

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD JOHANNESBURG)**

CASE NO:

JA19/00

In the matter between

GLAXO WELCOME SA (PTY) LTD

APPELLANT

AND

BONGI EUDONCIA MASHABA

1ST

RESPONDENT

G. SHAKOANE N.O

2ND

RESPONDENT

CHAIRPERSON : GOVERNING BODY

3RD

RESPONDENT

OF THE CCMA

JUDGEMENT

ZONDO JP

Introduction

- [1] The appellant appeals to this Court against a judgement of the Labour Court which was given by Marcus AJ. The judgement was given in a review application which had been brought by the appellant in that Court against the present respondents concerning an arbitration award which was issued by the second respondent in arbitration proceedings between the appellant and the first respondent. Those arbitration proceedings had been aimed at the resolution of a dispute between the appellant and the first respondent about the fairness or otherwise of the first respondent's dismissal by the appellant from the latter's employment. The review application sought to set aside the award that was issued pursuant to the arbitration proceedings. Leave to appeal was granted by the Court a quo.

The back ground

- [2] The appellant is a registered company. It carries on business as a manufacturer and distributor of pharmaceuticals at Halfway House, Midrand, Gauteng. The first respondent is a former employee of the appellant. The

second respondent is a commissioner of the CCMA. The third respondent is the chairperson of the Governing Body of the CCMA. The first respondent was employed by the appellant in May 1995 as an assistant human resources officer. In 1996 she was made a human resources officer. Her duties within the appellant's human resources department included the administration of

employee files, loans administration, liaison with brokers
on

employee benefit applications, preparation of employment contracts, administration in regard to recently employed employees, recruitment of shopfloor temporary staff and the maintenance of records thereanent as well as dealing with housing loans and medical aid queries.

[3] On the 5th and the 9th of June 1997 the appellant convened a disciplinary inquiry to hear certain charges of misconduct that had been preferred by the appellant against the first respondent. There were five charges that she faced in the disciplinary enquiry. They were:.

1" the unauthorised and insubordinate distribution of a questionnaire ostensibly to evaluate department performance and calculated to create the false impression that it was undertaken as a segment of a bona fide survey whereas it was intended simply to provide material for her defence at the previous disciplinary enquiry.

2.The negligent re-hiring of temporary employees who had previously been dismissed for the offence of trashing the factory floor.

3.As a member of the Human Resources Department, creating obstacles to the proper running of the disciplinary process by:.

3.1 insisting on outside representation at an appeal knowing this to be contrary to established policy;

3.2 failing to comply with the request that an appeal be supported by written motivation;

3.3 relying upon the aforesaid conduct to enter into dispute with the company;

4. Continuing argumentative and insubordinate conduct towards managers of the company;

5. Compounding the transgression of an employee by facilitating a breach of procedures in relation to the rehiring of informal workers.”

[4] The complainant against the first respondent in the disciplinary inquiry was Ms Roslan, the first respondent’s immediate supervisor. The chairman of the disciplinary inquiry concluded the disciplinary inquiry in the following terms:

“Due to the extremely sensitive and confidential nature of the position filled by [the first respondent] and her conduct generally, made me come to the conclusion that due to the continuous and repeated unacceptable performance and workplace behaviour resulting in irreparable damage the trust relations and credibility within the department and the company as a whole, I have no alternative but to terminate [the first respondent’s] services with immediate effect.”

The first respondent was aggrieved by her dismissal. A dispute arose between the appellant and the first respondent about the fairness or otherwise of the first respondent’s dismissal. She referred the dispute to the CCMA for conciliation. Attempts at conciliation failed. She then requested that the dispute be arbitrated by the CCMA. The CCMA appointed the second respondent to arbitrate the dispute.

The arbitration

- [5] In the arbitration proceedings the person whom one would have thought the appellant would have called to give evidence as its main witness, namely, Ms L. Roslan was, surprisingly, not called at all and yet, she was central to the charges in the disciplinary inquiry. In the arbitration proceedings the appellant only called Mr Ronald Mnguni, who was its human resources manager, Mr Karel van Breda, a security manager in the appellant and one Mr Msiza, a warehouse manager. In his arbitration award the second respondent indicated the relevance of the evidence of each of the appellant's witnesses thus: He said that Mr Mnguni's evidence was aimed at confirming the charges against the first respondent. He said that Mr Mnguni's personal knowledge was limited to a few aspects and he had no personal knowledge of the greater part of the evidence he tendered with the result that such evidence was hearsay. In fact he said Mr Mnguni read from a prepared statement when he gave evidence. According to the second respondent, Mr Van Breda's evidence related to the charge that the first respondent had negligently re-hired shop floor temporary employees who had previously been dismissed by the appellant for trashing the factory floor. With regard to Mr Msiza's evidence, the second respondent stated that Mr Msiza's evidence was limited to saying that there were times when the relationship between him and others, on the one hand, and the first respondent, on the other, had not been good. In this regard Mr Msiza had cited two incidents in support of his evidence. The one was an incident when he had directed certain "**medical aid clients**" to the first respondent for advice and they had come back unhappy with the first respondent's advice. The other was an incident when the first respondent had refused to hire her uncle on the basis that to do so would breach the appellant's policy on the hiring of relatives.
- [6] The first respondent testified on her own behalf in the arbitration proceedings. She dealt with all the charges that had formed the basis of her dismissal. The second respondent then analysed all evidence that had been given before him. In his award he came to the conclusion that the dismissal of the first respondent by the appellant had been both substantively and procedurally unfair. He ordered the appellant to reinstate the first respondent with full retrospective effect and without any loss of benefits that the first respondent would have enjoyed had she not been dismissed.

The review in the Court a quo

- [7] Subsequent to the issuing of the arbitration award by the second respondent, the first respondent brought an application in the Court a quo for an order making the arbitration award an order of court. The appellant responded to this by bringing an application to review and set aside such award. Pending the outcome of such review application, the appellant asked that the application to make the award an order of the Court a quo be stayed.
- [8] The review application was partially successful in the Court a quo. The order that was made by the Court a quo was in the following terms:-

“6.4.1 That part of the second respondent’s arbitration award delivered on the 19th October 1998 under case no GA 10899 (“ the arbitration award”) that dealt with the allegations against the first respondent on the charge of creating obstacles to the proper running of the disciplinary process is reviewed and set aside.

6.4.2 The matter is referred back to the Commission for Conciliation, Mediation and Arbitration for a different commissioner to determine the dispute between the parties concerning the charge of creating obstacles to the proper running of the disciplinary process.

6.4.3 The application to have the arbitration award made an order of Court is postponed a sine die.

6.4.4 The applicant is entitled to 40% of the costs of this application.”

- [9] In the course of its judgement, the Court a quo did not make a finding on the reviewability or otherwise of the second respondent's finding that the dismissal of the first respondent had been procedurally unfair. Except for the second respondent's finding on the charge that the first respondent had created obstacles to the proper running of the disciplinary process, the Court a quo found that all the other findings made by the second respondent which the appellant had contended rendered his award reviewable were not assailable.

The appeal

- [10] The leave to appeal that the Court a quo subsequently granted to the appellant was of a general nature which allowed the appellant to appeal against the whole judgement of the Court a quo including its failure to make a finding on the second respondent's finding that the dismissal was procedurally unfair. When this appeal was called in Court, there were a number of instances of non-compliance with the rules of this court for which condonation was sought by the appellant. The one was the failure by the appellant to deliver the record on time. Another was its failure to deliver its heads of argument on time. Yet another one was its failure to deliver its power of attorney on time. The first respondent, who was the only respondent to oppose the appeal, took several objections in limine against the appellant's appeal.
- [11] One of the objections in limine taken by the first respondent was that, as the appellant had failed to deliver the record timeously, the appellant was deemed to have withdrawn the appeal in terms of the provisions of Rule 5(17) of the Rules of this Court. On the side of the first respondent it appeared that the first respondent had wished to pursue a cross-appeal against the Court a quo's finding that the second respondent's finding relating to the charge of creating obstacles in the running of the disciplinary process was not justifiable in terms of the reasons given for it. The appellant had made a reference in its Heads of Argument to a cross-appeal by the first respondent but the latter had not complied with the requirement of the Rules of this Court relating to the delivery of a notice of cross-appeal and had not dealt with the

cross-appeal in its Heads of Argument.

- [12] As a period of over three years had lapsed from the date of the dismissal to the date of the appeal and as all parties and the Court thought it was important that this appeal should put an end to this whole dispute once and for all, it was agreed by all parties that all incidents of non-compliance with the rules of this Court on both sides should be condoned by this Court and that the Court should then hear the merits of the appeal and the cross appeal. The Court granted an order to this effect and proceeded to hear argument on the appeal and the cross-appeal.
- [13] Before proceeding, it is important to state that there was no dispute that the second respondent had correctly summarised the evidence presented by the appellant's witnesses save in respect of two complaints in relation to Mr Msiza's evidence and that of Mr Van Breda. With regard to Mr Msiza's evidence the appellant's complaint is that the second respondent misconstrued Mr Msiza's evidence in that Mr Msiza had said that the first respondent's refusal to hire her uncle was as a result of her own personal reasons as opposed to the appellant's policy. In my view this is of no consequence. The appellant also complained that the second respondent had attributed to Mr Van Breda evidence that had been given by the first respondent. I shall deal with this aspect of the matter shortly when I deal with each of the various charges against the first respondent.
- [14] In attacking the second respondent's award, Mr Antonie, for the appellant, proceeded on the basis of the test of review as laid down by this Court in **Carephone (pty) Ltd v Marcus N. O. & others (1998) 19 ILJ 1425 (LAC) at 1435G**. Before he dealt with the various charges, Mr Antonie, made a general attack on the second respondent's award which I now turn to deal with. The appellant stated in its supplementary affidavit that underlying the second respondent's assessment of

the evidence and

the relief he granted was his complete failure **“to address the fundamental reasons for which the first respondent was dismissed.”**The appellant states that the fundamental reason for the dismissal of the first respondent is reflected in what Ms Roslan presented in the disciplinary enquiry as the charge against the first respondent as well as in part of what was said by the chairman of the disciplinary inquiry when he gave his decision and reasons for his finding. The quotation of what Ms Roslan said in the disciplinary inquiry reads thus:-

“The charge is conduct destructive of the trust and confidence required in a human resources officer. Disloyal conduct serving to undermine the credibility and proper functioning of the human resources department.”

[15] The quotation from the chairman of the disciplinary enquiry that is relied upon as revealing the fundamental reason for the first respondent’s dismissal reads thus:-

“Due to the extremely sensitive and confidential nature of the position filled [by the first respondent] and her conduct generally, made me come to the conclusion that due to the continuous and repeated unacceptable performance and workplace behaviour resulting in irreparable damage to the trust

relationship and credibility within the department and the company as a whole, I have no alternative but to terminate [the first respondent's] services with immediate effect."

[16] The evidence that was led on behalf of the appellant before the second respondent did not come anywhere near to being sufficient to prove any valid reason for the dismissal of the first respondent. I do not think that any more requires to be said in this regard other than dealing with the various charges of misconduct because the appellant, it seems to me, may have intended that the evidence relating to those charges would not only prove the alleged acts of misconduct on the first respondent's part but that it would also prove this alleged fundamental reason for the dismissal of the first respondent.

The charge of unauthorised questionnaire

[17] The second respondent disposed of this charge on the basis that the first respondent had already been disciplined for her conduct in regard to this charge in a previous disciplinary inquiry which had taken place in March 1997 and that the appellant had no right to discipline her for the second time. In the review application the appellant attacked this finding on the basis that, even though the chairman of the disciplinary inquiry

seems to have taken it into account it had not formed part of any charge against the first respondent in the disciplinary inquiry of March 1997. For this reason, so argued the appellant, it had been open to it to charge the first respondent with. The Court a quo rejected the appellant's complaint in regard to the manner in which the second respondent dealt with this charge and gave its reasons therefor. It dealt with it

paragraphs 16 - 22 of its judgement. I agree with its conclusion and its reasons for rejecting the appellant's complaint in this regard. It would serve no purpose to repeat those reasons in this judgement.

The charge of alleged negligent re-hiring of temporary employees

[18] The allegation against the first respondent in this regard is that she had negligently hired temporary employees who had previously been dismissed from the appellant for trashing the factory floor. Although the appellant has complained that the second respondent attributed to Mr Van Breda evidence that was given by the first respondent in regard to the temporary employees involved, this is of no consequence because the appellant led no evidence in the arbitration proceedings to prove negligence on the first respondent's part. The first respondent admitted that

she hired the temporary employees in question but stated that there had been nothing in the records indicating that they had previously been dismissed by the appellant. This part of her evidence was not challenged in the arbitration proceedings. The appellant sought to challenge it only in the review application by seeking to introduce evidence that had not been led in the arbitration. The appellant cannot do this. Accordingly the appellant failed to prove this charge before the second respondent.

[19] The charge relating to creating obstacles to the running of the appellant's disciplinary process.

- [19.1] The charge against the first respondent in this regard was that she had created obstacles to the proper running of the appellant's disciplinary process by doing three things. The first was that, in connection with an appeal that she noted in respect of the disciplinary inquiry of March 1997, she had insisted on being represented by a union official when she knew this to be contrary to established policy. Although in her evidence in the arbitration proceedings, the first respondent appears to have denied that she had insisted on such representation, I do not think that it was necessary for the second respondent to go as far as deciding this question. It seems to me that the first question in regard to this

charge should have been whether it disclosed any cause for disciplinary action even assuming that she had so insisted.

- [19.2] I do not think that it did. There was nothing in the policy of the company that banned such representation. If the first respondent felt that, in order to properly protect her rights and interests, she required representation by a trade union official, she was entitled to seek permission for such representation; she was entitled to negotiate and bargain for it as best she could. It was up to the appellant either to grant or refuse her request. Once the appellant had properly considered the first respondent's request and refused it, the appellant was entitled to proceed with the appeal on the basis that her request of such representation had been refused. I can, therefore, not see how her insistence affected or prejudiced the appellant. This allegation disclosed no cause for disciplinary action. Accordingly the first respondent should not even have been charged with it. Although the Court a quo was correct in saying the finding that the first respondent did not insist on outside representation was contrary to the clear evidence before the second respondent, this was, in my view, besides the point. The final finding that the first respondent was not guilty of misconduct

in this regard should stand.

[19.3] It was also alleged under this charge that the first respondent had created obstacles in the proper running to the appellant's disciplinary process by failing to comply with the request that she support her appeal with written motivation. It is true that the appellant requested the first respondent to give motivation for her appeal which she had noted in regard to the disciplinary inquiry of March 1997. In a letter of the 23rd May 1997 Mr McClintock, the Human Resources Director of the appellant, wrote to the first respondent's representative. In that letter his explanation for the appellant's requirement for such motivation was given in these terms: **"As you know an appeal will only in exceptional circumstances require a full re-hearing of the case and to determine what form the appeal should take it is essential that [the first respondent] complies with the requirement that she spell out in detail the specific grounds and motivation of her appeal."**

[19.4] The second respondent found that there was no evidence to prove the existence of a rule requiring such motivation for appeals. He also found that the appellant had not proved that the first respondent

had ever been called upon to supply such motivation and that she was made aware of the consequences of non-compliance therewith. The Court a quo concluded that these findings by the second respondent were unjustified. I shall assume that the Court a quo was correct in finding that the second respondent's findings were unjustified. However, there is a prior question which arises before determining whether the appellant had such a rule and, if so, whether it had called upon the first respondent to provide motivation for her appeal.

- [19.5] That question is whether, assuming there was a rule requiring such motivation and assuming that the first respondent had been called upon to provide such motivation and had failed to do so, such conduct was one that could provide a basis for the appellant to discipline the first respondent. I think not. It seems clear to me that in that case the appellant may have had no obligation to process the first respondent's appeal. However, the first respondent's conduct did not provide any basis for disciplinary action to be taken against her. She had a right to pursue her appeal but, if she wanted to exercise that right, she had to comply with the requirements laid down for its prosecution. If she chose not to comply with such requirements, she risked forfeiting her right to be

heard on appeal. However, this is a far cry from saying that she could be disciplined for her failure to motivate her appeal so that it could be prosecuted. In my view the Court a quo erred in dealing with this part of the matter as if it provided a basis for possible disciplinary action. Accordingly, even though the reasons given by the second respondent for dismissing this charge may have been unjustified, the first respondent's conduct disclosed no basis on which disciplinary action could be taken against her.

- [19.6] In support of the charge of creating obstacles to the proper running of the appellant's disciplinary process, the first respondent was also alleged to have relied upon the conduct dealt with above under par 19.1 to 19.5 **"to enter into dispute"** with the appellant. This was alleged because in response to the appellant's insistence that the first respondent should stop seeking union representation and that she should provide motivation for her appeal, her union declared a dispute with the appellant and referred it to the CCMA. It is clear that what the appellant sought to discipline the first respondent for was the fact that the employee exercised her right to refer a dispute to the CCMA. Not only is such a charge incompetent but also I am of the opinion that any dismissal for such conduct may arguably

constitute an automatically unfair dismissal in terms of sec 187(1) of the Labour Relations Act, 1995 (Act NO 66 of

1995) (**“the Act”**). The first respondent’s conduct in this regard should never have formed the basis of a charge of misconduct.

The charge of alleged argumentative and insubordinate conduct towards managers of the company

[20] The fourth charge against the first respondent was that it **“continued argumentative and insubordinate conduct towards managers of the company”**. This charge appears to have been based on a memorandum that the first respondent wrote to her immediate superior which is dated the 29th May 1997. That is a lengthy memorandum. It was quoted in full in par 50 of the judgement of the Court a quo. Although this memorandum is lengthy, I consider that it is necessary to quote it in full. It reads thus:-

TO: LYNN ROSLAN

cc: P. Smith, J. McClintock, P. Twala

From: BONGI MASHABA

Date: 29 May 1997

“1. Apology

I want to apologise regarding the fact that:

2 of the 10 people I called in for a 1 day-job on 16/05/97 were dismissed for bad conduct last year.

I helped Melany the way I did.

2. I have the following problems in regard to your reaction to

the above and many others

- 2.1 The way you seem to change facts regarding issues to suit whatever purpose you want and the way you take these as far as you do. Your complains about me are not based on the true facts of the events but projected to suit what you want them to look like.

You have done this on a number of occasions beside these (see Addendum A), to name a few, - in my appraisals (to which I complained in writing); my salary increase; in your disciplinary action against me (some proof of which was submitted); and very recently (HRIS meeting & B. Glynn issue - both I complained in writing).

- 2.2 Your inconsistency regarding how I should perform my work. Your rules change everytime to suite the purpose of that instance, - today they are right, tomorrow they are wrong depending on what impression you want to present about me or the wrong you want seen in my doing.

E.g You say I should not have help Melany with documentation but should

have told her about the procedure and come to discuss with you.

I did that regarding informal recruitment documents from I. Twala, - you took this to the disciplinary action that I can't communicate policies and procedure I came to you for help.

I explained procedure to M. Skeen as you say you expect me to, - you took that to the disciplinary action alleging that I was "extremely difficult".

You put in my objectives and emphasised that I must help people because "I am the only person in the department who is not being helpful". - I helped Melany, now I shouldn't have.

You have emphasised numerously and very strongly to me that you want action not stories. - I acted, and now I should have passed this on to you without doing anything.

You have told me that we must be flexible with the policies & procedures. This was also supported during the disciplinary hearing, - (to my point about informal recruitment and its implications, re: Michaela's temps) that policies & procedures are not cast in stone they are a guide and an example given about compassionate leave, you further said this is not a bureaucratic company.

2.3 When dealing with issues, mistakes and complains that concern me, - On a number of occasions I find you quick to lashout criticism, hardhanded and very hasty to judge,

accuse and allege no matter how I try to tell/remind you the real facts or what you said. Only if something reminds you or someone else tells you something then you

realise the actual facts and you apologise for being angry, (e.g. J. Nelson & see memo to you re: B. Glynn).

2.4 I find you do not take into consideration the facts/circumstances involved or even check your understanding of facts and procedures surrounding an issue at hand, some of which are standard procedure, e.g. some of the points you use in your allegation indicate your misunderstanding of the actual facts and procedures, maybe purposefully to project that I am incapable, e.g: Any person who has been called in to do a job for the company must be paid a salary of the work done. Legally if these people did a job for GWSA it remains the company's responsibility to pay them. If Steyn did wrong he should be corrected but we may not withhold their salary because of that otherwise the company may be liable for withholding pay.

It is also GWSA policy and procedure that salaries must be paid through the Salaries Department whether the employees were recruited formally or informally and for any length of stay. The documents I gave you are in the names of the casuals and not Steyn and therefore would not "get the money paid out to the employee (Steyn)". The arrangement

between themselves they can sort it out so, and I can't be involved - my duty is to ensure that people are paid in lieu of the work done and that the correct documents (even though late) are done.

There is no way that salaries Department can process and pay a salary if there is no documentation and this applies for all employees, - 1-day casuals, temps, permanent, etc informally or formally recruited. This is legal, procedural and necessary documentation and not an "instruction to payroll to regard informal workers as employees",- they are temporary employees while they work for us, that's what we always do, when the contract is finished they are no more, but payroll records must be justifiable anytime later on.

- 2.5 The way you deal with problems that involves me seems very subjective, attacking the symptoms and not the causes. E.g. Steyn did wrong and I did wrong, - but you don't do anything about the cause of the fault. There is still a chance that someone else can do what Steyn did and I can be blamed for any of the points under 2.2 - and you will always have a reason to portray something wrong I have done.

What Steyn did and some other problems you blame on me indicate a structural problem with the communication

strategies you use to communicate the company policies and procedures, it does not reach everyone. E.g. We are still receiving and submitting to Payroll after the 10th (even 1 month late), despite the fact that I was disciplined to correct that problem - the departments don't know about payroll-10th - problem so this will keep occurring and I am the one who takes these to payroll dept and therefore blamed for late submission.

- 2.6 My suggestions: You don't take cognisance or encourage them you just listen or ignore them then later use them to allege that that was an action agreed upon (Addendum A). Sometimes you only take them if someone else suggests them and there are examples of this.
- 2.7 I find some of your reactions biased - and giving selective treatment - e.g. In view of Addendum A, it does not seem a problem that people who were involved in this issue did not follow procedure to inform me; Angela vs Packing hall staff medical aid service; when someone in your own department refuses point blank and rudely to adhere to procedure and/or to use appropriate forms which you sanctioned should be used, - you say you are not going to be a referee and not going to involve yourself in acts of "catching up" someone, -

but if other people don't you want to know from me why they are not using the correct forms.

3. My functional responsibility in the department

3.1 Yes I have the responsibility to advise correctly. Like everyone else I am not 100% perfect and cannot make everyone happy all the time, but I pride myself with the experience, knowledge and the good I have and still contribute to the company. I know that my performance is not as bad as you portray it. Everyday I meet complicated issues which I have to deal with and advise on. E.g. last week Friday I gave you 4 typical situations of this which I advised and dealt with to the best of my knowledge and ability. You also have come to me for advice, help and explanation on issues of policy and procedure and how to go about it.

3.2 Since I joined the company it has been my job to explain/advise/inform on policy and procedure before anyone else did in this department. I have corrected numerous incorrect applications of policies and procedures within and outside the department for the benefit of the company and I think I have been trying my best for the company. I have never before had any such problems as you portray in this regard. If after all this there is something that I am not doing right in this regard I think management should not only judge but be objective in its approach and attend to the cause of the problem to help me correct my wrongs and improve from them.

4. If I do wrong I have to be reprimanded or subjected to all forms of correctional measures but it should be truthful and based on real and actual facts of the event. I expect respect, leadership, guidance, encouragement and correction that will help me do my job best but so far most of the feedback seems inconsistent and very destructive. (See memo HRIS).

5. I don't know why you are doing all this. Maybe there is another side of it which I am missing or misunderstanding, but this is the way I see things and what I feel subjected to. I feel grossly victimised and unfairly treated. I am now beginning to believe that this is a procedural act aimed at removing and replacing me from my position due to the reasons of "not being able to perform my duties correctly, putting the company at risk, incapable to communicate policies, wrong application of policy and procedures, interpersonal relationship, etc, most of which are not based on real facts and there are more of these examples.

6. This has been going on since last year and every aspect of my life and myself is affected, I can't even begin to tell how much. My worklife is a nightmare in waiting, expecting to be called in for another wrong.

I hope and pray that you take the content of this letter as an unbottling of all the things that disturb and concern me in my daily worklife.

With all due respect.

Bongi"

It is difficult for one to read the first respondent's memorandum without feeling some sympathy for the first respondent in regard to the clear frustration experienced by her. This is not a case of insubordination. This is a case of an employee who was seeking help and who may have needed clarification of certain important matters in order for her to know what exactly was expected of her. There is nothing in the memorandum that suggests that she was being insubordinate. In any event Ms Roslan did not give evidence to dispute the first respondent's evidence in this regard. In the course of her frustration the first respondent might not have chosen all her words as carefully as she would probably have done in different circumstances. However, that is understandable in such a situation. The Court a quo rejected the appellant's complaint

in this regard and, in my view, correctly so.

[21] **The charge of compounding the transgression of an employee.**

[21.1] The fifth charge was that the first respondent had compounded “**the transgression of an employee by facilitating a breach of procedure in relation to the rehiring of informal workers**”. The Court a quo dealt with this charge

in paragraphs 50-61 of its judgement. It rejected the appellant’s attack as lacking in merit and gave its reasons for such conclusion. I agree with both its conclusion and reasons. It would serve no purpose to repeat those in this judgement.

[22] In the light of the foregoing I am driven to the conclusion that the second respondent’s finding that the first respondent’s dismissal was substantively unfair cannot be said to be unjustifiable. In so far as the Court a quo found the contrary in respect of the charge of creating obstacles in the proper running of the appellant’s disciplinary process, this overlooked, as I have already indicated, that the first respondent’s conduct in that regard could not form a basis for disciplinary action.

[23] **Procedural fairness**

[23.1] What remains is the question of procedural fairness. The appellant complained that the Court a quo should have dealt with this aspect of the matter. In the light of the conclusion I have come to on the issue of substantive fairness, it seems to me that whether or not the second respondent finding on procedural fairness was justifiable or not becomes academic.

[24] **The relief of reinstatement**

[24.1] The appellant has also attacked the relief of reinstatement that was granted by the

second respondent. In this regard the appellant has contended that the trust relationship between the parties has broken down completely. It has pointed out that there was sufficient evidence before the second respondent to support this contention. In my view it was the relationship between the first respondent and her immediate superior, Ms Roslan, that was strained. I am not sure even in regard to that relationship that I can go so far as to say it had completely broken down. Even if I could, the one difficulty I would have in this regard is that the appellant may well be largely to blame for such a breakdown in which case I do not think it would be appropriate to let it benefit from its own fault.

[25] In this case the first respondent was found by the second respondent not to have been guilty of any of the charges which formed the basis of her dismissal. This Court has come to the same conclusion. She has been forced into litigation that has gone on for over three years with probably very little in terms of financial resources. In all the circumstances I am of the opinion that there is an insufficient basis to interfere with the order of reinstatement made by the second respondent especially in the light of the very unacceptable manner in which the appellant treated the first respondent.

[26] In the result, although the appellant's appeal against the Court a quo's failure to deal with the issue of procedural unfairness was

justified, in the end that aspect of the matter is of no consequence and its appeal has, for all intents and purposes, failed. The first respondent's cross-appeal must be upheld.

[27] In the premisses I make the following order:.

1. The appeal is dismissed with costs.
2. The cross appeal is allowed with costs.

3.The order of the Court a quo is set aside and replaced with one in the following terms:-

“1. The application is dismissed with costs.

2.The arbitration award issued by the second respondent in the dispute between the applicant and the first respondent under CCMA case no GA 10898 is hereby made an order of this Court.”

RMM Zondo
Judge President

I agree

D.M. Davis
Acting Judge of Appeal
I agree

B.R. du Plessis
Acting Judge of Appeal

