IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1404/14

In the matter between:

JOSEPH NDZIMANDE & 2 OTHERS **Applicant**

And

RAYMOND DIDBEN *N.O* **First Respondent**

COMMISSION CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

XTRATA COAL SOUTH AFRICA (ATCOM NORTH) **Third Respondent**

GLENCORE OPERATIONS (PTY) LTD **Fourth Respondent**

Heard: **6 June 2018**

Delivered: **2 April 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The individual applicants (Messrs Ndzimande, Lubisi and Makama) were dismissed from the employ of the third respondent (Xstrata) on the grounds that they brought the latter into disrepute after allegedly having made false statements against it.

[2] The statements were made in an interview which was aired on three SABC radio stations in the course of a march embarked upon by about 600 employees of Xstrata on 28 September 2012 to the Department of Labour to hand in a memorandum of grievances. The individual applicants faced a further charge related to their alleged failure to observe Xstrata's codes on grievance resolution.

[3] Aggrieved with their dismissal, the individual applicants referred an alleged dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The first respondent (the Commissioner) was appointed to arbitrate the dispute when attempts at conciliation failed.

[4] In an arbitration award dated 25 May 2013 and issued under case number MP 466-13, the Commissioner found that the dismissal of the individual applicants was for a fair reason on the basis that Xstrata had a standing rule pertaining to communications, which the individual applicants ought to have been aware of.

[5] With this application, the individual applicants seek an order reviewing and setting aside the Commissioner's arbitration award. They allege that the Commissioner committed several reviewable gross irregularities and exceeded his authority by assisting Xstrata with its case in the arbitration proceedings.

[6] Xstrata opposed the review application. The fourth respondent (Glencore) was joined to these proceedings on account of a transfer of Xstrata's business as a going concern to it.

Arbitration proceedings and award:

[7] The incident having taken place on 28 September 2012, the individual applicants were notified of the charges against them on 26 October 2012[1]. The purpose of the march to the Department of Labour was to hand in a memorandum of grievances, in terms of which they wanted matters referred to the Department on March 2010 to be resolved. They had further alleged in their memorandum that Xstrata was exploiting them.

[8] It is alleged that in the course of the march, Ndzimande and his colleagues uttered false and "*defamatory*" statements against Xstrata during an interview conducted and broadcasted on the SABC radio stations, *viz* Ikwekwezi FM; Ukhozi FM and Motsweding FM.

[9] At the arbitration proceedings, Xstrata's contentions before the Commissioner were that it had a code on communication which precluded its employees from making statements to the media without prior authorisation from the competent authority. It further contended that Ndzimande and his colleagues had contravened the said code, and further that Ndzimande was previously issued with a valid final written warning for a similar offence, which was valid as at the time of the incident complained of.

[10] Xstrata led the evidence of Ms Sarah Kekana (Kekana), which can be summarised as follows:

10.1. The code on communications provided that no employee was permitted to communicate with the public media without permission from the Chief Operations Officer (COO). The code further provides that the authority to communicate with the media is vested on the COO and that employees were to decline to comment on internal matters when approach by the public media.

[1] **DISCIPLINARY COMPLAINT FORM**

…

1. **Gross misconduct arising out of the following**:

1.1 Your conduct in making incorrect or false statements regarding the Company and/or the workplace both in public and the media;

1.2 Bring the Company into disrepute or undermining its image through incorrect or false public statements;

1.3 Failing to obey instructions to follow the recognized channels or procedure in raising alleged grievances or complaint.

10.2. In the interview conducted during the march, Lubisi was heard alleging that Xstrata had undertaken to pay them for overtime, but had refused to do so. That statement was however false and misleading. Initially in the internal disciplinary hearing, the individual applicants had denied having made the statements attributed to them.

10.3. Kekana further testified that the utterances attributed to Ndzimande and his colleagues undermined the industrial relations and aggravated other employees and the public into believing that Xstrata was exploiting its employees. This also may have led to loss of investor confidence.

10.4. In the week preceding the march, and after Ndzimande had informed her of it and told her that the media would be present at that march, Kekana had advised Ndzimande of the relevant human resource policies and in particular, his appeal processes which were still pending in respect of a final written warning issued for similar misconduct.

10.5. Under cross-examination, Kekana testified that the media statements were false. She denied the allegations that the employees were not paid overtime, and explained that the employees were expected to report for duty 30 minutes before their shift commenced, which was something referred to as the "*hot seat change*".

10.6. The employees were nevertheless remunerated for that period as it appeared on Lubisi's payslip. She further contended that there were instances when employees on the next shift did not report for duty on time, necessitating those on the out-going shift to continue working. However, those employees that were inconvenienced by the late arrival of the next shift were remunerated for the additional time spent on duty.

[11] The evidence Ms Yvonne Mokoena (Mokoena), the Human Resource Manager was essentially that the allegations made by the individual applicants as aired on the radio stations were false and/or misleading on the basis that:

11.1. Xstrata utilised a shift-system for the management of its' human resources. The employees were entitled to four days off and were remunerated according to a computer program known as "*Skycom*" which determined the employees' remuneration based on the data captured and the movement of employees.

11.2. Skycom was utilised to determine the times employees clocked in and out, and took account of the continuous operations circle to determine the extent of the remuneration which was inclusive of the overlap times and the *hot seat change*.

11.3. Xstrata had received correspondence from the Department of Labour which made enquiries about its remuneration structure and how the wages were adjusted. This had followed upon a complaint lodged by Ndzimande to the Minister of Labour, requesting an investigation into allegations of fraud in the running of Xstrata's operations. The Department also sought to conduct an investigation at the premises.

11.4. On 14 March 2012, a meeting was held with the representatives from the Department of Labour. The meeting dealt with the provisions of the wage agreement, which was in place, and as well as the medical aid benefits of the employees. All the issues raised by the employees were addressed and resolved.

[12] Ndzimande's evidence on behalf of the individual applicants is summarised as follows:

12.1. The employees had outstanding grievances that Xstrata had failed to resolve over a long period. At some point, the employees waived the processes contemplated in terms of the Collective Agreement and appointed him and others to represent them in discussions with Xstrata in respect of those outstanding grievances. At the time, they were members of the recognised union, NUM.

12.2. The parallel structure secured meetings with the representative of Xstrata and discussed the issues which were previously referred to the

Department of Labour. It was then decided that the Department of Labour should be engaged to mediate the resolution of the grievances.

12.3. Ndzimande was appointed by the employees to write the letter, which was then addressed to the Minister of Labour. The Department of Labour agreed to meet the employees and a meeting was convened at the trade union's offices and documents and payslips were handed over to the Department of Labour for investigation.

12.4. On 22 October 2010, the employees were invited to the Department of Labour office where they were given feedback on the investigation. However, the communication and feedback from the Department of Labour ceased from 22 October 2010. In the 2011 wage negotiations, the employees observed that they were experiencing the same difficulties as they did in 2009, which prompted them to re-approach the Department of Labour and further sought clarity on their previous complaints and filed a new complaint with the Department of Labour.

12.5. The complaints were still pending before the Department of Labour. The lack of feedback from the Department of Labour prompted the employees on 28 September 2011, to march to its offices to hand over a memorandum of grievances.

12.6. Ndzimande also complained about problems surrounding health and safety issues at Xstrata, and contended that employees were compelled to work in an unsafe environment, and were subjected to fumes and chemicals. He also complained about unsafe blasting practises and unsafe transport vehicles allocated for the use of employees. He contended that these matters were reported to the competent authority within Xstrata and the Department of Labour, but however remained unresolved.

12.7. He and his colleagues were not aware of the policy on communication until when the issue was raised at the disciplinary hearings. He contended that the policy was not published for comment in terms of the existing industrial practice. He further stated that in making the

statements to the media, they were merely exercising their right to freedom of speech.

12.8. Under cross-examination, Ndzimande had conceded that making false allegations against an employer might be considered wrongful; that the making of false statements may have the potential to bring an employer into disrepute, and further that such conduct could constitute misconduct where an employee refused to comply with a lawful instruction from the employer. However, he denied that he was aware of the policy on communication and that its breach could attract a dismissal.

[13] The Commissioner in his arbitration award came to the conclusion that the dismissal of the individual applicants was fair. He further made a punitive costs order against the applicants. His reasons are summarised as follows:

13.1. It was common cause between the parties that the central issue was whether the comments broadcasted over the SABC radio stations were attributed to the individual applicants.

13.2. The individual applicants had initially denied that the recorded voices heard over a video clip obtained from the SABC were theirs, but had however belatedly conceded at the arbitration proceedings. The Commissioner further held that the justification proffered by Ndzimande for the belated concession was disingenuous.

13.3. The Commissioner further accepted the evidence of Xstrata's witnesses that it had a code in place which governed misconduct in respect of unauthorised and misleading communication.

13.4. He further observed that the individual applicants failed to rebut the evidence that there were policies in place that governed the conduct in question, and concluded that Ndzimande and his colleagues ought to have been aware of the code. This was further so since evidence was led to demonstrate that the individual applicants were subjected to an induction programs, which covered the code on misconduct relating to

communication. The Commissioner rejected Ndzimande's allegations that the induction did not cover all aspects of the codes, or that his signature appearing on the documents confirming his attendance at the induction was suspect.

13.5. The Commissioner rejected Ndzimande's evidence that he and his colleagues were not aware that they were conducting an interview with the media on basis that the uncontested evidence of Kekana revealed that Ndzimande had informed her of their intention to invite the members of the media to attend the march. This was also in addition to the evidence that correspondence was sent to Ndzimande prior to the march reminding him of the code on communication.

13.6. The Commissioner further found that in view of the fact that Ndzimande and his colleagues had organised the march, it was improbable that they were caught unaware of the status of the people interviewing them.

13.7. In considering whether the statements that were made to the SABC radio stations were indeed false or constituted misrepresentation, the Commissioner observed that Ndzimande and his colleagues did not produce any evidence to support the false allegations made by them against Xstrata, and that in contrast, the latter through its witnesses had produced documentary evidence to demonstrate that the allegations were without substance, and that all their grievances had been attended to.

13.8. In the Commissioner's view, Ndzimande was a disgruntled employee on a crusade who refused to conduct himself within recognised industrial structures. This according to the Commissioner was fortified by the fact that the shift system, medical deductions and remuneration structure were a product of an agreement between Xstrata and the recognised bargaining parties.

Grounds of review and submissions:

[14] The applicants in their founding affidavit aver that the Commissioner committed reviewable irregularities in the conduct of the proceedings in that he did not deal with the evidence before him in a balanced manner contrary to the standards of impartiality expected from commissioners.

[15] It was further averred that the Commissioner further committed a gross irregularity in labelling Ndzimande a disgruntled employee who acted outside the scope and mandate of his trade union, NUM. The applicants further hold the view that the Commissioner was inconsiderate in awarding a punitive costs order against them, taking into account that the punishable conduct ought to be attributed to their previous attorneys of record.

[16] Xstrata and Glencore in opposing the review application submitted that the ultimate decision reached by the Commissioner was materially justified by the evidence placed before him, and that the applicants failed to demonstrate on which grounds the Commissioner's arbitration award was reviewable. In this regard, it was submitted that:

16.1. There was no merit in the contention that the Commissioner utilised hearsay evidence to sustain the charges of misconduct preferred against the individual applicants in view of the lack of corroborating evidence.

16.2. It was further contended that the corroborating evidence of Skhosana was unnecessary in view of the fact that the audio recordings were secured from the source, which was the SABC radio stations.

16.3. The Commissioner was required to determine whether the voices in the audio recording were those of the individual applicants and if so, whether the statements attributed to them constituted misrepresentation, which in turn constituted misconduct in term of Xstrata' codes.

16.4. The Commissioner's analysis of the evidence was not reviewable as the probabilities demonstrated that the individual applicants made false statements and, in the result, were guilty of misconduct.

Evaluation:

[17] It has been repeatedly stated that in review proceedings, arbitration awards are not to be easily interfered with unless the decision arrived at by the commissioner was entirely disconnected with the evidence or is unsupported by any evidence and/or involves speculation on the part of the commissioner.[2] The test on review is whether the decision arrived at by the commissioner is one that a reasonable commissioner could have reached. As was stated in *Goldfields*, the review 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 which was reasonable to justify the decisions he or she arrived at.[3]

[18] In this case, and in establishing the fairness of the dismissal, the Commissioner had correctly pointed out that central to the determination of the dispute was whether the voices on the radio clips, which Xstrata had obtained from the SABC were those of the individual applicants. It followed that once it was established that this was indeed the case, the enquiry to follow would have been whether the statements attributed to the individual applicants constituted misconduct, which was gross enough to call for the ultimate sanction of dismissal.

[19] It is further trite that when considering the fairness of a dismissal for misconduct, commissioners are enjoined to have regard to the provisions of section 188(2) of the Labour Relations Act[4]. In this regard, commissioners are further enjoined to have regard to the provisions of Item 7 of Schedule 8 as contained in the Code of Good Practice: Dismissal[5], and the CCMA Guidelines.

[2] *DRS Dietrich, Voigt & Mia v Bennet CM N.O & Others*. Case no: CA14/2016 (Delivered on 27 February 2019 at para [30]

[3] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para [16]

[4] Act 66 of 1995 (as amended) Which 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"*

[5] Which provides:

[20] In this case, the Commissioner had upon the concessions made by the individual applicants, concluded that indeed the voices heard were theirs. These concessions came about belatedly, as the individual applicants had as far back as in the internal disciplinary enquiries, denied that the voices on the audio clip were theirs. They had continued with that denial in the pre-arbitration minutes.

[21] Once the concessions were made, it was then for the commissioner to consider whether the conduct in question constituted misconduct. It follows that any question of the Commissioner having relied upon hearsay in concluding that the individual applicants had indeed made the statement became moot. The evidence of the main complainant, Boy Skhosana, who had heard the statement over the radio and reported it to Xstrata, was unnecessary. The audio clips were made available and the individual applicants had conceded that it was their voices that were heard. Thus, no purpose would have been served by calling Skhosana to testify on issues conceded to.

[22] The Commissioner, and correctly so, found that Xstrata had a communication policy in place, and that it was improbable that the individual applicants could not have been aware of the policy in view of a variety of factors including that the policy was brought to their attention during their induction, and that they had signed to attest that indeed this was the case. A second consideration was that on 30 July 2012, Ndzimande was issued with a final written warning for making false and/or incorrect statements about Xstrata to the Department of Labour in regard to health and safety matters at the workplace. A third consideration was that prior to the march on 28 September 2012, Ndzimande was issued with a letter advising him to desist from making false and incorrect

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' **Guidelines in cases of dismissal for misconduct**. -Any person who is determining whether a *dismissal* for misconduct is unfair should consider –

(a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not -

(i) he rule was a valid or reasonable rule or standard;

(ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.'

statements about Xstrata and to raise matter properly in accordance with company procedures. In the light of these facts, it is patently clear that the individual applicants ought to have known about the policy and the consequences of its breach.

[23] A further issue for determination before the Commissioner was whether the statements attributed to the individual applicants constituted misconduct in the sense that they were made in contravention of the standing policy on communication. Upon a concession having been made that the voices heard over the audio clips were those of the individual applicants, their case was that they were not aware that their statements were to be broadcast over the public media. The Commissioner however rejected that assertion, particularly since it appeared from the evidence that Ndzimande had deliberately invited the media to the march. The evidence of Sara Kekana that Ndzimande had personally informed her that the media would be present at the march was uncontroverted. Flowing from that, Kekana had informed Ndzimande in writing of his obligations in terms of the company media policy. In those circumstances, the probabilities that Ndzimande and others could not have been aware that they were making statements about the purpose of their march to the media are clearly remote.

[24] The statements attributed to the individual applicants made over the public media as the Commissioner correctly found, had a detrimental effect as they brought Xstrata's name into disrepute. The fact that the march was legal, or did not disrupt production, or was peaceful was irrelevant to the determination of the issues before the Commissioner.

[25] A clip of the audio recording as transcribed[6] reveals that during the interview, Ndzimande, Lubusi and Makama alleged *inter alia* that if their demands were not met, a strike would take place after a dispute was referred to the CCMA. They were further heard saying that that Xstrata was forcing employees to work long hours without pay despite the company's promises; that Xstrata's head office in Australia gave employees 2.6 billion (currency unspecified) to

[6] Page 426 of the Index to Record Bundle

share, which Xstrata was withholding and had instead offered to give them profit sharing.

[26] Ordinarily, there is nothing wrong when employees raise legitimate grievances and threaten to exercise their constitutional right to strike. There is however everything wrong when in the course of raising those grievances, employees make false and defamatory statements, which may have serious repercussions for the employer. This is particularly even moreso, where those employees had been warned to desist from such conduct.

[27] It can further be accepted that the nature of our labour relations is such that it is adversarial. One of the primary objectives of the LRA is to create rules of engagement by promoting and facilitating collective bargaining at the workplace, and to provide a framework within which employees and their trade unions can collectively bargain with their employers on a variety of issues, with the aim of promoting effective resolution of labour dispute[7].

[28] It follows from the above that ordinarily, where there are recognised union structures at a workplace, it would be the union leadership that speaks on behalf of the employees and articulates whatever grievances they may have. Where however employees disassociates themselves from their own union which had been engaged with the employer on their grievances, and thereafter act on a frolic of their own outside of the rules of engagement, and further make public statements against the employer or anyone for that matter that are false and defamatory, they must be visited with the consequences thereof.

[29] To the extent that the individual applicants had accused Xstrata of a variety of wrong-doing including that their grievances had not been resolved and monies due to them were not paid in respect of shift or overtime allowances, the evidence before the Commissioner was that all the grievances and issues raised by the employees including non-payments of whatever was due to the employees, health and safety, shift systems, medical aid deductions, allowances, and/or alleged exploitation of employees, were investigated by

[7] Section 1 of the LRA

both the Department of Labour and the Department of Minerals and Energy. Ordinarily, if the Departments had investigated the complaints and found any wrongdoing on the part of Xstrata, further steps would have been taken including the issuing of compliance orders.

[30] Significant with the evidence and the Commissioner's findings in this regard was that all the issues raised by Ndzimande and other employees had been attended to and dealt with in consultation with their union, NUM, which they had disassociated themselves from. The issue of funds coming from Australia was equally explained on behalf of Xstrata, as it was the latter's contention that it was resolved by affording all employees an opportunity to buy into a share scheme, and if they were unsure of the details in that regard, it was up to them to seek clarity.

[31] In the light of documentary proof adduced on behalf of Xstrata that all the employees' grievances had been attended to and resolved, nothing was presented before the Commissioner by the individual applicants that this was not the case. It followed that there was no cause for them to make the false allegations against Xstrata. The individual applicants had not presented anything before the Commissioner to demonstrate any semblance of truth in their statements made to the media.

[32] The statements made by the individual applicants to the public media were patently false, malicious and damaging to Xstrata's reputation. It is indeed startling for the individual applicants to argue that the charges against them or the conduct complained of had nothing to do with Xstrata, its policies or rules, since the statements were made in their own personal capacities but on behalf of 600 other employees. The fact remains that they acted on a frolic of their own and outside the rules of engagement. They had embarked on their march as employees of Xstrata, and had made false statements against it contrary to established policies. Their further contention that they were merely exercising their freedom of speech and did not need Xstrata's permission is clearly without merit. The employees' freedom of expression is not unfettered. Thus, they cannot embark on a march and make false statements against the employer without consequences.

[33] It follows from the above that the individual applicants had broken the rules in relation to Xstrata's communication policy despite being warned, the effect of which was to place Xstrata's name into disrepute. Their evidence or defence that they were merely exercising their freedom of expression amounts to red herring. Significantly, other than continuously having denied that they had made the statements until their belated concessions at the arbitration proceedings, they had not at any stage appreciated or acknowledged their wrongdoing nor shown any contrition in that regard.

[34] It was argued on behalf of the individual applicants that the Commissioner in confirming their dismissal had not taken account of their long service to the company. It has long been stated that long service on its own is not sufficient to save an employee's job especially in circumstances where the conduct complained of was gross[8]. I have already indicated in this judgment that the misconduct in question had serious repercussions for Xstrata. In any event, an employee with a long service is expected to be even more familiar with company policies and rules. Furthermore, the fact that Ndzimande was already on a final warning for similar conduct does not appear to have dissuaded the individual applicants from their self-destructing path. To this end, a sanction of dismissal as correctly found by the Commissioner was indeed appropriate in the circumstances.

[35] In regards to the issue of costs as awarded by the Commissioner against the individual applicants, it was their case that the Commissioner was inconsiderate as they had presented a case before him, and that they could

[8] See Woolwoths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (LAC) [2011] 10 BLLR 963 (LAC); (2011) 32 ILJ 2455 (LAC), where it was held that;

> "[48] It has long been held that the employer's decision to dismiss an employee will only be interfered with if that decision is found to have been unreasonable and unfair. The fact that an employee has had a long and faithful service with the employer thus far is indeed an important and persuasive factor against a decision to dismiss the employee for misconduct, but is by no means a decisive one. In *Toyota South Africa Motors (Pty) Ltd v Radebe and Others,* this Court held:
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> > "Although a long period of service of an employee will usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.""(Citations omitted)

not be blamed for the conduct of their previous attorneys who withdrew from the matter midstream the arbitration proceedings.

[36] It was common cause that two sets of attorneys representing the individual applicants withdrew midstream the arbitration proceedings, *viz* Snyman attorneys and Omar attorneys. Ultimately, the individual applicants were represented by Ndzimande for the remainder of the proceedings, which took place over a period of thirteen days between 3 June 2013 and 15 May 2014.

[37] In awarding costs, the Commissioner had lamented the conduct of the applicants, including that they had caused the delays in finalising the matter through postponements despite timeous notifications; that they had denied allegations and then made belated concessions; that they had denied knowledge of Xstrata's policies despite oral and documentary evidence to the contrary; that Ndzimande had persisted with making false allegations against Xstrata in the proceedings despite having placed no evidence in support of those allegations; and the fact that they had unreasonably refused to accept a settlement proposal and persisted with a weak case.

[38] In my view, and in the light of the reasons outlined by the Commissioner, I fail to appreciate how the Court can interfere with his discretion in regards to costs, which cannot by any account be said to have been exercised arbitrarily, capriciously or maliciously. A mere allegation that a commissioner was 'inconsiderate' when awarding costs is not sustainable on its own to have the costs order reversed.

[39] In conclusion, and in line with the enquiry enunciated in *Goldfields*[9], I am satisfied that the Commissioner gave the parties a full opportunity to have their say in respect of the dispute; had correctly identified the dispute he was required to arbitrate; understood the nature of the dispute he was required to arbitrate; dealt with the substantial merits of the dispute; and arrived at a decision that falls within a band of reasonableness.

[9] At para [20]

[40] The applicants were represented by Freedom of Expression Institute, and having had regard to the circumstances of the case and the costs order already imposed on them by the Commissioner, I am of the view that the requirements of law and fairness militates against a further costs order.

[41] In the premises, the following order is made;

Order:

1. The Applicants' application to review and set aside the arbitration award issued by the First Respondent under case number MP 466-13 dated 25 May 2014 is dismissed.

2. There is no order is to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	M.D Teffo
Instructed by:	Freedom of Expression Institute (FXI)
For the Third and Fourth Respondents:	Mr D. Cithi of Mervyn Tabacks Incorporated