IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: DA16/05

In the matter between

The Member of the Executive Council for Finance, KwaZulu Natal[1]	**First Appellant**
The MEC for Education, KwaZulu-Natal	**Second Appellant**

And

Wentworth Dorkin N.O.	**1st respondent**
Hamilton Ntshangase	**2nd respondent**

JUDGMENT

ZONDO JP

[1] This is an appeal from a judgment given by the Labour Court, through Francis J, in a review application that was brought by the appellants against the respondents to have a certain decision taken by the first respondent reviewed and set aside. The first appellant is the Member of the Executive Council responsible for Finance in

[1] I have added KwaZulu Natal to show which province is referred to.

KwaZulu-Natal. The second appellant is the Member of the Executive Council responsible for education in KwaZulu-Natal. The first respondent is employed in the Department of Education, KwaZulu-Natal, as Chief Director in the Empangeni Region, KwaZulu-Natal. The second respondent is employed as a Director: Arts in the Department of Education in KwaZulu-Natal.

[2] The decision which the appellants sought to have reviewed and set aside by the Labour Court was a decision that the first respondent, in his capacity as the chairperson of a disciplinary inquiry into certain allegations of misconduct made against the second respondent, took to give the second respondent a final written warning as a sanction after he had found him guilty of several allegations of misconduct. It was because the appellants were aggrieved by the imposition of only a final written warning as a sanction on the second respondent that they brought an application to have that decision reviewed and set aside by the Labour Court. The Labour Court held that the first appellant did not have locus standi to bring the review application. It dismissed the review application.

[3] The allegations of misconduct with which the second respondent was charged in the disciplinary inquiry that the first respondent chaired were in effect the following:

> "1.**Charge no 1: that during or about 1997 you secured the secondment or temporary transfer of a Mr Sandile Herbert Makhanya, an educator, to the Directorate under his control without the**

permission of Mr Makhanya's Head of Department

Charge no 2: It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R. 825 of 10/6/1997), and the provisions of Chapter B and C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries in the amounts set out in column 2 of Schedule A attached hereto, to the persons whose names and student numbers appear in column 1 of the said schedule, to study at the Tertiary Institutions referred to in column 3 of the said schedule, without the authority to do so, without any budgetary provision for such expenditure, and in conflict with the requirements of the business plan of the KwaZulu-Natal Community College Project, thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 3 **It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to the Public Service Coordinating Bargaining Council), read with the provisions of the Code of conduct for the Public Service (R. 825 of 10/6/1997), and the provisions of Chapter B and C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries in the amounts set out in column 2 of Schedule A attached hereto, to the persons whose names and student numbers appear in column 1 of the said schedule, to study at the Tertiary Institutions referred to in column 3 of the said schedule, contrary to the approved Departmental procedures regarding the allocation of bursaries, and without the prescribed agreement being concluded between the successful applicants and the Department;**

Thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **performing poorly or inadequately for reasons other than incapacity.**

Charge No. 4 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and the provisions of Chapter B and C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries in the amounts set out in column 2 of Schedule B attached hereto, to the persons whose names and student numbers appear in column 1 of the said schedule, notwithstanding their failure to submit applications in the prescribed form, or at all,

thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 5 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public

Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and the provisions of Chapter B and C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries to the persons whose names and student numbers appear in column 2 of Schedule C attached hereto, to enable them to pursue studies reflected in column 1 of the said schedule, notwithstanding the fact that the said courses are not approved fields of study for the allocation of bursaries by the Department,

thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 6 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and the provisions of Chapter B and C of the Public

Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries to the persons whose names and student numbers appear in column 1 of Schedule D attached hereto, for the amount reflected in column 1 of the said schedule, to study at the Tertiary Institutions reflected in column 3 of the said schedule, notwithstanding the fact that the said amounts exceed the Department's prescribed maximum amount of R10 000,00 per annum, applicable at the time,

thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 7 **It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and the provisions of Chapter B and C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries to the**

persons whose names and student numbers appear in column 1 of Schedule E attached hereto, and whose relationship with you are reflected in column 2 of the said schedule, to study in the field of study set out in column 3 of the said schedule, notwithstanding the fact that the said person are relatives, thus failing to put the public interest first in the execution of your duties, favouring relatives in the allocation of bursaries when they are not entitled to such bursaries; and utilising your official position to obtain potential private benefits for yourself during the performance of your duties, without declaring your interest to the Department,

thereby:

4. **wilfully or negligently mismanaging the finances of the State;**
5. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
6. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 8 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and the provisions of Chapter B and

C of the Public Service Staff Code, in that you during or about the beginning of 1998 allocated bursaries to the persons whose names and student numbers appear in column 1 of Schedule F attached hereto, whose parent's name and Persal numbers (where applicable and available) are reflected in column 2 of the said schedule, with the particulars of the parents' employment reflected in column 3 of the said schedule, to the field of study set out in column 4 of the said schedule notwithstanding the fact that the said persons are dependents of state employees, thus failing to put the public interest first in the execution of your duties, favouring associates, friends and/or work colleagues in the allocation of bursaries when they are not entitled to such bursaries; and utilising your official position to obtain potential private benefits for yourself during the performance of your duties, without declaring your interest to the Department,

thereby:

7. **wilfully or negligently mismanaging the finances of the State;**
8. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
9. **performing poorly or inadequately for reasons other than incapacity.**

Charge No 9 **It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), read with the provisions of the Code of Conduct for the Public Service (R825 of 10/6/1997), and section 9 of the Public Service Act, 1994 (Proclamation 104 of 1994), in that you during or about April 1998 employed Mr. M J Mazibuko and Ms. Gugu Mzuwini without the required authority to do so, without following the prescribed procedures, and/or selecting for appointment persons who were your friends, associates and/relatives,**

thereby:

1. **abusing your authority; and**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture.**

Charge No 10 **It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), in that between March and April 1998 procured goods, alternatively ensured and/or authorised the procurement of goods as reflected in column 1 and 2 of Schedule G attached**

hereto, at the prices reflected in column 3 of the said schedule, to the value of R 524 610,30, ostensibly in accordance with a business plan known as the KwaZulu-Natal Community College Project dated 9 December 1995, without ascertaining that the goods purchased were necessary for the implementation of the said business plan, that proper arrangements were made for the receipt of the goods and the storage thereof on state premises; that a record was prepared to the goods received indicating the place or places they were stored, and that the goods were recorded in the state asset register,

thereby:

1. **wilfully or negligently mismanaging the finances of the State; and/or**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture;**

Charge No 11 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), in that you between March and April 1998 failed to take adequate steps to ensure that state assets under your control, as set out in columns 1 and 2 of Schedule H attached

hereto, acquired for the amounts set out in column 3 of the said schedule, were properly secured,

thereby:

1. **wilfully or negligently mismanaging the finances of the State;**
2. **prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture; and**
3. **causing a loss to the Department in the amount of R 208 683,10, as the equipment, as a result of your actions, is no longer in the possession of the Department, and/or cannot be traced.**

Charge No 12 It is alleged that you committed an act of misconduct by contravening the provisions of the Disciplinary Code and Procedures for the Public Service (contained in Resolution 2 of 1999, agreed to in the Public Service Coordinating Bargaining Council), in that you during or about 1998 removed state assets reflected in column 1 of Schedule I attached hereto, purchased for amounts reflected in column 2 of the said Schedule, without the permission of the employer and kept them under your control either at your house at BB 984 Umlazi, and/or at places unknown to the employer,

thereby:

4. **wilfully or negligently mismanaging the finances of the State; and**

5. prejudicing the administration, discipline and efficiency of the KZN Department for Education and Culture."

[4] In the disciplinary enquiry witnesses were called who gave evidence in support of the allegations against the second respondent. His representative in the disciplinary inquiry cross-examined the witnesses. The second respondent also gave his own evidence to defend himself against the charges. It would seem that the second respondent did not call any witnesses to testify on his behalf. He was also cross-examined.

[5] The first respondent evaluated the evidence given in the disciplinary inquiry and found the second respondent guilty of all the allegations with which he had been charged. He found him guilty "**as charged**." Charge 6 related to the fact that, whereas the maximum amount of a bursary that was authorised for the Department to give to certain students was R 10 000,00, the second respondent had given certain students bursaries of more than R 10 000,00 each. The names of the students were listed in Schedule D to the "**charge sheet**." There were 39 students to whom he had given bursaries which fell under charge 6. Fourteen of such students had been awarded bursaries of R 20 000,00 or more each. That alone totals just under R 300 000,00. Charge 10 included an allegation that the second respondent had mismanaged the Education Department's finances by purchasing goods to the value of R 524 610, 30 without ascertaining that such goods were necessary for the implementation of a certain business plan. Charge 11 included an allegation that, as result of the second respondent's

failure to take adequate steps to ensure that certain state assets under his control were properly secured, the State had lost R 208 683,10 as the value of such State assets as such assets could no longer be traced. When regard is had to the amounts relating to other charges which the second respondent was found guilty of mismanaging it seems to me that one is talking of a figure that is not less than R 500 000,00 a substantial portion of which represented a loss to the Department. An amount of more than R 1 million had been awarded to students as bursaries when no authority had been given for the awarding of such bursaries. In fact in par 21 of the founding affidavit in this case it is inter alia stated that in this case the second respondent caused the Department a loss of more than R 1,2 million and was found guilty of nepotism and abuse of power. In his answering affidavit the second respondent did not dispute any of this. Elsewhere in his affidavit he specifically admitted having caused the Department a loss of more than R 200 000,00.

[6] In my view there can be no doubt that an employee who is found guilty of the number of allegations of which the second respondent was found guilty when such allegations are of the serious nature of which the allegations against the second respondent were, should be dismissed. I can see no basis which would, generally speaking, save such employee from dismissal. Of course, every case would have to be decided on its own merits. There is nothing that the second respondent said in the disciplinary inquiry or in the answering affidavit which, in my view, a lesser sanction than dismissal.

[7] The first respondent was required to hold the disciplinary inquiry in accordance with the Disciplinary Code and Procedure contained in the Public Service Co-Ordinating Bargaining Council Resolution No. 2 of 1999. The second respondent stated that he did not challenge the findings of the chairman of the disciplinary inquiry. The basis of his opposition to the review application was that the Court a quo did not have jurisdiction to entertain the review application, that the appellants had no right to challenge the decision of the chairperson of the inquiry, that the chairman of the inquiry had powers to impose the sanction that he imposed and that, in imposing it, he had considered all the relevant facts including the fact that the second respondent had 21 years of service at the time. He also contended that in imposing the sanction of a final written warning, the second respondent was exercising a discretion and there was no basis upon which it would be justified to interfere with the manner in which he had exercised his discretion.

[8] The first question to decide is whether or not the first appellant had *locus standi* to bring this application. The second respondent took the point that the first appellant had no *locus standi*. Mr Shabalala, who deposed to an affidavit purportedly on behalf of the first appellant, stated that the basis for the first appellant's *locus standi* was that, as the Member of the Executive Council responsible for finance, he had the responsibility of allocating money made available by the central government to various provincial departments and that, where losses had been caused to departments, he was the one who was required to "**find**" the funds. Mr Shabalala also said that as the person in charge of the

province's budget, the MEC for finance - that is the first appellant - has "**a substantial interest in ensuring that the proper sanction is imposed on a provincial employee who has caused loss to provincial coffers**."

[9] In law there is nothing in what Mr Shabalala said in his affidavit that gives the first appellant *locus standi* to bring a review application to Court with regard to what sanction should be imposed by a government department other than his own department when an employee of that department has been found guilty of misconduct even if some misconduct relates to the management of the finances of that department. How discipline is maintained in a department falling under another Member of the Executive Council in the Provincial Government is not his business but it is the business of the Member of the Executive Council responsible for that Department. The first appellant can approach the Premier of the Province and raise his concerns with him if he believes that another Member of the Executive Council is failing to maintain proper discipline in his or her department and he feels that such failure has a negative impact on the provincial government or on the province's budget. He cannot institute court proceedings in regard to such matter. In fact I wonder whether the member of the Executive Council for Finance was ever made aware that Court proceedings were instituted in his name for the purpose of achieving a certain disciplinary sanction against a certain employee falling under the department of another Member of the Executive Council. I have serious doubts about this and no affidavit from the Member of the Executive Council for Finance was filed in Court in

this regard. Accordingly, the Court a quo was right in holding that the first appellant had no *locus standi* in this matter.

[10] The next issue to be decided is whether or not the second appellant had a right to bring a review application to set aside a sanction imposed by the first respondent pursuant to a disciplinary inquiry. In the founding affidavit it is contended that the conduct of a disciplinary inquiry and the resultant decision on sanction in the circumstances in which the first respondent in this case did constitute an administrative action. The second respondent disputed this. The first respondent was employed by the State at the relevant time. It is not clear whether, in making the decision that he made, he was performing a function on behalf of the employer or whether he was performing such function as an independent tribunal. However, in the view I take of this matter, this does not make much difference. In **Sidumo & Another v Rustenburg Platinum, case no: CCT 85/06** as yet unreported, which was handed down on the 5th October 2007, the Constitutional Court had to decide whether, when a CCMA commissioner conducts arbitration proceedings under the compulsory arbitration provisions of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") to resolve a dismissal dispute, that constitutes an administrative action. It held that such action does constitute administrative action. It seems to me that, if the conduct of compulsory arbitrations relating to dismissal disputes under the Act constitutes administrative action, then the conduct of disciplinary hearings in the workplace where the employer is the State constitutes, without any doubt, administrative action. If it constitutes administrative action, then it is required to be lawful, reasonable and procedurally

fair. Accordingly, if it can be shown not to be reasonable, it can be reviewed and set aside.

[11] On whether or not the second appellant had *locus standi* to bring a review application to set aside the sanction imposed by the first respondent, I am persuaded on the basis of the decisions in **Perskor Retirement Fund v Financial Services Board 2003(6) SA 38 (SCA)** and **Pharmaceutical Manufacturers Association of SA and Another in re**: **Ex Parte President of the Republic of South Africa & others 2000 (2) SA 674 (CC)** that the second appellant had *locus standi* to approach the Court in the circumstances of this case. It does not appear to me that any elaboration is required on this. A reading of those two decisions reveals, in my view, quite clearly that the second respondent in this case would also have the requisite *locus standi*.

[12] The question whether or not the second appellant had locus standi to bring the review application that it brought in the Labour Court in this case was also linked to the question whether it had a right to in effect challenge the decision of the first respondent when the first respondent had been appointed by the Department of Education to chair the disciplinary inquiry. It would seem that the first respondent had been appointed by the then Superintendent-General of the Department of Education, KwaZulu-Natal, to chair the disciplinary inquiry.

[13] The fact that the first respondent had not been appointed by the second appellant but by someone else in the Department – albeit the Superintendent-General –has the effect, in my view, of diluting,

if not destroying, the point that the second appellant had no right to in effect challenge the first respondent's decision. Indeed, it is arguable that that fact renders the argument inapplicable. Even if one were to say that, generally speaking, the second appellant does not have that right, one would be forced to say that does not become a remedy that is resorted to lightly. In **BMW (SA)(Pty) Ltd v Van der Walt (2000) 21 ILJ 113 (LAC)** the majority held that an employer has a right to subject an employee to a second disciplinary inquiry on the same issue in respect of which he has already been found guilty and has had a sanction imposed upon him when "it is, in all the circumstances, fair to do so." (see BMW (SA) Pty Ltd v Van der Walt at 117 G-H, par 12) but in the last sentence of the same paragraph it was stated that "(i)t would probably not be considered to be fair to hold more than one disciplinary enquiry save in exceptional circumstances" that cannot be absolute as there may be exceptional circumstances in which every reasonable person would agree that senior authorities in an organisation, particularly a government department, must be able to intervene to reverse a decision on sanction reached by a chairman of a disciplinary inquiry who has been appointed by them. A good example in this regard is whether the decision reached by the chairman of the inquiry has been induced by corruption. In the public interest this had to be so. However, the Courts will have to constantly endeavour to ensure that the right of senior authorities in such an organisation to reverse or approach a court to reverse such a decision on sanction .

[13] In the BMW case the employer sought to achieve a result which the first disciplinary inquiry did not give him and, therefore,

decided to subject the employee to a second disciplinary inquiry. In this case the second appellant seeks to achieve a result which the disciplinary inquiry chaired by the first respondent did not give him. In the BMW case the employer resorted to instituting a second disciplinary inquiry against the employee. In this case the employer resorted to instituting court proceedings to achieve that result.

[14] The decision of the majority in the BMW case sanctioned a second disciplinary as a way for an employer to achieve that if, in all the circumstances, it is fair to do so and it expressed the view that it would probably be unfair to subject an employee to a second disciplinary hearing except in exceptional circumstances. In the light of that decision it would be consistent with that decision to hold in this case that this case presented exceptional circumstances and the second appellant had a right to approach the Labour Court to seek to alter the decision on sanction made by the first respondent.

[15] In any event, contrary to what the Labour Court held this is not a case where the first respondent's powers were limited to making a recommendation about what the sanction should be. If one has regard to the provisions of PSCBC Resolution NO2 of 1999 which governed the powers of, and the procedure by which the first respondent was bound, one can only conclude that the first respondent's power was to make the decision on sanction recommendation. In this regard clause 7.4 (a) of Resolution No 2 reads as follows:

> "**If the chair finds an employee has committed misconduct, the chair must pronounce a sanction, depending on the nature of the case and the seriousness of the misconduct, the employee's previous record and any mitigating or aggravating circumstances"**

The rest of clause 7.4.a is to the effect that sanctions consist of among others "**dismissal**." Clause 17.4.(c) and 8.7. make it clear that, if there is no appeal, the employer is required to implement the decision of the chairman of the disciplinary inquiry. If there is an appeal, the employer is required not to implement such decision but, in that case, must implement the decision of the "**appeal authority**."

[16] The Labour Court expressed the view that it is not in the public interest to allow the State as an employer to bring applications to review its own decisions. I take a different view. I am of the opinion that, particularly in the case of an employer who is part of the State and therefore uses tax-payers money there are cases where such an employer is, and must be able, to approach a court of law to have its own decisions reviewed and set aside. I note that the Labour Court did not consider the Pharmaceutical case of the Constitutional Court referred to above which is a good example, albeit outside of the employment law field. However, if such circumstances can arise outside the employment law field, why can they not arise in the labour law field? If and when they do arise, why should the State as employer not be able to approach the Labour Court or any court of competent jurisdiction for a review? I cannot think of any reason why not. The Labour Court expressed the view that the only remedy for the State as employer in such a

case is "not to accept the recommendation of the first respondent …". As I have said the first respondent's decision was not a recommendation. It was a decision which the State as employer was bound to implement in terms of Resolution No 2 unless it got it set aside.

[17] In the BMW case this Court, in the majority judgment, held that, where there are exceptional circumstances, an employer is entitled to seek to change a decision of a disciplinary inquiry. In my view, if one has regard to the multiplicity of the charges of misconduct of which the second respondent was found guilty, their seriousness and the amount of financial loss that the second respondent caused the Department of Education, this was a case in which it was justifiable for the employer to take steps aimed at changing the sanction imposed by the first respondent. Counsel for the second respondent conceded that there are cases in which it would be justified for the employer to seek to have the decision of the disciplinary inquiry changed. He submitted, however, that this was not one of those. As stated already, in my view if there are such cases, this is definitely one of them.

[18] With regard to the second respondent's contention that the first respondent exercised a discretion in imposing the sanction of a final written warning, I am of the opinion that the first respondent's conclusion that this was a case in which dismissal was not the appropriate sanction and that a final written warning was is a conclusion that could only be reached by someone who did not exercise any discretion at all or who simply acted arbitrarily and did not apply his mind at all. To the extent that his decision

constitutes an administrative action, I have no hesitation in concluding that his is a decision that no reasonable person could reach on the facts of this case and his decision is not just unreasonable but is, without any doubt, grossly unreasonable. The facts that the second respondent had 21 years of service and that he had a clean record cannot mean that on the facts of this case the sanction of dismissal would not be appropriate. There is a limit to which an employee's long service period and clean record can save such employee from dismissal when he is guilty of misconduct.

[19] With regard to costs I have been tempted to award costs against the second respondent because the second appellant has had to come to court to seek to alter the sanction imposed upon the second respondent but, I think that, having obtained a sanction of final written warning which was not his decision but that of the first respondent – he was entitled to come to Court and seek to defend it. Indeed, he was successful in the Court below. The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not

always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes. In that way these Courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the Courts for adjudication.

[20] In this case the second respondent will lose his job and he has had to defend the decision taken by the first respondent and even engaged Senior Counsel to defend such decision. Unless there is a trade union behind which will foot his legal bill, he stands to spend a lot of money on legal fees. In all of the circumstances I am of the view that the requirements of the law and fairness dictate that no order should be made as to costs on appeal and none should have been made in the Court below.

[21] In the result I make the following order:

1. The appeal against the decision of the Labour Court in regard to the *locus standi* of the first appellant is dismissed.
2. The appeal against the order of the Labour Court is upheld.
3. There is to be no order as to costs on appeal.
4. The order of the Labour Court is set aside and, for it, the following order is substituted:-

"(a) the first applicant has no *locus standi* in this matter

(b) The review application is granted with no order as to costs.

(c) The disciplinary sanction imposed by the first respondent on the second respondent is hereby set aside and replaced with the following sanction:

(i) The appropriate sanction is dismissal with immediate effect."

Zondo JP

I agree.

Pillay AJA

I agree.

Kruger AJA

Appearances

For the Appellant	:	Adv. MJD Wallis SC (with Adv. MG De Klerk).
Instructed by	:	Feisal Abraham Attorneys
For the Respondent	:	Adv KJ Kemp SC
Instructed by	:	Deneys Reitz Attorneys
Date of judgment	:	21 December 2007