IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 14/2014

In the matter between:

CAMPBELL SCIENTIFIC AFRICA (PTY) LTD **Appellant**

And

ADRIAN SIMMERS **First Respondent**

JOHN WILSON THEE N.O **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **3 September 2015**

Delivered: **23 October 2015**

Summary: Dismissal of employee for sexual harassment and unprofessional conduct found substantively fair at arbitration. Labour Court on review held that while conduct inappropriate it did not constitute sexual harassment. Dismissal set aside and employee reinstated with 12 month final written warning. Held on appeal: Conduct constituted sexual harassment and sanction of dismissal fair. Commissioner committed no reviewable irregularity and decision fell within the bounds of reasonableness required. Appeal upheld with costs.

Coram: Waglay JP, Coppin JA *et* Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This is an appeal, with the leave of the court *a quo*, against the judgment of the Labour Court (Steenkamp J) in which the dismissal of the first respondent, Mr Adrian Simmers, for sexual harassment and unprofessional conduct was found substantively unfair and his retrospective reinstatement ordered subject to a final written warning valid for 12 months.

[2] Mr Simmers, a 48-year-old installation manager employed by the appellant, Campbell Scientific Africa (Pty) Ltd, was dismissed following a disciplinary hearing for unprofessional conduct and the sexual harassment of 23-year-old Ms Catherine Markides, who was employed by Loci Environmental (Pty) Ltd, through which company the appellant was contracted as part of a consortium to work on a joint project in Botswana. Aggrieved with his dismissal, he referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). A first arbitration award was set aside by the Labour Court (Rabkin-Naicker J) on the basis of certain procedural irregularities and the matter was remitted back to the CCMA for a hearing *de novo* before a different commissioner.

Arbitration

[3] The evidence before the commissioner in the *de novo* hearing was that Mr Simmers, his colleague Mr Frederick le Roux, also an employee of the appellant, and Ms Markides were staying at a lodge near Serowe in Botswana where they were contracted to survey a site for the installation of equipment for the

Botswana Power Corporation. On their last night at the lodge, the three had dinner together. While Mr Le Roux settled the bill, Mr Simmers and Ms Markides walked to the parking area to wait for him. Ms Markides in her evidence, tendered via telephone from Australia, said that while waiting for Mr Le Roux, Mr Simmers told her he felt lonely, made advances towards her and asked her to come to his room, an invitation which she said he "*reiterated a number of times*" to the point that she felt "*quite uncomfortable*". He also asked her if she had a boyfriend, causing her to respond that she did, that she was in contact with him and that it was a serious relationship. Mr Simmers then invited her to phone him in the middle of the night if she changed her mind.

[4] Ms Markides said she felt threatened, that his advances to her were "*not welcome at all"* and she programmed Mr Le Roux's number into her cellphone so that he was "*one button away from a call just in case anything happened*". She stated in evidence that:

> *'…It made me feel incredibly nervous that he had treated me this way, I felt – it was uncomfortable for me, I was not open to suggestions, the offers that he was making at all – at all. I just felt that it was a very inappropriate way for him to behave towards me*.'

[5] Ms Markides continued that she felt *"quite insulted", "quite shocked"* and upset given that it was "…*just before we went to bed and the sleeping arrangements were that Mr Simmers' room was quite close to mine*…".

[6] Following the incident, she said that she would not agree to work with Mr Simmers again. Ms Markides also took issue with Mr Simmers' conduct, which she considered inappropriate and unprofessional, in telling her that Mr Le Roux was difficult to work with, that he was a stubborn perfectionist who took too much time to do his job and did not listen.

[7] Mr Simmers' version differed in certain material respects from that of Ms Markides. He said that he asked Ms Markides only once and half-jokingly "*Do*

you need a lover tonight?" and that when she refused he told her that if she changed her mind, she should come to his room and knock and that they could then go to town and take a few photographs. Ms Markides did not recall this being said. She also denied that what had occurred was no more than a sexual invitation between consenting adults which had been meant lightly.

[8] Although made after-hours, the commissioner found Mr Simmers' conduct to constitute sexual harassment with the verbal sexual advances made to Ms Markides unwelcome and related to the workplace. The commissioner also found that Mr Simmers had acted in an unprofessional manner in making remarks to Ms Markides about Mr Le Roux behind his back which "could have had the effect of bringing the company's name into disrepute".

[9] The commissioner concluded that –

> 'In my opinion the entire conversation pertaining to the incident was inappropriate considering that they hardly knew each other. I find it inappropriate that a stranger would approach another person and ask whether she has a boyfriend. The complainant testified that even though she did not tell the Applicant to stop, she made it clear in no uncertain terms that it was not acceptable and that she had blatantly refused the invitation. I therefore find that the Applicant's proposals to Ms Markides constituted sexual harassment in the form of unwanted sexual advances.'

[10] The sanction of dismissal was found to be fair given that the misconduct was serious, with the mitigating factors not negating the aggravating circumstances and when Mr Simmers had shown no remorse and remained adamant throughout the proceedings that his behaviour was not serious. It was found that his "behaviour cannot be rehabilitated" and that any future employment relationship between the parties was not possible. With no procedural defect, the dismissal of Mr Simmers was found both procedurally and substantively fair.

Labour Court

[11] Dissatisfied with the commissioner's award, Mr Simmers sought its review by the Labour Court. Steenkamp J considered the issues for determination to be whether the words "do you want a lover tonight" and "come to my room if you change your mind", which Mr Simmers admitted saying, constitute sexual harassment or "mere sexual attention"? And if the words "do you want a lover for tonight" do constitute sexual harassment, whether these words are sufficiently serious to justify a dismissal? Regarding the charge of unprofessional conduct, the issue for determination was stated as whether Mr Simmers' discussions with Ms Markides regarding Mr Le Roux justified a dismissal or other punishment.

[12] The Court found it relevant that Mr Simmers and Ms Markides were not co-employees, that they would probably never work together again since Ms Markides had gone to Australia and that "there was no disparity of power" between them. In addition, the conduct was "once-off" and was found to have occurred outside of the workplace and outside working hours.

[13] The commissioner's statement was found illogical that "the fact that the applicant had not denied that he had made the remarks to the complainant certainly would suggest that he was aware or should have been aware that his remarks on the day of the incident would not be welcome and therefore constitute sexual harassment". Mr Simmers' conduct, it was stated, "…did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment":

> '[29] It is true that a single incident of unwelcome sexual conduct can constitute sexual harassment. But it is trite that such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. This nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or *quid pro quo* harassment. In this case, it is common cause that the Commissioner dealt with a single incident. He found so. Once Markides made it plain to Simmers that it was not welcome, he backed off.'

[14] The Court continued:

> '…Misunderstandings are frequent in human interaction. An inappropriate comment is not automatically sexual harassment. This was a fundamental error made by the Commissioner one that led directly to his conclusion that dismissal was a fair sanction. Simmers' comment was sexual attention, crude and inappropriate as it may have been. It was a single incident. It was not serious. It could only have become sexual harassment if he had persisted in it or if it was a serious single transgression. Add to this the fact that there was no workplace power differential, the parties were not co-employees, and the incident took place after work. The advance was an inappropriate sexual one, but it did not cross the line to constitute sexual harassment. It certainly did not lead to a hostile work environment; in fact, Markides left for Australia shortly after the incident, and it is unlikely that the parties will ever work together again – they do not even work for the same employer.'

[15] The Court took issue with the commissioner's failure to consider the relevance of Ms Markides' e-mails in which:

> 'She did not say that she was afraid, nor nervous, nor threatened, nor apprehensive. In her evidence at arbitration she could not provide a plausible explanation why she did not include the following allegations, raised for the first time at arbitration, in her email: …that she was "incredibly nervous"; …that she felt insulted; …[and] that she had put Le Roux's cell phone number into her cell phone in case Simmers approached her during the night.'

[16] The high-water mark of her complaint was found to be that contained in her e-mail of 11 June 2012 in which she stated that to her Mr Simmers' conduct in relation to Mr Le Roux was inappropriate and disrespectful; that she was surprised by his advances; and that she felt uncomfortable with his conduct "overall". By failing to take this evidence into account, the arbitrator was found to have reached a decision that no reasonable decision-maker could have reached on the facts before him. Mr Simmers' conduct was found not to have amounted to sexual harassment and even if it did, it could not justify dismissal:

> 'It is common cause that Simmers did not touch Markides. His verbal conduct was crude and inappropriate, but it was not a demand for sex. It was an

> unreciprocated advance. In blunt terms, he was "trying his luck". It was inappropriate but it did not justify dismissal. The Commissioner concludes, correctly and reasonably, that this was a once-off incident. There was no power differential and the parties were together for only a brief sojourn. It did not create a hostile work environment for Markides. No reasonable commissioner, in my view, could have found that this incident justified dismissal as a fair sanction.'

[17] A fair sanction, the Court concluded, would have been some form of corrective discipline including a written or final written warning for inappropriate conduct. Similarly, it was found that while Mr Simmers did behave unprofessionally in discussing Mr Le Roux's perceived shortcomings with Ms Markides, creating a bad impression and leading her to consider his conduct inappropriate and surprising, dismissal was not a fair sanction for a first offence when a form of progressive discipline was appropriate. The decision of the commissioner was found to fall outside of the realm of reasonableness required with the sanction imposed unfair. Consequently, Mr Simmers' dismissal was held to be substantively unfair and he was retrospectively reinstated into his employment with final written warning valid for 12 months.

Evaluation

[18] Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.[1] Central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination.[2]

[19] The treatment of harassment as a form of unfair discrimination in s6(3) of the Employment Equity Act 55 of 1998 recognises that such conduct poses a barrier

[1] Section 1(a) to (c) of the Constitution of the Republic of South Africa.
[2] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) at para 29.

to the achievement of substantive equality in the workplace.[3] This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the 1998 Code), issued by NEDLAC under s203(1) of the Labour Relations Act 66 of 1995 (LRA), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued by the Minister of Labour in terms of s54(1)(b) of the Employment Equity Act 55 of 1998.[4]

[20] At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often "…less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor." [5]

[21] By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as "the most heinous misconduct that plagues a workplace".[6]

[22] Both the 1998 and the Amended Codes of Good Practice provide that victims of sexual harassment may include not only employees, but also clients, suppliers,

---

[3] Section 6(3) reads: 'H*arassment of an employee is a form of unfair discrimination which is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)*'. Section 6(1) has expanded upon the grounds of unfair discrimination provided in s 9(3) of the Constitution to include family responsibility, HIV status and political opinion.

[4] GN 1367 of 1998 issued by NEDLAC in terms of s 203 of the LRA; and GN 1357 of 2005 issued by the Minister of Labour in terms of s 54(1)(b) of the EEA (4 August 2005). See para 1 of the 1998 Code; para 4 of the Amended Code.

[5] Basson A "Sexual Harassment in the Workplace: An Overview of Developments" in *Stell LR* 2007 3 425-450 at 425 quoting Garbers 2002 *SA Merc LJ* 37 n 5.

[6] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at para 20. See too *Department of Labour v General Public Service Sectoral Bargaining Council and Others* (2010) 31 ILJ 1313 (LAC) at para 37.

contractors and others having dealings with a business.[7] In addition, both Codes record that a single act may constitute sexual harassment.[8] Distinctions exist between the Codes in the definition of sexual harassment, with the 1998 Code defining it as:

> *'(1) …unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.*
>
> *(2) Sexual attention becomes sexual harassment if:*
>
> *(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or*
>
> *(b) The recipient has made it clear that the behaviour is considered offensive; and/or*
>
> *(c) The perpetrator should have known that the behaviour is regarded as unacceptable*."[9]

[23] The definition contained in the 2005 Amended Code of sexual harassment is that of -

> '*…unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:*
>
> *4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*
>
> *4.2 whether the sexual conduct was unwelcome;*
>
> *4.3 the nature and extent of the sexual conduct; and*

[7] Para 2.1 of 1998 Code.
[8] Para 3(2)(a) of 1998 Code; See too *J v M Ltd* (1989) 10 ILJ 755 (IC).
[9] At para 3.

4.4 the impact of the sexual conduct on the employee.' [10]

[24] In spite of it being termed the "Amended" Code, this Code does not replace or supersede the 1998 Code, which to date has not been withdrawn. The result is that in terms of s203(3), both Codes are as "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA.

[25] The commissioner, while correctly recording that in addition to the Code of Good Practice: Dismissal, any other relevant Code of Good Practice was to be taken into account in his determination of the matter, relied only on the provisions of the 1998 Code and not the Amended Code. Although the Labour Court found that the commissioner had relied on the Amended Code (when in fact it was the 1998 Code to which the commissioner had referred), the Court then considered the provisions of the Amended Code and not the 1998 Code. For current purposes little turns on this discrepancy.

[26] The appellant was entitled to discipline Mr Simmers for misconduct which was both related to and impacted on his employment relationship with the appellant.[11] This was so given that the misconduct occurred within the context of a work-related social event when Mr Simmers would not have been at the lodge in Botswana and in the company of Ms Markides had it not been for his employment with the appellant and it was to the appellant that Ms Markides complained regarding to Mr Simmers' conduct.

[27] There is no dispute that Mr Simmers made advances to Ms Markides that took the form of unwelcome and unwanted conduct of a sexual nature. While the Labour Court found the advances crude and an inappropriate, it erred in finding that the advances made constituted inappropriate sexual attention and not harassment, were not serious and did not impair the dignity of Ms Markides, who was not a co-employee, with whom there existed no disparity of power and when

[10] At para 4.
[11] See *Hoechst* (*Pty*) *Ltd v CWIU* (1993) 14 *ILJ* 1449 (LAC); *Saaiman and Another v De Beers Consolidated Mines* (*Finsch Mine*) (1995) 16 *ILJ* 1551 (IC).

the two were unlikely to work together in the future. To the contrary, the unwelcome and inappropriate advances were directed by Mr Simmers at a young woman close to 25 years his junior whose employment had placed her alone in his company and that of Mr Le Roux in rural Botswana. Underlying such advances, lay a power differential that favoured Mr Simmers due to both his age and gender. Ms Markides' dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult. As much was apparent from her evidence that she was insulted, felt "incredibly nervous" given the proximity of the sleeping arrangements at the lodge and that she programmed Mr Le Roux's number onto her phone "just in case anything happened".

[28] The commissioner did not, in my mind, fail to appreciate the distinction between the content of the e-mails sent by Ms Markides to the appellant and her oral testimony in which she indicated that she was afraid, nervous and threatened by Mr Simmers' conduct. From her e-mails, it is apparent that she was circumspect in her initial report to the appellant when she stated in general terms that she considered Mr Simmers' conduct unprofessional, inappropriate and "…felt it would reflect badly on the company if…he…continued to behave in that manner". Thereafter on the request of the appellant, she provided further details of the incident and on 11 June 2012, while accepting the appellant's apology for the behaviour, accepted that it was not behaviour "appropriately representative of CS Africa" but Mr Simmers' "personal misconduct". In this e-mail, she provided some detail of the advances made to her and also reported that Mr Simmers had been unprofessional in speaking to her about Mr Le Roux in an "undermining and unnecessary" manner.

[29] When on 21 June 2012 Ms Markides was informed that a formal disciplinary process was to be instituted against Mr Simmers, she was asked to supply a "short declaration". She replied in writing:

> '…I found Adrian's conduct inappropriate. He constantly attempted to influence my opinion of Frederick into condescension, saying that he was a perfectionist, that he was stubborn, that he took too much time to do his job, that he didn't listen, that he was an impossible person to work with. It was uncomfortable for me that he (Adrian) would try to talk about Frederick behind his back to me.
>
> One night, after we had dinner, Frederick was finalising the bill, and Adrian and I were standing in the parking area. I said that I was not tired, Adrian suggested that we do something, to which I said (reluctantly) that we should speak to Frederick. He refused saying that he did not want Frederick to know or be involved. I then said that I was just going to go to bed. He said that it was difficult to be alone, that he was lonely and asked if I wanted to go for a walk (alone with him) or go to his room with him. I refused, he then asked about my boyfriend (whom I had mentioned …) and asked if I was in contact with him, if it was a serious relationship. I said yes, I speak to him every day…Adrian then asked again if I was sure I didn't want to spend some time with him, to which I refused again, and said I was just going to go to bed. He then reiterated his offer, saying that if I changed my mind I could just go to his room during the night. I again said that I was going to bed….Overall I felt uncomfortable with Adrian's conduct, and was surprised by his advances to me, and his disrespectful behaviour towards Frederick.'

[30] In her oral evidence, Ms Markides explained that her e-mail –

> '…was quite brief because that's what I was asked for, it was just a brief statement of what had happened, I wasn't asked to explain exactly how I felt that evening…I didn't go into detail of emotional wellbeing or anything.'

When pressed further as to why she had not done so, she answered:

> 'Because as far as I took it, I wasn't asked to do that.'

[31] By the nature of oral evidence, it was reasonable to accept that Ms Markides would provide further details, including of her emotional response to the incident, when testifying about it and that her evidence would flesh out the content of her e-mailed statement. It is relevant that no challenge was put to Ms Markides in

cross-examination that her evidence as to her reaction to the advances made was untrue, nor that either her credibility or the reliability of her evidence was tainted by her failure to record the detail of such reaction in her e-mails. In not rejecting Ms Markides' evidence and in placing reliance on her oral evidence concerning the impact of Mr Simmers' conduct, the commissioner did not commit a reviewable irregularity. It follows that the Court *a quo*'s conclusion that the commissioner, in failing to take the content of the e-mail evidence into account, reached a decision that no reasonable decision-maker could have reached on the facts before him is consequently, in my mind, strained.

[32] It is trite that an arbitration award will be set aside on review where the result is unreasonable insofar as it is not one that a reasonable arbitrator could reach on all the material that was before the arbitrator.[12] From the record, it is apparent that distinctions existed in the versions of Ms Markides and Mr Simmers regarding the incident which the commissioner in his award did not resolve. While there may have been benefit in finding on these distinctions, I agree with Mr *Freund* SC for the appellant that these were not sufficiently stark to place mutually exclusive versions before the commissioner and that the decision reached by the commissioner was one that a reasonable decision-maker could have reached on the material before him. Mr Simmers' conduct constituted sexual harassment, as defined in both Codes: it was unwelcome and unwanted; it was offensive; it intruded upon Ms Markides' dignity and integrity; and is caused her to feel both insulted and concerned for her personal safety.

[33] In *SA Broadcasting Corporation Ltd v Grogan NO and Another,*[13] Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. In *Gaga v Anglo Platinum Ltd and Others,*[14] this Court noted similarly that the rule against sexual harassment

[12] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25. See too *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields*) (2014) 35 ILJ 943 (LAC).
[13] (2006) 27 ILJ 1519 (LC) at 1532A.
[14] [2012] 3 BLLR 285 (LAC).

targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates.[15] The fact that Mr Simmers did not hold an employment position senior to that of Ms Markides or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been metered out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women. Far from not being serious Mr Simmers capitalised on Ms Markides' isolation in Botswana to make the unwelcome advances that he did. The fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and in this regard the Labour Court erred in treating the conduct as simply an unreciprocated sexual advance in which Mr Simmers was only "trying his luck". In its approach the Court overlooked that in electing to make the unwelcome sexual advances that he did, Mr Simmers' conduct violated Ms Markides' right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by Mr Simmers to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur. In treating the conduct as sexual harassment, Ms Markides, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords.

[34] Turning to the issue of sanction, the commissioner found the dismissal of Mr Simmers to be fair on the basis of the seriousness of the misconduct, the lack of remorse shown by Mr Simmers, the conclusion that there was little room for rehabilitation and that a future employment relationship was not possible. In doing so he had regard to whether there existed factors in favour of the

[15] At para 41.

application of progressive discipline rather than dismissal. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (*Sidumo),*[16] it was emphasised that –

> 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'[17]

[35] The commissioner had regard to all relevant circumstances in arriving at a conclusion that the dismissal of Mr Simmers was fair. It follows that in the manner of his approach to the issue of sanction, the commissioner properly applied his mind to the appropriateness of the sanction in the manner required in *Sidumo* and committed no reviewable irregularity in doing so.[18] The result was neither inappropriate nor unfair. Rather, the sanction imposed serves to send out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.[19]

[36] It follows that the arbitration award was justifiable in relation to the reasons given for it and did not fall outside of the range of decisions which a reasonable decision-maker could have made on the material before him. For these reasons, the appeal must be upheld. There is no reason in law or fairness as to why costs should not follow the result and I did not understand counsel for either party to contend differently.

---

[16] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).
[17] At para 79.
[18] See too para 117.
[19] *Gaga v Anglo Platinum Ltd and Others* at para 47.

Order

[37] In the result, the following order is made:

1. The appeal is upheld.

2. The order of the Court *a quo* is set aside and replaced with the following order:

   '(1) The review application is dismissed.

   (2) There is no order as to costs.'

3. The first respondent is to pay the costs of the appeal.

_____

Savage AJA

I agree

_____

Waglay JP

I agree

_____

Coppin JA

APPEARANCES:

FOR APPELLANT:	Mr A Freund SC
	Instructed by Willem Jacobs & Associates
FOR FIRST RESPONDENT:	Mr L Ackermann
	Instructed by Legal Aid Clinic, University of Stellenbosch