IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CASE NO: 8/2017**

In the matter between:

GUGU FAKUDZE **APPELLANT**

And

THE SWAZILAND REVENUE AUTHORITY **1st RESPONDENT**

THE DIRECTOR-CUSTOM INLAND OPERATIONS **2nd RESPONDENT**

THE HEAD OF CORPORATE SERVICE **3rd RESPONDENT**

THE COMMISSIONER GENERAL **4th RESPONDENT**

Neutral Citation: *Gugu Fakudze v The Swaziland Revenue Authority and 3 others (08/2017) [2017] SZICA 01 (30 October 2017)*

Coram: J Magagula AJA, D. Tshabalala AJA, M. Langwenya AJA

Heard: **10th October, 2017**

Delivered: **30th October, 2017**

Summary

Labour law-employee suspended and subsequently charged with gross negligence- gross negligence an infraction of the disciplinary code-disciplinary code mandates disciplinary chairperson to close enquiry if employee is found not guilty- no review process for chairperson's finding where guilty verdict returned-deviation from a disciplinary code-when permissible and when not allowed-where chairperson of a disciplinary enquiry relinquishes her powers conferred by mandatory provision in a code, and improperly defers to management contrary to provisions of code-such conduct set aside.

JUDGMENT

M. LANGWENYA, AJA

[1] In this matter, the appellant-an employee of the first respondent-who at the time of the appeal is on suspension, appeals against the ruling of the Industrial Court delivered on 5 May 2017 in favour of the respondents.

[2] The brief background of facts which gave rise to this appeal are as follows: Ms Gugu Fakudze (I will, in this judgment refer to her as the appellant) is employed as a senior customs officer by the first respondent. The appellant was suspended, charged and taken before a disciplinary enquiry for charges relating to gross negligence. For ease of reference, the charges are restated:

Count 1

"Gross negligence in that on or about the 2nd September 2016, respondent failed to exercise due care and diligence in that on receipt of certificates of origin number SZ33459 and SZ33460 from trader (Afrimpex), and failed to verify if both goods and trader qualified under SADC preferential market access. That the respondent proceeded to validate the certificates by appending her signature to the non-qualifying company and violated paragraph 10.1.16 of the disciplinary code and procedure."

Count 2

"Gross negligence in that on 20th September 2016, respondent failed to exercise due care and diligence in that on receipt of certificates of origin number 33459

and 33460 from a trader identified as Afrimpex failed to verify if both trader and goods qualify under SADC trade protocol as indicated in the list of exporters and goods qualifying under trading block. She further validated certificates of origin by appending signature though the company did not qualify under SADC preferential market access and the goods did not originate from South Africa and as a result violated paragraph 10.1.16 of SRA Disciplinary Code and Procedures[1].”

[3] What is clear from the charges is that respondents recognize the Disciplinary Code because the charges are based on the Code.

[4] On 10, 22 February 2017 and on 13 March 2017 a disciplinary enquiry was convened in respect of the appellant. The disciplinary enquiry was chaired by an internal chairperson one Ntombifuthi Nhlengethwa who is the director in legislative Domestic Taxes within the Swaziland Revenue Authority (SRA)[2].

[5] On 13 March 2017 the chairperson ‘recommended’ that the appellant be found not guilty on both counts 1 and 2[3].

[1] Page 31 of Record of Proceedings.
[2] Page 31 of Record of Proceedings
[3] Page 55 of Record of Proceedings

[6] On 23 March 2017, the appellant through her Union, the Swaziland Revenue Workers Union (SRAWU) wrote to the respondents[4] calling upon them to uplift appellant's suspension and reinstate her.

[7] On 24 March 2017, Respondents wrote to SRAWU and stated that respondents were not in agreement with the chairperson's findings and were therefore reviewing the findings of the chairperson. The letter stated that appellant would be advised of the next step not later than 31 March 2017[5]. The letter was signed by the Head of Corporate Service. SRAWU's response to appellant's letter of 24 March 2017 was a letter dated 24 March 2017[6]. In this letter SRAWU dis-approves of respondents' conduct of reviewing the findings of the chairperson of the disciplinary enquiry. At this point, I pause to remark that SRAWU could have done well to confine itself to the issue under discussion and refrain from the use of incendiary and personal language directed at management of first respondent. Such behaviour is to be deprecated.

[8] On 29 March 2017 the respondents wrote to SRAWU alerting them that their chosen route to review the disciplinary enquiry's findings was based on legal advice supported by cases from the Industrial Court[7]. Respondents further invited the appellant to make representations 'on the stated course of action before the

[4] Page 59 of Record of Proceedings
[5] Page 61 of Record of Proceedings
[6] Pages 62-63 of Record of Proceedings
[7] Pages 64-65 of the Record of Proceedings

close of business on Friday 31 March 2017[8]'. On 30 March 2017, the appellant filed an urgent application in the Industrial Court for an order *inter alia*, setting aside her suspension; setting aside respondents' proposed review of the chairperson's findings and hearing the matter as one of urgency[9].

[9] The application was opposed by the respondents who raised two points *in limine* to wit; i) that the court should not intervene in incomplete disciplinary proceedings; and ii) that the applicant's affidavit does not comply with the peremptory requirements of Rule 15 of the Industrial Court.

[10] The court *a quo* found in favour of the respondents and held that the appellant had not set out exceptional circumstances to enable the court to intervene. It was the finding of the court *a quo* that the chairperson of the disciplinary inquiry made a recommendation and did not hand down a verdict when she finished adjudicating on the matter of the appellant. The appellant had argued that the chairperson conducted the inquiry in terms of clause 8.4.11 of the Disciplinary Code which uses peremptory language to signal the finality of proceedings once the chairperson returns a verdict of not guilty. The effect of clause 8.4.11 of the Code, so it was argued on behalf of the appellant, is that the disciplinary inquiry is not pending and as such the appellant is entitled to return to work because she was found not guilty by the disciplinary chairperson.

[8] Page 65 of the Record of Proceedings.
[9] Pages 3-4 of the Record of Proceedings

[11] It is my respectful view that the honourable court *a quo* paid scant regard to appellant's argument and submission and took the view that the chairperson of the disciplinary enquiry only had power to make a recommendation and not a binding finding in the nature of a verdict. I respectfully disagree with the position taken by the court *a quo* on this point of law. The reasons for my disagreement are outlined below.

Ad Mandate of the Chairperson

[12] The terms of reference of the chairperson of the disciplinary enquiry are a matter of dispute but only in so far as the issue of whether the chairperson was mandated to make a recommendation or to hand down a verdict on completion of the enquiry by herself[10]. The respondents state that the mandate of the chairperson was to 'preside over the enquiry and make a recommendation to the head of department, who would then make a pronouncement on the final verdict and sanction in liaison with the Human Resources Manager[11]' The appellant disagrees and argues that it is incorrect that the chairperson's mandate was to make a recommendation. The appellant argues that in line with the clauses of the disciplinary code, the chairperson handed down a verdict. The appellant argues further, that if she had been informed that the chairperson's mandate was not in accordance with the disciplinary code she would have objected to the

[10] Page 72, paragraphs 6.4 and 6.4.1 of the Record of Proceedings.
[11] Page 32, Paragraph 11.2 of Record of Proceedings.

continuation of the enquiry[12]. It is apposite to restate verbatim appellant's contention herein:-

> **'Further, my honest belief and understanding of the disciplinary enquiry process is that the duty of the chairperson is twofold. First, after the parties have presented and closed their submissions, the chairperson based on these submissions and evidence presented if any, has to make his findings. These findings relate to the (sic) guiltness or otherwise of the accused employee. The second part which according to my understanding is largely dependent on the first is that of making recommendations. The recommendation is with regard to the appropriate sanction to be meted for a guilty finding. Thus, where a no guilty verdict is pronounced in terms of the disciplinary code, the disciplinary enquiry is closed and as such no recommendation that the chairperson can make as the matter closes immediately upon the pronouncement of the no guilty verdict'[13].**

[13] Clearly there was a dispute concerning the mandate of the chairperson. For this reason, in my respectful view the court *a quo* erred in holding that 'it is not in

[12] Page 72, Paragraph 6.4 of the Record of Proceedings.
[13] Page 72, Paragraphs 6.4 and 6.4.1 of the Record of Proceedings.

dispute that the appointed chairperson's mandate was to hear the matter and thereafter make findings and recommendations[14]'

[14] As noted earlier, the respondents recognize the disciplinary code which is why they charged the appellant with infringing certain aspects of the code. It is common cause that the incidence of discipline in the workplace of the respondents is governed by the disciplinary code which, at the material time of this dispute was binding on all parties to it. For that reason, the appellant was charged with infringing certain parts of the disciplinary code by the respondent. It is apposite to refer to the relevant clauses of the disciplinary code:

Clause 8.4.10

Once the chairperson is satisfied that all facts have been heard, he may close the enquiry to consider all the evidence prior to giving verdict. The verdict shall be delivered within three working days of the conclusion of the enquiry.

Clause 8.4.11

If the employee is found not guilty, the enquiry will be closed.

[14] Page 119 Paragraph 2 of the Record of Proceedings.

[15] To my mind, the wording of the disciplinary code is clear and unambiguous- namely that the chairperson gives a verdict whose effect is to bring finality to the proceedings if the verdict is one of not guilty. In my view, the wording of the disciplinary code does not only make it clear that the chairperson's pronouncement of the verdict is a final aspect of her mandate if her decision is a verdict of not guilty, but it also gives no impression that the parties to the disciplinary code granted the respondents a power to substitute its own finding for a verdict imposed by its chairperson.

[16] Accordingly, respondents' attempt to review and substitute the verdict of not guilty-in an enquiry that is closed- handed down by the chairperson, is invalid.

[17] Invalidity implies an unlawful act and vitiates the act as a whole. An unlawful act cannot be acknowledged nor upheld. The legal position is that the employer is not allowed to interfere in the outcome of a disciplinary enquiry if the chairperson has the power to make a final decision. The law has, as its aim, the protection of workers from arbitrary interference with discipline in a fair system of labour relations.

[18] *Ex facie* the record of proceedings, in particular the report of the chairperson's disciplinary enquiry, except for a sub-title of 'recommendation' there is no proof the chairperson of the enquiry explained to the appellant that she would deviate from the provisions of the disciplinary code by giving a recommendation and not

a verdict[15]. This was not only prejudicial to the case of the appellant but it was also an unfair labour practice. The appellant was entitled therefore to approach the court *a quo* and ask for its intervention to right the wrong occasioned by respondents' failure to abide by the collective agreement reflected in the disciplinary code.

[19] It was argued on behalf of the respondents that the chairperson's mandate was to make a recommendation and that the employer has a right to deviate from provisions of the disciplinary code especially where the code is not a subject of mutual engagement between the employer and the Union representing employees. This argument can be disposed of in two ways: first, the explanation of deviation from the code comes *ex post facto* the hearing when the fourth respondent alludes to it in his answering affidavit, the chairperson's report reflects no such explanation. Second, where deviation is permissible, it must not be resorted to arbitrarily. A justification must be given to the employee (in this instance at the commencement of the disciplinary enquiry) to enable her to weigh her options and act to protect her rights.

[20] When a court is faced with two conflicting versions, it has to, on probabilities, decide which of the versions is likely to be true. The probabilities, in this present case do not favour the respondents' version any more than they favour the

[15] See Page 45 of the Record of Proceedings.

appellant's version. The respondent therefore failed to prove on a balance of probabilities that the appellant's explanation is false. Accordingly, the evidence of the appellant that she was not informed of such deviation is accepted by this court.

[21] The fact that the chairperson refers to her findings as recommendations in her report is, in my view indicative of a dispute solver who relinquished her duty and improperly deferred to management much against her clear mandate to close the case once she had handed down a not guilty verdict. Accordingly, since a disciplinary hearing is a matter of both substantive and procedural fairness, any improper deference of power by the disciplinary enquiry chairperson falls to be set aside.

[22] For these reasons, the honourable court *a quo* erred to hold that the chairperson was enjoined to make recommendations when a legally binding disciplinary code required her to close the matter once she pronounced herself in handing down a verdict of not guilty[16]. The finding of the chairperson was a verdict and not a recommendation in light of clause 8.4.11 of the disciplinary code. The employee is entitled, after being acquitted in a disciplinary hearing to a feeling that the matter is put to rest.

[16] Page 119 of the Record of Proceedings, paragraph 2.

Deviation from a Code-When Permissible?

[23] The right to a fair procedure in any sense of that expression must ensure that the party against whom the disciplinary enquiry is being conducted is given full opportunity to participate meaningfully in a transparent due process where the chairperson has outlined the procedure and satisfied herself that the parties are in agreement with same. It is my view that in as far as possible, the disciplinary proceedings should be conducted in accordance with the code which serves as a guide (in as far as all codes are not exhaustive) and ensures predictability and certainty of the proceedings to both parties. Where exceptional circumstances exist, the code may be deviated from, on condition the employee is notified of the deviation before the disciplinary enquiry starts so she can accordingly assert her rights and marshal her defence. This will be done to ensure adherence to the rules of natural justice. In the present case, the appellant was not informed prior to the commencement of the disciplinary hearing that the code would be deviated from. What is an exceptional circumstance is a question of fact and will depend on the circumstances of the case.

[24] Concerning deviation from the disciplinary code by the employer, Mlangeni AJA's trenchant remarks are instructive[17]:

[17] See Swaziland Posts and Telecommunication Workers Union and Another v Swaziland Posts and Telecommunication Corporartion Appeal Case No. 004/2006.

'It is settled law that a Code may be deviated from by the employer in exceptional circumstances. A dichotomy is often drawn between a code that is unilaterally introduced by the employer and one that is settled through mutual engagement, the argument being that in the case of the unilaterally formulated one the employer has unfettered right to deviate from it under exceptional circumstances, so long as the employee does not establish prejudice'.

[25] In the case of **Swaziland Development Finance Corporation v Swaziland Union of Financial Institution and Allied Workers and Another**[18], Honourable Hlophe AJA position on the above matter is pertinent:-

'…[**I**]**t cannot, realistically in my view be said that just because the employer developed and introduced the disciplinary code alone…he then retains the power to regard it as his own exclusive property in perpetuity so as to always being able to deviate from it at will. I think to adopt such a formalistic approach would not be appropriate as it would be against the very essence of recognizing a union in the first place'.**

[18] (7/2015) 2015 [SZICA 01] 2015 at paragraph 18

[26] The import of Honourable Hlophe AJA's observations is that the employer has to consult the workers on all material facts 'impacting adversely on the employees' rights[19]'. On the face of the record, the appellant was not consulted by the respondents about the deviation from the code-an issue that resulted in an adverse impact on her rights. The conclusion is that deviation from the code is not permissible if it causes or has the potential to cause prejudice upon the employee[20].

[27] In the present case, the respondents have acted completely contrary to a binding collective agreement dealing with the procedure for disciplinary action against the appellant employee. The respondents cannot unilaterally abrogate to themselves a right to alter the decision of a chairperson in so far as such action is not permitted by the code. In the event respondents are unhappy about the finding of not guilty pronounced by the disciplinary chairperson, their only option is to take the chairperson's decision on review.

[28] This case is distinguishable from the cases where courts have recognized that it would be unfair to burden employers with decisions that are clearly wrong. The courts have provided some guidance in finding balance between the rights and interests of the employers and the employees in this regard. In the present case,

[19] See Paragraph 18 of the Swaziland Development Finance Corporation v Swaziland Union of Financial Institutions and Allied Workers and Another, (7/2015) 2015 [SZICA01]
[20] Per Mlangeni, AJA in Swaziland Posts and Telecommunication Workers' Union v Swaziland Posts and Telecommunication Corporation.

the consideration is whether the re-opening of a disciplinary hearing where the chairperson has said the employee is not guilty is fair to both the employer and the employee[21].

[29] It should also be noted that where an employer's disciplinary procedure specifically provides for the power to overrule a chairperson's decision this is not in and of itself sufficient to render the interference as being fair. The employer would still have to show that it was substantively fair to interfere and that the employee was accorded procedural fairness.

Effect of Finding of Not Guilty by the Chairperson

[30] The chairperson of the disciplinary enquiry found that the appellant was not guilty of the offences charged. The logical consequence of a finding that the employee is not guilty is that the status *quo ante* suspension, charging and disciplinary proceedings regarding the employment relationship is restored. Effectively the appellant's status *qua* employee is thereupon that of an employee who has been cleared of any wrongdoing in the manner decided by the chairperson of the disciplinary enquiry.

[21] See the cases of BMW v Van Der Walt (JA 10/99) [1999] ZA (LAC) 28; Metrorail Services and Others (DA 19/2002) [2003] ZALAC.

Ad Binding Nature of the Disciplinary Code

[31] It is not inconceivable to think that when the parties agreed on the provisions of the code, they also intended to be bound by its contents. That being the case, I am inclined to find that in the conduct of the disciplinary enquiry, the chairperson was acting in terms of the disciplinary code which empowered her to issue a verdict at the end of hearing the matter. In that case, the decision of the chairperson is not subject to review by the respondents. Instead, the respondents are obliged in terms of the collective agreement to respect the finality of the matter where the chairperson has returned a verdict of not guilty. In the absence of evidence on the record that the appellant was engaged by respondents about the deviation from provisions of the code, it is not open to the respondents to review the decision of the chairperson.

Ad Court's Intervention in Incomplete Disciplinary Hearing

[32] Concerning whether or not the court could intervene in incomplete disciplinary hearing, the Industrial Court held that:

> **'The applicant has not set out exceptional circumstances for this court to intervene, especially because the employer has an inherent**

right to intervene and interfere with what it may justifiably consider as irrational and flawed recommendations. This in effect means that the point of law on the intervention of this court in the incomplete disciplinary enquiry succeeds'.

[33] It is a trite position of the law that the court cannot come to the assistance of an employee before his disciplinary enquiry has been finalized. The reason being- the court does not want to interfere with the prerogative of an employer to discipline its employees, or even to anticipate the outcome of an incomplete disciplinary process[22]. This would be the case even if the employee is in a situation where his pre-dismissal rights have been infringed or where there have been unfair labour practices. In such a case the court would only be able to grant relief after the fact. Conversely, the court has jurisdiction to interdict any unfair conduct including a disciplinary action in order to avert irreparable harm being suffered by an employee. Put differently, where exceptional circumstances exist for the court to intervene, it will.

[34] Whether the Industrial Court was correct to rule that the appellant did not set out exceptional circumstances for the court to intervene is a question of fact that depends on the circumstances of each case. The appellant was charged, tried

[22] Graham Rudolph v Mananga College and Another Industrial Court case No. 94/2007 at page 16. See also Bhekiwe Dlamini v Swaziland Water Services Corporation (ICA Case No. 13/2006); Thobile Bhembe v Swaziland Government and Others (IC Case No. 5/2001); Swaziland Electricity Board v Michael Bongani Mashwama and Others (ICA Case No. 21/2000).

and acquitted by the chairperson of the disciplinary enquiry. Instead of closing the enquiry, the chairperson purported to give a 'recommendation' to the management of the first respondent.

[35] The management of the first respondent made their intention of reviewing the decision of the chairperson known to the appellant. Appellant was entitled to approach the court *a quo* to have her rights protected as failure to do so would result in irreparable harm if respondents were not stopped from their unlawful act of unilaterally appropriating to themselves a power to review the chairperson's decision-a power that is not given by the Code.

[36] In answering the question of whether the appellant set out exceptional circumstances for the court to intervene, the court *a quo* ought to have considered whether a failure to intervene would result in injustice or whether the appellant could achieve justice by other means. The court *a quo* did not in my view, engage in this enquiry. The enquiry starts with an assessment of the nature of the disciplinary enquiry that the appellant was subjected to as well as the mandate of the chairperson of the disciplinary enquiry.

[37] As stated above, the finding of this court is that the mandate of the disciplinary chairperson was to act in line with clauses 8.4.10 and 8.4.11 of the disciplinary

code. The Code clothed the chairperson with power to close the enquiry, and not to approach management if she found the employee not guilty. The chairperson did not follow the Code in this regard. The court *a quo* was enjoined, in my view to step in and right the wrong that was occasioned by the respondents' move to review a not guilty verdict and show intentions of wanting to substitute same with a finding of guilty. It was wrong of the respondents to re-open an otherwise closed matter.

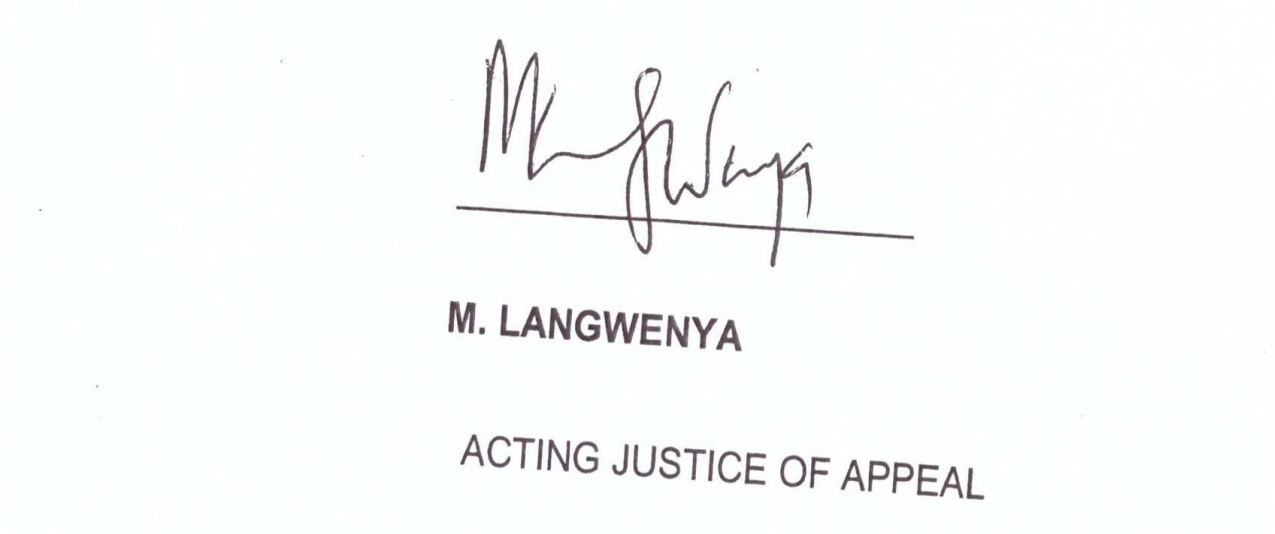
[38] The disciplinary code of the respondents vested a power of final decision in the chairperson of the disciplinary enquiry. Accordingly the employer was prohibited from changing it. Since the disciplinary code exists to regulate the relationship between the respondents and their employees, properly construed, it also confers final decision making power on the chair of the disciplinary enquiry. The attempt by first respondent to review the chairman's finding of not guilty is therefore unfair on the appellant. Accordingly, the finding of not guilty handed down by the chairperson should prevail subject to review proceedings by an aggrieved party.

[39] The peremptory language used in clause 8.4.11 of the disciplinary code means that the first respondent has no powers conferred on it to change a sanction imposed by a disciplinary chairperson.

The Order

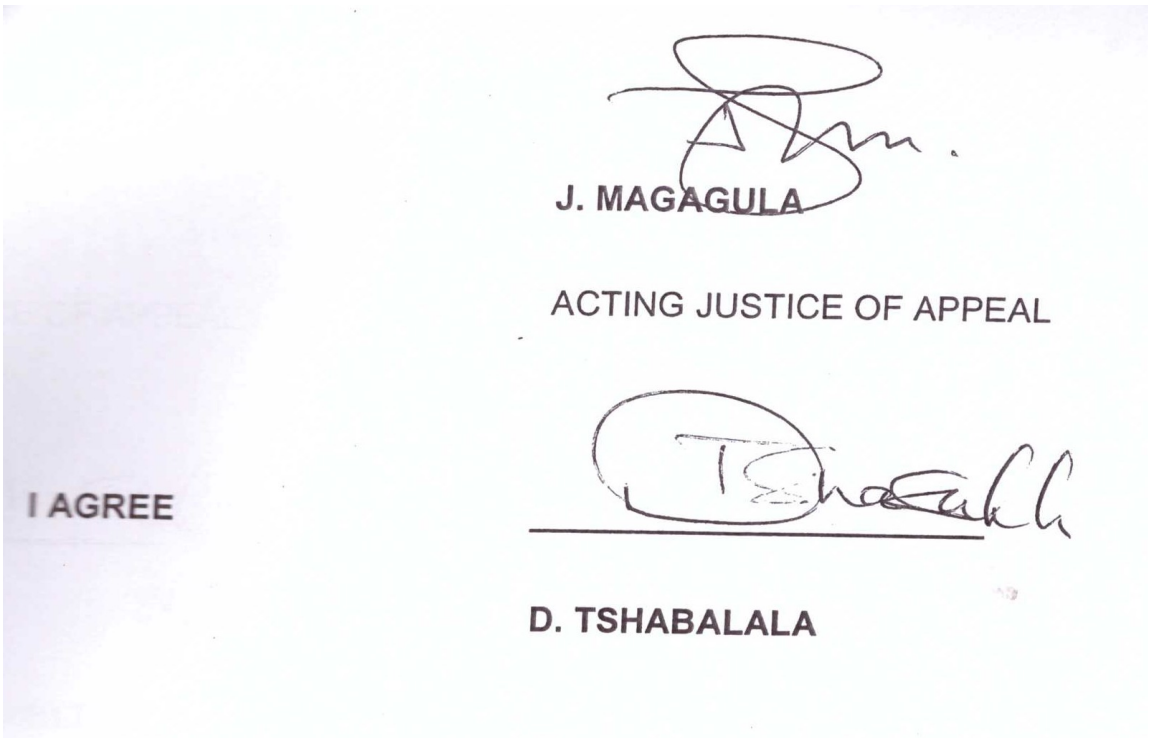
[40] Accordingly, the Court makes the following order:

The appeal is upheld with costs



ACTING JUSTICE OF APPEAL

I AGREE _____



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For the Respondent: Attorney Z. Jele