore the metaphorical mask. I find that the Respondent discharged the onus by credible evidence that its version is the more probable and acceptable version (as per Masilela supra) and that the probabilities consequently favour the Respondent. Hence I find that the Employees were correctly found guilty of the offences recorded in paragraph 3 above.'

[47] At page 29, paragraph 1, the commissioner says the following:

> 'Although I have already stated that I cannot find that the employees were not telling the truth by only observing their demeanour, I find that they were the ones who needed to wear the mask as opposed to the Respondent's witnesses who were free to give their testimony without the necessity of all to wear masks.'

[48] In this respect, the Third Respondent led two witnesses, Mr Kunene, who testified that by virtue of not having a written data of the patient it meant that no one was sitting with the patient compartment and that of the guard Lushaba who testified that when the said ambulance came in he saw Pillay driving and Temba sitting with him in front.

The two Applicants testified and confirmed that Pillay was driving whereas Tembe was sitting with the patient in the patient compartment. They also led evidence of Mr. Mbowa who confirmed the said sitting arrangement.

[49] The commissioner has discretion to make credibility finding based on demeanour of the witnesses. He has observed them in the hearing and hence is in a better position to make such observations. Such demeanour may include arrogance, hesitation in answering questions, or answering questions promptly etc.

[50] The commissioner cannot simply say he/she was influenced by the witnesses' demeanour without explaining the nature of the demeanour. Similarly, the commissioner cannot simply say that the witness has a reason to "wear a mask". I understand this to mean that they had a motive not to tell the truth. I am of the view that he should lay the basis for this conclusion. The commissioner has not done this. Since the commissioner has not given reasons for rejecting the evidence of the Applicants other than to say they had reason to wear a mask, he has failed to apply his mind to the evidence before him and hence the confirmation of the conviction on charge 1 and 3 is a conclusion a reasonable commissioner could not reach.

[51] Even if I were to agree with the convictions on all charges as the commissioner did, the sanction therefore was too hash. This is the complaint of the Applicants. I say this because the evidence shows that Pillay had 30 year service with the Third Respondent. He had a clean record safe for a warning which was unrelated to this matter and which the commissioner accepted that it should have no influence on this matter. Tembe on the other hand had four years' service with the Third Respondent and a clean record. In addition there is evidence that the Third Respondent had given the other

employees final written warnings for the same or similar offences. Additional to this, there is also evidence showing miscommunication between Stoffels and Pillay. This meant that the Applicants did not just leave the patient and failed to take steps whatsoever to ensure that the patient is transferred.

Even if the applicants were found guilty, which I do not agree with, the sanction in the light of the factors that I have outlined above would be too harsh. In my view, the commissioner has failed to apply his mind to evidence before him. Had he applied his mind properly, he would not have reached the conclusion he reached with regard to sanction.

[52] In addition to review and setting aside of the decision of the commissioner, the Applicants have prayed for correction of the said decision.

[53] It appears that the matter arose in 2009, which is relatively a long time ago. The relevant evidence is before me and there appears to be nothing that prevents me from assisting the parties in this regard.

[54] I have dealt with charge 2 and found that on the evidence available the Third Respondent has failed to discharge the onus that lie on it to prove on a balance of probabilities that the applicants had committed the offence preferred against them.

[55] What is left is to determine whether a finding of guilt by the chairperson on charge 1 and 3 is justifiable.

[56] The Third Respondent led the evidence of one direct witness, the security officer who was in charge at the gate. She testified that she saw Pillay driving and Tembe next to him in the front seat. The Third Respondent also led evidence by Mr Kunene who testified that non-completion of certain documents indicated that, the patient was neglected alone at the patient compartment. On the other hand the applicants testified and confirmed that Tembe sat with the patient in the patient compartment and cared for her, including also giving her some food. They further led evidence of an independent witness, Mbowa who testified that she was next to the gate and

saw Pillay in the driving seat. She only saw Tembe when the ambulance stopped and he jumped out from the back of the ambulance.

[57] From the record there appears no reason to reject either evidence as not credible. This also appears to have been the commissioner's reasoning save where he said the Applicants and its witness had a reason to wear a metaphorical mask. In my view, the evidence is balanced. Since the onus lies on the Third Respondent to prove its case on a balance of probabilities, I find that the latter has failed to discharge same. The Applicants therefore are not found guilty of charge 1 and 3 hence the dismissal therefore was substantively unfair.

[58] Even if I am wrong with regard to my finding on charge 1 and 3 for argument purposes, and they are found guilty, the sanction of dismissal was harsh in the circumstances. The same reasons I gave above in respect of charge 2, apply in this regard.

[59] In the premises, I make the following order:

1. That the award issued by the Second Respondent under case no. PSHS394-09/10 and 359-09/10 dated 28 November 2012 and issued under the auspices of the Third Respondent is corrected and substituted with an order that the dismissals of the Second and the Third Applicants were substantively unfair.

2. That the Second and the Third Applicants be reinstated retrospectively.

3. The Third Respondent is ordered to pay the costs of the application.

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Shai, AJ

Acting Judge of the Labour Court

Appearances:

For Applicants:	Advocate C. A Nel
Instructed by:	MacGregor Erasmus
For Third Respondent:	Advocate N.S.V. Mfeka
Instructed by:	State attorney