IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO:** 1186/23

In the matter between:

XOLILIE MNISI-SACOLO **APPLICANT**

And

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY **FIRST RESPONDENT**

THE PRESIDING JUDGE OF INDUSTRIAL COURT **SECOND RESPONDENT**

SITTING MEMBERS OF INDUSTRIAL COURT **THIRD RESPONDENT**

HASSO N. MAGAGULA N.O. **FOURTH RESPONDENT**

Neutral Citation: ***Xolile Mnisi-Sacolo and Limkokwing University of Creative Technology and Others (1186/23) SZHC 230 [2023) (21 August 2023)***

Coram: LANGWENYA J

Heard: 12 June 2023

Delivered: 21 August 2023

Summary: *Labour Law-Application for review of Industrial Court decision-Jurisdiction of the High Court to review Industrial Court decision-Section 152 of the Constitution & Section 19(5) of the Industrial Relations Act-Whether the Industrial Court acted unreasonably and unlawfully in holding that the disciplinary process was time barred-Whether Industrial Court committed irregularity in admitting new and hearsay evidence-whether Industrial Court was correct to hold that the chairperson was entitled to refuse to recuse himself-Grounds raised are for appeal and not for review-application dismissed with costs.*

JUDGMENT

Introduction

[1] The applicant, Xolile Mnisi-Sacolo approached this court in terms of Rule 53 of the High Court Rules read with Section 152 of the Constitution and Section 19(5) of the Industrial Relations Act (IRA) 1/2000 to review and set aside the Industrial Court's decision of 22 May 2023 under case number

31/2023. The Industrial Court's decision complained of herein dismissed the applicant's urgent application for a stay of the disciplinary hearing and further refused to declare that the disciplinary hearing is time barred.

[2] Disenchanted with the decision of the Industrial Court, the applicant approached the High Court on a certificate of urgency filed a notice of motion on 31 May 2023 for an order in the following terms:

1. **'Dispensing with the usual forms and procedures as relating to time limits and service of court documents, that the matter be heard as one of urgency.**
2. **Condoning the applicant's non-compliance with the rules of this Court as relate to service and time limits.**
3. **A rule *nisi* hereby issue calling upon the respondent to show cause why on a date to be determined by the Court an order should not be made final that:**
   3.1 the disciplinary hearing intended to proceed on 5 June 2023 per dates suggested by the chairperson for the continuation of the matter on 25 May 2023 be stayed.
4. **Prayers 1, 2, 3 and 3.1 to operate with immediate effect pending determination of the matter.**
5. **Reviewing and setting aside the Judgment of the Industrial Court dated 22 May 2023 and referring the matter back to the Court *a quo* for reconsideration by a differently constituted court or Bench.**
6. **Costs of the application against the respondent.**
7. **Further and or alternative relief.'**

Jurisdiction

[3] As indicated above, the application is brought in terms of Rule 53 of the High Court Rules read with Section 152 of the Constitution and Section 19(5) of the IRA.

[4] Section 152 of the Constitution 1/2005 states as follows:

'Review and supervisory powers of the High Court

152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement or its review or supervisory powers.'

[5] Section 19(5) of the Industrial Relations Act 1/2000 states as follows

'Right of appeal or review

19 (5) A decision or order of the High Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at Common law.'

[6] The import of the above provisions is that they arrogate exclusive jurisdiction to this Court to review an Industrial Court's judgment when called upon to do so. I am in no doubt that the present proceeding relates to the review of a judgment of the Industrial Court issued in terms of the provisions of the IRA. In my view, the matter is properly before this Court because all the jurisdictional issues and facts that bring it within the ambit of the IRA have been met; for that reason, this Court is properly placed to consider the merits of the application for review.

Background

[7] The applicant is employed by the first respondent as a lecturer. The applicant's contract of employment commenced on 2 November 2021 and ends on 1 November 2024[1].

[8] The first respondent is a university established in terms of the laws of the country and has its premises at Sidvwashini in Mbabane. The university has limited legal capacity to sue and be sued in its own name.

[1] See Volume 1 of record of proceedings at page 19.

[9] On 22 October 2022, the applicant was charged with misconduct and was invited to a disciplinary hearing by the first respondent. The applicant requested for further particulars on certain issues before she first appeared in the disciplinary hearing. During the first appearance, the applicant applied to be represented by an external representative.

[10] It is applicant's contention that on her first appearance she was with her representative and the hearing only dealt with housekeeping issues. It was on her first appearance before the disciplinary hearing that she applied for the recusal of the chairman. The chairman dismissed the application after he refused to recuse himself.

[11] On 13 January 2023 the hearing commenced. The applicant moved an application to have the disciplinary proceedings quashed because they were time barred in terms of clause 1.6.1 and clause 1.7 of the disciplinary code.

[12] On 24 January 2023 oral evidence was heard to determine whether or not the disciplinary proceeding was time barred in light of the provisions of the disciplinary code referred to above. The applicant relied on the AQA Moderation report of 26 April 2022 to substantiate her case that the disciplinary process was time barred.

[13] The applicant argued that in terms of the AQA Moderation report, the first respondent took a decision to discipline her on 26 April 2022 but only instituted the disciplinary process in earnest in October 2022, much against the provisions of clause 1.6.1 and clause 1.7 of the disciplinary code. It is the case for the applicant that Hlobsile Shongwe gave evidence admitting that the AQA Moderation report was prepared and dispatched on 26 April 2022 and that in terms of the report, a decision to discipline the applicant was

made then. The applicant contends further that when Hlobsile testified that she does not know who made the decision to discipline the applicant in July 2022 she virtually gave hearsay evidence and that such evidence should not be relied on. The chairman of the disciplinary hearing dismissed the preliminary objection raised by the applicant after hearing the evidence of Hlobsile.

[14] Aggrieved by the ruling of the chairman of the disciplinary hearing, the applicant moved an urgent application before the Industrial Court to have the ruling reviewed and set aside. The applicant argued before the Industrial Court that she was subjected to a disciplinary process that was time barred in terms of the provisions of the disciplinary code which forms part of her terms and conditions of service. She contended also that the disciplinary process was presided over by a chairman she perceived to be biased. These factors, it was argued constituted exceptional circumstances that should move the Industrial Court to hear the matter as one of urgency.

[15] After hearing the matter, the Industrial Court ruled that the charges against the applicant were not time barred and that the chairman of the disciplinary hearing was not biased.

Applicant's grounds of review application

[16] Disenchanted with the decision of the Industrial Court, the applicant approached the High Court on a certificate of urgency and sought that the decision of the Industrial Court be reviewed and set aside because the Court failed to consider relevant considerations patent in clauses of the disciplinary code.

[17] The applicant argued that the Industrial Court ignored a relevant matter in clause 1.5.2 of the disciplinary code-a clause which provides that civil and criminal investigation and proceedings pending against an employee are not a bar to an employer's right to discipline an employee who has been charged under the disciplinary processes within the University. It is the applicant's argument that if the Court *a quo* had considered clause 1.5.2 of the disciplinary code, it would have reached a different conclusion of the matter.

[18] It is applicant's lamentation further that the Industrial Court should not have admitted the evidence given by Tfobile Gumede in respondent's answering affidavit as this evidence constituted hearsay evidence. It is applicant's contention that the Industrial Court committed an irregularity when it failed to confine itself only to the evidence which was led during the disciplinary hearing and instead admitted new and hearsay evidence tendered by Tfobile Gumede. For this reason, the applicant prays that the Court *a quo*'s decision be reviewed and set aside.

[19] The applicant argues also that the Industrial Court failed to adopt a purposive interpretation of clause 1.6.1 and clause 1.7 of the disciplinary code. According to the applicant, a purposive interpretation of the clauses referred to herein means that the employer cannot institute disciplinary proceedings against the applicant after the lapse of six months after the decision to discipline her was taken. It is applicant's contention that in failing to take the decision to discipline her promptly, the first respondent did violence to clause 1.6.1 of the disciplinary code.

First Respondent's rebuttal

[20] In rebuttal, the first respondent argues that the present application for review is misplaced for the following reasons: First, clause 1.5.2 of the disciplinary code was not complained of before the chairman of the disciplinary code and before the Industrial Court. Only clause 1.6.1 and clause 1.7 were referred to by the applicant in the proceedings before the Industrial Court. Second, respondent avers that even if it is wrong in arguing that clause 1.5.2 was not referred to in previous proceedings, it is fortified in its argument that there are many authorities where the labour courts have interdicted employers from instituting disciplinary proceedings against employees while civil and criminal proceedings are pending against employees. Lastly, the first respondent argues that the Industrial Court did not disregard the clauses complained of in as much as it held that whether disciplinary proceedings are instituted promptly or not is a matter to be determined from an objective consideration of all facts.

[21] The respondent contends further that Tfobile's evidence was not hearsay evidence in as much as it was confirmed by Hlobsile's confirmatory affidavit. Hlobsile testified before the chairman at the disciplinary hearing.

[22] Lastly, the respondent argues that the applicant has not met the requirement of a stay of disciplinary proceedings as she has failed to demonstrate that she has prospects of success.

Issues for determination

[23] It would appear to me that the issues for determination in this matter are first, whether the applicant has made out a case that the Industrial Court acted unreasonably and unlawfully in not holding that the disciplinary

process was time barred in terms of the disciplinary code. Second, whether the Industrial Court committed an irregularity in relying on hearsay evidence submitted on behalf of the first respondent. Lastly whether the Industrial Court was correct to hold that the chairperson was entitled to refuse to recuse himself.

The application of the law to the facts

[24] It is important to state that the High Court has jurisdiction to review decisions of the Industrial Court on Common law grounds. Common law grounds include and are not limited to: the fact that the decision complained of was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or purpose. Where the Industrial Court considered irrelevant matters and ignored relevant one in its decision-making and where the decision is grossly unreasonable, the High Court will review the decision on Common law grounds[2].

Applicant's first ground for review

[25] The applicant contends that the Industrial Court ignored a relevant matter in clause 1.5.2-1.5.1.2 of the disciplinary code. Clause 1.5.2-1.5.1.2 of the disciplinary code states as follows:

> **'1.5.2 The effect of Civil or Criminal Proceedings**
>
> **1.5.1.2 The fact that a police investigation or prosecution in relation to a criminal charge or proceedings (whether criminal or civil) of any nature whatsoever are pending against the employee shall not, in any manner prevent the University from taking disciplinary action as it may deem fit against the employee in relation to any matter or indiscipline in terms of the General Conditions of Service, Code of Conduct, applicable laws and regulations, in force from time to time governing or having effect in relation to discipline by the University;'**

[2] See: *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132(AD) at 152A-E.

[26] In my view the enquiry should be directed to what is the purpose of clause 1.5.2 in first respondent's disciplinary code? The rationale for this clause is to emphasize the employer's prerogative to discipline its employees whenever the need to do so arises. According to clause 1.5.2 nothing, including investigation, prosecution in criminal and civil matters trumps the employer's right to discipline its employees. Even though the Industrial Court's judgment does not specifically refer to clause 1.5.2 it does, however reflect that it was in pursuit of the employer's right to discipline the applicant that certain processes had to be adhered to before the disciplinary proceedings could be embarked upon[3]. It therefore cannot be said that the Industrial Court ignored a relevant matter in its consideration of the issues before it.

[27] In her replying affidavit at the Industrial Court, the applicant states that clause 1.5.2 of the disciplinary code confirms the employer's prerogative to discipline its employees. She then argues that in terms of clause 1.5.2, the first respondent was not bound to address the grievances she raised before it instituted the disciplinary proceedings against her[4]. She makes similar averments before the High Court in her replying affidavit[5]. She states that the grievances she lodged were unrelated to the alleged misconduct she was accused of. I am of the view that in as much as the first respondent was not bound to address the grievances raised by the applicant before it instituted the disciplinary proceedings, it was also not precluded from doing so. The fairness of the disciplinary proceedings is the operative criterion. In dealing

[3] See paragraph 26 of the Industrial Court judgment at page 56 of the Book of Pleadings.
[4] See Record of proceeding Volume 2, Applicant's Replying affidavit, paragraph 5 at page 111.
[5] See paragraph 11 of Applicant's Replying affidavit at page 146 of the Book of Pleadings

with the applicant's grievances before disciplinary action was instituted against her, the first respondent showed the epitome of fairness.

[28] The applicant's application stands to be dismissed because the conclusion reached by the Industrial Court cannot be faulted for both reasons of unfairness and unreasonableness. The decision of the Judge *a quo* cannot be said to be one which a reasonable decision maker could not have reached in the circumstances.

Applicant's second ground for review

[29] The applicant complains further that the Industrial Court acted unreasonably and unlawfully not to find that the disciplinary proceedings were time barred in terms of clause 1.5.2; 1.5.1.2 (these clauses have been referred to in the preceding paragraphs); 1.5.1.3; 1.6.1; 1.7 and 17 of the disciplinary code. Applicant contends that had the Industrial Court adopted a purposive interpretation of the said clauses, it would have reached a different conclusion. I capture hereunder the clauses referred to by the applicant in this regard.

[30] Clause 1.5.1.1.3 states as follows:

> **'The University shall be entitled to take disciplinary action against its employees as it may seem fit notwithstanding the outcome of any court proceedings against the employee concerned.'**

[31] Clause 1.6.1 states as follows:

> **'Discipline is an area of decision making vested exclusively with line management. However, disciplinary action shall only be taken in respect of offences which an employee has been charged with and such action must be taken promptly, and as soon after the breach of discipline as is practicable.'**

[32] Clause 17 states as follows:-

'17.1 Subject to the Labour laws of eSwatini parties agree to incorporate as though specifically traversed health disciplinary and grievance procedures codes and or instruments available within the employer and or as will be available from time to time. In the event that upon conduct hereof none are in place, provisions of the eSwatini Labour Codes and Codes of Good Practice as well as dictates of Common law and natural justice shall be followed.'

[33] In articulating the meaning of clause 1.6.1 and clause 1.7 of the disciplinary code, the Industrial Court stated as follows:

> *'[23] It is clear that a disciplinary hearing should be held within as prompt a period as practicable. Investigations including ascertaining whether or not charges can be taken against an employee are aspects for determining whether or not a disciplinary hearing has to be held promptly or not In other words whether or not a hearing has, in the circumstances of a particular matter been promptly held, is to be determined from an objective consideration of all the facts.*
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> *[24] A disciplinary hearing is to be held within 10 days in the measuring of clause 1.7 where the offence in question should result in any form of written warning. We have to agree with the respondents that it would be difficult to fix a period in the case of a disciplinary process which had a number of issues raised. We, however, agree it should be within a prompt period, which should be determined from the facts of the matter.*
>
> *[25] The question is whether in light of the circumstances of the matter and viewed objectively, can it ever be said that the matter was not promptly dealt with or even put differently that it should have been heard within 10 days of the taking of the decision.*
>
> *[26] We have already said that the position adopted by the applicant in the circumstances of this matter, can never be correct. Following the processes that had to be adhered to before the disciplinary proceedings could be embarked upon, it cannot be correct that the said proceedings were time barred. The issue of the proceedings having to be dealt with within 10 days does not even arise in a charge of gross misconduct, as indicated above.'*

[34] It is important to state at this juncture that review is not concerned with the question whether the decision of the Industrial Court was right or wrong but with whether the way the decision was reached is acceptable within the confines of the law. This court, sitting on review of the decision of the Industrial Court is not at large to venture into the merits of the decision of

the Industrial Court as its focus is not so much on the decision itself, rather on the process of arriving at it.

[35] This Court finds that applicant's application for this Court to review and to set aside the Industrial Court's decision refer to specific instances where it is alleged that the Court *a quo* erred by making incorrect findings. It is argued that the Industrial Court erred in not invoking a purposive interpretation of clause 1.6.1 and 1.7 of the disciplinary code. Clearly herein, the applicant is challenging the correctness of the decision of the Industrial court. The law in this regard is now settled that an appealable decision is not necessarily a reviewable one. In review proceedings the court does not concern itself with the merits of the case or whether the decision is right or wrong, but it is only concerned, in this case, with whether the Industrial Court acted in good faith or not in arriving at the decision complained of. It would have been a different matter altogether if the applicant's complaint was that the Judge *a quo* based her decision on the wrong appreciation of the facts or wrong principles of the law[6].

[36] In explaining the difference between appeal and review, the learned authors-Herbstein and Van Winsen[7] state as follows:

> **'The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked.'**

[37] In *Judicial Service Commission and Others v Chobokoane*[8] Steyn P remarked that: 'It should be borne in mind that, when exercising review

[6] *Giddey NO v JC Barnard & Partners* 2007 (5) SA 527 (CC) at 535.
[7] In 'The Civil Practice of the Supreme Court of South Africa,' 4th edition at page 932.

functions, the court is concerned with the legality of the decision, not its merits' (Baxter, Administrative Law, 306).'

[38] In review proceedings the court is not concerned with the substantive correctness of the decision, but only with determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was ultra vires the powers allocated to the tribunal[9].

[39] In *Ellis v Morgan, Ellis v Dessai*[10] the Court defined the meaning of 'irregularity' in the context of review proceedings in the following terms:

> **'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined.'**

[40] It is important to mention also that judicial review of administrative, quasi-judicial and judicial action ensures that the exercise of the discretion of a functionary is procedurally judicious. Likewise, the Common law does not seek to scrutinize the correctness or otherwise of the decision or the merits of the matter but the fairness, and reasonableness of the procedure. Put differently, the review court does not and ought not to concern itself with the substantive fairness of the impugned decision. This aspect was explained in *Bel Porto School Governing Body & Others v Premier, Western Cape & Another*[11] as follows:

> **'The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision has erred in a respect that would provide grounds for review...**

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[8] 2000-2004 LAC 859 at 864A-B.

[9] *Tselentis v Salisbury City Council* 1965 (4) SA 61 (SRA).

[10] 1909 TS 576 at 581

[11] 2002 (3) SA 265 (CC) at para 86-87

> **The role of Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistent with the requirements of the controlling legislation. If these requirements are met, and the decision is one that a reasonable authority could make, Courts would not interfere with the decision.'**

[41] I should state at this juncture that a review court may interfere if the exercise of discretion by the administrative functionary or decision-maker was based on a wrong appreciation of the facts or wrong principles of law. The Court in *Turstco Insurance Limited t/a Legal Shield Namibia & Another v Deeds Registries Regulation Board & Others*[12] defined the position of the law in the following terms:

> **'A Court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within which the range of reasonable course of conduct available.'**

[42] The remarks above endorse the view that a review court should not exercise its review poser by substituting its own discretion for that of the administrative official whose decision is reviewed[13]. The review court is entitled to set aside the impugned decision or action if it is satisfied that the requirement of procedural fairness-the incident of natural justice- was not met[14] and the administrative official failed to exercise its discretion or, if it did, was actuated by improper motives or an irregularity appears on the

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[12] 2011 (2) NR 726 (SC) at para 31; *Giddey NO v JC Barnard & Partners* 2007 (5) SA 527 (CC) at page 535.

[13] *De Vries v Du Plessis* 1967 (4) SA 469 (SWA) and *Lewis Stores & Others v Greytown Council & Others* 1964 (1) SA 90 (N).

[14] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2001 (1) SA 1 (CC) para 219.

record, for example, where there is failure to hear or consider one party's evidence[15].

[43] In this matter, it has not been shown that the Industrial Court did not follow requirements of procedural fairness; that it failed to exercise its discretion; that it was actuated by improper motives or that an irregularity appears on the record.

Applicant's fourth ground for review

[44] The applicant argues that the Industrial Court committed an irregularity when it admitted the evidence of Tfobile Gumede through the first respondent's answering affidavit. It is the applicant's contention that Tfobile's evidence is hearsay evidence because she did not give evidence before the chairman of the disciplinary proceeding as only Hlobsile testified. The applicant contends that much against established legal principles that no new evidence can be introduced in review proceedings, the Industrial Court admitted the evidence of Tfobile which was not only new evidence but was also hearsay evidence and thus committed an irregularity.

[45] In her answering affidavit before the Industrial Court, Tfobile states that she deposes to facts within her personal knowledge. In her replying affidavit, the applicant admits that facts deposed to by Tfobile are known by Tfobile[16]. The applicant denies only that those facts are true and correct. If Tfobile deposed to facts within her knowledge, it cannot be correct that she was giving hearsay evidence. Notably, contents of Tfobile's answering affidavit are confirmed by Hlobsile Shongwe-Tsabedze (who testified before the chairman of the disciplinary hearing) and by Nompendulo Dlamini.

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[15] *Tshungulwana v Brownlee NO* 1911 EDL 136.

[16] See paragraph 2 of the applicant's replying affidavit at pages 109-110 of the Book of Pleadings.

[46] The applicant complains that Tfobile presented new evidence during the hearing before the Industrial Court. There is no merit in this assertion as it is not borne out by the record of the disciplinary hearing and of the Industrial Court.

The applicant's fifth ground for review

[47] It is the applicant's lamentation further that the Industrial Court committed a reviewable irregularity by not reviewing and setting aside the chairman's ruling on his recusation. It was argued that the chairman's decision that he is not biased against the applicant is flawed in that it does not consider the applicant's argument that because the chairman is a family friend he is conflicted and therefore ethically disqualified to preside over the disciplinary matter. In support of this argument, Mr Ndlangamandla for the applicant relied on *Attorney General and another v Nhlanhla Hlatshwayo*[17]a case that was before court as an appeal and not as a review. In the present matter, the applicant is attacking the correctness of the decision as opposed to the procedure adopted by the chairman in arriving at his decision.

[48] In the Court *a quo*, the applicant's contention was that the chairman did not follow proper procedure and further failed to consider certain facts which he ought to have. It seems to me that the applicant is basing her review on the supposed failure by the Industrial Court to apply the law correctly (a view I do not necessarily agree with). That is a good ground for appeal but not a ground for an application for review. It is trite that it is not a ground for review as much as it is a ground of appeal that the Industrial Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. The learned Judge a *quo* made a conscious decision

[17] Industrial Court of Appeal Case No: 7/2008 at paragraph 13 and 16.

on the issue of the chairman's recusation and exercised her discretion in favour of the first respondent. If she reached a wrong conclusion of the law, it could be a good ground for appeal but not for review.

[49] In the result, the review application stands to be dismissed.

[50] There is no reason in law or fairness as to why the applicant should not be ordered to pay costs for this review.

Order

[51] In the result the following order is made:

i) The application to review and set aside the Industrial court decision under case number 31/2023 delivered on 22 May 2023 is dismissed.

ii) The applicant to pay costs of the first respondent.

M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Applicant: Mr Meluleki Ndlangamandla

For the Respondent: Mr Banele Gamedze