



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA 17/14

ETHEKWINI MUNICIPALITY

Appellant

and

LOVEDALE MODERATE Z. HADEBE

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

HUMPHREY NDABA N.O.

Third Respondent

Heard: 10 September 2015

Delivered: 10 May 2016

Coram: Tlaetsi DJP, Ndlovu JA et Makgoka AJA

Summary: Review of an arbitration award – proper approach restated - employee reinstated on arbitration after dismissal – substantive fairness – inconsistency in applying discipline. S 193 of the LRA – whether employee entitled to reinstatement – dismissal unfair only because of the inconsistency rule – factors to be considered for reinstatement under such circumstances. Reinstatement and compensation – whether they can be ordered in the same relief or only in alternative of one another – proper interpretation of section 193(2) of the LRA.

JUDGMENT

MAKGOKA AJA

Introduction

- [1] This is an appeal against the whole of the judgment and order of the Labour Court (Mhlongo AJ) handed down on 11 June 2014, in terms of which the dismissal of the first respondent (Ms Hadebe) by the appellant (the municipality) was found to be substantively unfair. The Labour Court ordered that Ms Hadebe be reinstated to her previous position, with compensation. The Labour Court also ordered the municipality to pay the costs of the review application on an attorney and client scale. The appeal is with leave of the Labour Court, which was granted on 5 November 2014. The appeal is directed against the order of reinstatement, and the costs order made against the municipality.

The Parties

- [2] The appellant is a municipality established in accordance with s 12 of the Local Government: Municipal Structures Act 117 of 1998, and which, in terms of s 2(d) of the Local Government: Systems Act 32 of 2000, has a separate legal personality. Ms Hadebe is an erstwhile employee of the municipality. The second respondent is a dispute resolution body established in terms of the Labour Relations Act 66 of 1995 (the LRA). The third respondent (the arbitrator) an appointed panellist of the second respondent, conducted arbitration proceedings under the auspices of the second respondent.

The facts

- [3] The facts are simple. Ms Hadebe was employed by the municipality in 1999, in a unit known as Water and Sanitation. In 2003, she was appointed as a senior buyer, being responsible for, among others, the procurement of goods from suppliers in accordance with the municipality supply chain management policy. An internal audit into the affairs of the sanitation unit of the municipality

for the period July to October 2006 revealed that there were several breaches of the supply chain management policy.

- [4] The auditors recommended disciplinary action against certain employees, including Ms Hadebe. She was suspended on 20 November 2007. In January 2008, the municipality internally charged Ms Hadebe with misconduct, and called on her to answer allegations of numerous breaches of the supply chain management policy. She faced a total of nine charges, but was convicted of eight of those charges, as she was acquitted on charge 3. She was dismissed on 27 March 2008.
- [5] She appealed to the appeal tribunal, which appeal was unsuccessful, as, on 2 July 2008, the appeal tribunal confirmed her dismissal. Dissatisfied with that decision, Ms Hadebe referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the second respondent) for conciliation, and on failure thereof, for arbitration. The arbitration was conducted by an arbitrator who could not continue with the arbitration, and the arbitration had to start afresh before the third respondent (the arbitrator).

The arbitration proceedings

- [6] A total of eight witnesses testified on behalf of the municipality during the arbitration, while Ms Hadebe testified in her own case and did not call any witnesses. I shall refer briefly to the three charges that Ms Hadebe was ultimately found guilty of by the arbitrator. Charge 1 involved the purchase of shade cloth from one supplier at a higher price without quotation, whereas the same goods could have been procured from another supplier who, as per the municipality point system, was the most "responsive tender". The result was that the municipality allegedly incurred an additional cost of R11 685.
- [7] In charge 2, she was alleged to have cancelled an order from one supplier, citing an over-supply of the commodity in stock, only to replace it with another supplier a day later, without obtaining the necessary quotations from other suppliers. In charge 5, Ms Hadebe was alleged to have unnecessarily increased orders of roof screws, plastic cups and wooden pegs, thereby creating an unnecessary over-supply of those goods, during the period August

2005 to March 2006. In all three charges, Ms Hadebe was alleged, to have, among others, failed to conduct herself with honesty and integrity, and to perform her tasks diligently.

- [8] In her evidence, Ms Hadebe raised, among others, the issue of inconsistency. She pointed out that whereas the internal audit report also implicated another employee, Ms Connie Mkhize (Ms Mkhize), she was the only one charged with misconduct. The auditors had recommended that action be taken against Ms Mkhize on suspicion of colluding with suppliers. The municipality lost R375 000 due to “cover quoting” implicating her. It was common cause that no action was taken against Ms Mkhize. Instead, she was promoted to the position of senior buyer, a position previously held by Ms Hadebe, after the latter was dismissed. Thus, she accused the municipality of inconsistency in the application of discipline to its employees.
- [9] In this regard, one of the witnesses who testified on behalf of the municipality in the arbitration, Mr Neal McLeod, stated that a strategic decision was taken by the municipality to first initiate criminal and civil proceedings against Ms Hadebe, and depending on the outcome thereof, revisit Ms Mkhize’s position. Initially, it was thought that Ms Hadebe had influenced Ms Mkhize, or that there was collusion between them. It was only when preparing for the arbitration, and perusing the relevant files that he discovered that nothing had been done regarding Ms Mkhize.

The arbitration award

- [10] On 23 April 2012, the arbitrator issued an award, in terms of which Ms Hadebe was found guilty only of charges 1, 2 and 5. Unlike the presiding officer in the internal disciplinary hearing, the arbitrator found Ms Hadebe not guilty of charges 4 and 9. He also concluded that charges 6, 7 and 8 were duplication of charges 1, 2 and 5, and should be considered as part of those charges.
- [11] In his award, the arbitrator considered the collective agreement concluded between the municipality and its employees, which enjoins the municipality to act consistently and fairly with regard to matters of discipline. The arbitrator

further made reference to the code of good practice dealing with dismissals, and observed that as a general rule, fairness required that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty.

- [12] On the above considerations, the arbitrator concluded that there was nothing preventing the municipality from charging Ms Mkhize once it realised that she should have been disciplined. The arbitrator further observed that, instead, she had been promoted to the position initially held by Ms Hadebe, and thus benefitting by occupying a position she could not occupy on merit whilst Ms Hadebe was still employed. As a result, the arbitrator found Ms Hadebe's dismissal substantively unfair on the basis of this inconsistency. With regard to the procedural fairness of the dismissal, the arbitrator found no merit in the contentions by Ms Hadebe of bias on the part of the chairperson of the disciplinary hearing, and found that the dismissal was procedurally fair. Having made those findings, the arbitrator proceeded to consider what an appropriate remedy would be under the circumstances, regard being had to the provisions of s 193¹ of the LRA.

¹ The section concerns remedies for unfair dismissal and unfair labour practice, provides as follows:

- (1) If the Labour Court or an arbitrator finds that a dismissal is unfair the court or arbitrator may:
 - (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.
- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:-
 - (a) the employee does not wish to be re-instated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[13] The arbitrator considered that the order of reinstatement would be inappropriate. In reaching that conclusion, the arbitrator took the following factors into consideration: the nature of the offences Ms Hadebe had been found guilty of; that she did not demonstrate any remorse for her conduct; that she had conceded that the relationship at work was no longer good, which point was further confirmed by her union representative at the appeal hearing; that the trust relationship had broken down in the buying section and that Ms Hadebe was prepared to accept reinstatement without back-pay to any other position. The arbitrator accordingly granted Ms Hadebe compensation in the amount equivalent to nine months' remuneration, calculated at her monthly salary of R9 133.72, which adds up to a sum of R82 203.48. The arbitrator considered this compensation to be just and equitable. The prayer for reinstatement was refused, and the arbitrator made no order as to costs.

Review application in the Labour Court

[14] Ms Hadebe approached the Labour Court in terms of s145² of the LRA seeking to review and set aside the award by the arbitrator on the basis that it was not one which a reasonable decision-maker could have made. She contended that the arbitrator was obliged to order her reinstatement once he had found that the dismissal was substantively unfair, unless any of the factors referred to in s 193(2) were applicable. It was further submitted that the municipality did not lead any evidence that the trust relationship between the parties had irretrievably broken down. She argued that, on the contrary, there was evidence that she had a good relationship with her erstwhile

² Section 145 of the LRA provides:

- '1. Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –
- (a) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
 - (b) If the alleged defect involves corruption, within six weeks of the date that the applicant discovered the corruption.
2. A defect referred to in subsection (1) means-
- (a) That the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as arbitrator
 - (ii) committed a gross irregularity in the conduct of arbitration proceedings or
 - (iii) exceeded the commissioner's powers.'

manager and his successor. The municipality opposed the review application, and supported the award by the arbitrator.

[15] It must be stated at the outset that in the review application, Ms Hadebe did not challenge the finding of the arbitrator that her dismissal was substantively unfair only due to inconsistency. She also did not join issue with the findings of lack of honesty and integrity inherent in those charges which she was found guilty of. She merely sought to have the awarded varied with an order that she should have been reinstated to her employment on the same terms and conditions that applied to her employment prior to her dismissal.

[16] In its judgment, the Labour Court observed that it would only interfere with the decision of the arbitrator only in an instance where the arbitrator, in carrying out his/her duties, fails to apply the requisite standard of reasonableness. Accordingly, the Labour Court concluded that the reasonableness of the arbitrator's decision had to be assessed with reference to the principles governing dishonesty; the principles governing inconsistency in the application of discipline by the municipality; and the alleged failure by the arbitrator to apply his mind to the facts and the evidence before him. With regard to dishonesty, the Labour Court observed that all three charges, of which Ms Hadebe had been found guilty of, had an element of dishonesty, thus underscoring the seriousness of the charges. The Labour Court could not find fault with the arbitrator's finding on the issue of the unfairness of the dismissal due to inconsistency.

[17] As to the contention by Ms Hadebe that the award was reviewable for unreasonableness because the arbitrator had not reinstated her, despite finding the dismissal to have been substantively unfair, the Labour Court said:

'The decision reached by the commissioner on not re-instating the applicant after taking into consideration that the dismissal was substantively unfair, only due to inconsistency, was because the applicant was not entirely without blame in this matter. Secondly, the applicant has been out of work for more than four years. Section 193(1) of the LRA provides for three remedies for unfair dismissal, i.e re-instatement, re-employment or compensation. An order of re-instatement restores the status *quo ante*. The re-employment means

that it would be in the discretion of the employer to re-employ him/her to the same or different position. It does appear anomalous that section 193(2)(b) (sic) specifically gives the court or the arbitrator the power to order the employer to re-employ the employee, either in work in which the employee was employed before the dismissal or in other reasonable (sic) suitable work on any terms and from any date not earlier than (sic) the date of dismissal, yet it is silent on the terms of an order to reinstate. That must be so and is designed to place the employee back into the position that he/she occupied before dismissal. But does that mean an arbitrator does not have the power to re-instate an employee and yet to order the employer to place that employee in a different position? Surely, that does not preclude such an order. The commissioner may make an appropriate arbitration award in terms of the Act including but not limited to, an award that gives effect to the provisions and primary objects of the Act. One of those objects is the effective resolution of labour disputes, in terms of section 138(9) of LRA. I am of the view that (the) applicant should have been re-instated to the same or similar position that she held before dismissal since Connie Mkhize is still in the same department which she occupied'

[18] The Labour Court went on to make the following order:

- '1 The applicant must be re-instated 'without back pay' to the position that she occupied before dismissal or be placed to another position which is equivalent to the position she occupied before dismissal;
2. The third respondent is ordered to pay the applicant compensation as per the arbitration award;
3. The third respondent must pay the applicant's costs on an attorney and client scale.'

[19] Although not stated in explicit terms, it should be accepted that the effect of the above order was that the Labour Court reviewed and set aside the award made by the arbitrator and substituted it with the order mentioned above. The municipality appeals against this order on three grounds. First, that the Labour Court erred in granting Ms Hadebe both reinstatement and compensation in circumstances where an order for reinstatement is inconsistent with an award of compensation. The second ground of appeal is that the Labour Court erred

in granting reinstatement in light of the arbitrator's finding that the dismissal was substantively unfair only because of inconsistency of discipline on the part of the municipality. The third ground of appeal concerns the costs order made by the Labour Court. Before I consider these arguments, I deem it prudent to set out the proper approach for reviewing the awards made by arbitrators.

The test on review

- [20] The test for review of arbitration awards finds jurisprudential expression in a number of judgments, in particular the seminal judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines and Others (Sidumo)*³ in which, the court held that s 145 is now suffused by the constitutional standard of reasonableness. The question therefore is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. Applying this test, the Court explained, will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.⁴
- [21] With regard to the practical approach to be adopted by commissioners and arbitrators in considering the sanction of dismissal, the Court laid down the following guidelines:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list... To sum up. In terms of the LRA, a commissioner has to determine whether a

³ *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* (2007) 28 IJL 2045; [2007] 12 BLLR 1097; 2008 (2) SA 24; 2008 (2) BCLR 158 (CC).

⁴ At para 110.

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.”⁵

- [22] The test enunciated in *Sidumo* was applied by this Court in subsequent cases. In *Fidelity Cash Management Service v CCMA and Others (Fidelity)*,⁶ this Court pointed out that the reasonableness of the decision is determined without enquiring into the fairness of such decision. That task lies, statutorily, with the commissioner. The test is therefore a stringent one to ensure that awards by commissioners are not lightly interfered with.⁷ See also *Bestel v Astral*⁸ where caution was expressed not to blur the distinction between an appeal and a review, i.e. unlike in an appeal, in review proceedings the question is not whether the decision is correct, but whether it can be justified.⁹
- [23] After an initial period of uncertainty as a result of the emergence of the “process-related irregularities” jurisprudence,¹⁰ the proper application of the test was neatly summarised by the Supreme Court of Appeal in the path-finding judgment of *Herholdt v Nedbank (Herholdt)* as follows:¹¹

‘[A] review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and

⁵ At Paras 77-79.

⁶ [2008] 3 BLLR 197 (LAC).

⁷ *Fidelity*, above, at paras 98 and 100.

⁸ *Bestel v Astral Operations and Others* [2011] 2 BLLR 129 (LAC).

⁹ At para 18.

¹⁰ In terms of this approach, *Sidumo* was interpreted to create a large scope of review of arbitration awards on the mere existence of any proven irregularities, dialectical or otherwise, committed in the making of the arbitration award. This was propounded in cases like *Ellerine Holdings Ltd v CCMA and others* (2008) 29 ILJ 2899 (LAC); *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC); *Afrox Healthcare Ltd v CCMA and Others* [2012] 7 BLLR 649 (LAC); *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC).

¹¹ [2013] 11 BLLR 1074 (SCA).

relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.¹²

- [24] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)*,¹³ this Court pointed out that where a gross irregularity in the arbitration proceedings is alleged, the enquiry extends to whether the result was unreasonable, in particular, whether the decision arrived at by the arbitrator is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material.¹⁴
- [25] Therefore, the upshot of both *Herholdt* and *Gold Fields* is that a process failure on the part of a commissioner does not in itself render an award unreasonable. In order for it to be unreasonable, it has to be established that such failure caused the result of the award to be unreasonable. Thus, a process failure is of no consequence if the final result of the award is, nevertheless, capable of reasonable justification.
- [26] It was argued on behalf of the municipality that in reviewing and setting aside the arbitration award, the Labour Court failed to apply the test as set out in *Sidumo*, read with *Herholdt* and *Gold Fields* (referred to earlier in paras 14 – 19 above) in that it failed to determine whether the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before him.
- [27] In *Sidumo* above, the Constitutional Court held that the commissioner has to consider the full extent of the relevant personal and surrounding circumstances which includes the nature, the importance and purpose of the rule breached, the nature and extent of the breach, the reasons for the imposition of the sanction of dismissal, the basis of the challenge thereto, the harm or potential harm caused or likely to be caused by the breach of the rule, further conduct, including disingenuousness surrounding the commission of the breach and the disciplinary and arbitration processes, a complete lack of

¹² At para 25.

¹³ [2014] 1 BLLR 20 (LAC).

¹⁴ At paras 14 -15.

remorse and re-commitment to the values of the appellant, the effect of the breach on the trust relationship and the capacity for the resuscitation of a workable employment relationship, the effect of the dismissal on the employee and his or her service and disciplinary record.¹⁵

[28] In the present case, in reaching the conclusion he came to, the arbitrator carefully took into account the relevant circumstances referred to in the passage referred above. I have already set out in detail (in paras 10 - 13 above) the factors that the arbitrator took into account when he concluded that reinstatement was not an appropriate remedy in the circumstances. The Labour Court did not seriously consider those factors, except for a sweeping statement, without much substantiation, that “the commissioner (sic) was at fault since the length of time cannot prevent an employee from being re-instated or re-employed because he/she has been fighting his or her case with the employer.”

[29] With respect to the learned Acting Judge, and as correctly argued on behalf of the municipality, this is a conflation of the factors relied on by the arbitrator to determine the *quantum* of compensation with those which militated against an order for reinstatement. The ultimate question is whether the conclusion reached by the arbitrator is not one which a reasonable arbitrator could reach. I am firmly of the view that the conclusion reached by the arbitrator “falls within the band of decisions that a reasonable decision-maker could make on the facts available to him”¹⁶ and therefore, not reviewable. The Labour Court accordingly misdirected itself in concluding the contrary, and therefore, on this basis alone, the appeal has to succeed.

[30] Having reached this conclusion, it is not necessary to consider the other aspects argued on behalf of the municipality, namely whether it was competent for the Labour Court to order reinstatement and compensation in the same relief. In any event, that issue was authoritatively settled by the Constitutional Court in *Equity Aviation Services v CCMA and Others*¹⁷ where it

¹⁵ *Sidumo* at para 78.

¹⁶ As observed in *Gold Fields*, above, at paras 14-15.

¹⁷ [2008] BLLR 1129 (CC) at para 42.

was concluded that the remedies in s 193(1)(a) are in the alternative and mutually exclusive.¹⁸

Costs

- [31] There remains the issue of costs, to which I now turn. As stated earlier in the introduction, the Labour Court ordered the municipality to pay the costs of the review application on a scale as between attorney and client. The municipality appeals against that order too. The general approach to be adopted by a court of appeal when considering an appeal against costs is trite. The award of costs and the scale thereof is a matter within the discretion of the court making the order.¹⁹ The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made.
- [32] Put differently, a court of appeal's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court below, acting reasonably, could have made the order in question.²⁰ In applying this principle to the present case, it should always be borne in mind that not only did the Labour Court grant costs against a losing party such costs were ordered on a punitive scale of attorney and client.
- [33] In the present matter, what is immediately striking about the costs order is that it was not sought by Ms Hadebe in her review application. What is more, there is nowhere in the judgment where the issue of costs is discussed. There is therefore no basis at all in the judgment why a costs order was justified. I have carefully perused the record for any indication which might have impelled the learned Judge to make the punitive order of costs. There is none. The issue of costs, let alone on a heightened, punitive scale, was simply never foreshadowed, either in the papers or during argument. If the learned Judge was of the view that some conduct on the part of the municipality warranted

¹⁸ *Equity Aviation* at para 42.

¹⁹ *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and Another v Jongilanga* 1985 (3) SA 117 (A) at 124B.

²⁰ See *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D – E.

censure by way of a punitive costs order, he should have invited the parties to make submissions on the issue. It is undesirable that a party is penalised in this manner without being heard.

[34] I shall, for completeness sake, refer to the general principles applicable in the Labour Court as regards costs. This is governed by s 162 of the LRA which provides that in making orders for payment of costs, the Court has to have regard to the requirements of law and fairness. In deciding whether to order payment of costs, the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and during the proceedings. In *Moloi and Another v Euijen and Another*,²¹ it was observed that the framework of s 162 supports the proposition that when making orders of costs, the requirements of law and fairness are paramount.²² The requirements of law and fairness are on equal footing, and none is secondary to the other. See in this regard *Callguard Security v Transport and General Workers Union and Others (T&GWU)*²³ and *Xaba v Portnet*.²⁴

[35] The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court. Such orders are made in accordance with the requirements of law and fairness. See in this regard *MEC for Finance (KZN) and Another v Dorkin*²⁵ where Zondo JP explained the rationale for that approach:

'[T]he norm ought to be that costs orders are not made unless those requirements (of law and fairness) are met. In making decisions on costs orders this court should strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer organisations from approaching the Labour Court and this court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. This is a balance that is not always easy to strike, but if the court is to err, it should

²¹ (1999) 20 IJL (LAC).

²² At para 20.

²³ (1997) 18 ILJ 380 (LC).

²⁴ (2000) 21 IJL 1739 (LAC).

²⁵ 2008) 29 ILJ 1707 (LAC) at para 17.

err on the side of not discouraging parties to approach these courts with their disputes...'²⁶

Attorney and client costs

[36] The order of costs on a scale of attorney and client is an extra-ordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. It is discernible from a consideration of the authorities that where the Labour Court has made a costs order, it has invariably considered that it was deviating from the general premise, and therefore carefully reasoned the basis of such an order.²⁷ Unfortunately, in the present matter, the court did not even state its reasons for making the costs order. For all of the above reasons, the costs order made by the Labour Court falls to be set aside and replaced with one where no order is made with regard to the costs of the review application.

[37] To sum up. The award made by the commissioner is not one which a reasonable decision-maker could not make in the circumstances. It was therefore not reviewable. The Labour Court misdirected itself in reviewing and setting it aside. It erred, similarly, in the costs order it made. The appeal should therefore succeed.

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

1. The appeal is upheld;
2. The order of the Labour Court is set aside and the following is substituted for it:

‘The review application is dismissed. No order is made as to the costs’

3. No order is made as to the costs of the appeal.

²⁶ At para 17.

²⁷ See for example *Rudman v Maquassi Hills Local Municipality and Others* ((2014) 35 ILJ 765 (LC); *New Justfun Group (Pty) Ltd v Turner and Others* (J786/14) [2014] ZALCJHB 177 (14 May 2014).

TM Makgoka AJA

Tlaetsi DJP Ndlovu JA concur in the judgment of Makgoka AJA

APPEARANCES:

FOR THE APPELLANT:

Adv. L.R. Naidoo

Instructed by Hughes-Madondo Inc., Umhlanga
Rocks.

FOR THE FIRST RESPONDENT: No appearance