



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case no: PA4/2017

In the matter between:

ODWA MALAMLELA

Appellant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First respondent

ADV NYAMEKO GQAMANA N.O.

Second respondent

NELSON MANDELA BAY MUNICIPALITY

Third respondent

Heard: 22 May 2018

Delivered: 06 June 2018

Summary: Employee dismissed for insubordination after refusing to accept transfer to a position within the same directorate consequent to the breakdown in the relationship with her two superiors. At arbitration dismissal found to be substantively fair. On review the Labour Court set aside the arbitration award and found dismissal substantively unfair, with employee reinstated from date following judgment into the same or similar position. Appeal against Labour Court's failure to order retrospective reinstatement dismissed. Cross-appeal against judgment of the Labour Court succeeds on basis that the award of the arbitrator fell within the ambit of reasonableness

required. Order of Labour Court set aside and substituted with order that dismissal of the appellant was substantively fair.

Coram: Waglay JP, Phatshoane ADJP and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal and cross-appeal is against the judgment and order of the Labour Court (Lallie J), which set aside the arbitration award of the second respondent (the arbitrator) issued under the auspices of the first respondent, the South African Local Government Bargaining Council (SALGBC), and substituted it with a finding that the dismissal of the appellant, Ms Odwa Mamalela (the employee), on 23 July 2012 was substantively unfair. The third respondent, the Nelson Mandela Bay Municipality (the employer), was ordered by the Labour Court to reinstate the appellant into the same position or a similar position with effect from 3 October 2016.
- [2] The employer sought leave to appeal against the judgment of the Labour Court and the employee sought leave to cross-appeal against the date of reinstatement ordered. The Labour Court refused the employer leave to appeal but granted the employee leave to cross-appeal. With leave to appeal having been granted to the employee, the employer is entitled, in terms of Rules of this Court, to cross-appeal against the judgment. The employee sought that the late filing of her notice of appeal be condoned. The application was not opposed and there is no reason to refuse such application.
- [3] The employee's appeal is confined to the Labour Court's decision not to grant her reinstatement retrospective to the date of her dismissal in July 2012. She seeks that the Labour Court's order of reinstatement with effect from 3 October 2016 be substituted with an order of retrospective reinstatement from 23 July 2012. The employer opposes the appeal on the basis that in terms of s193(1)(a) of the Labour Relations Act, 66 of 1995 (the LRA), the Labour

Court or an arbitrator has a discretion and “*may*” reinstate an employee “*from any date not earlier than the date of dismissal*”. Since the appellant was found to have failed to come before the arbitrator “*with clean hands*”, the discretion was exercised against the appellant.

- [4] The employer cross-appeals against the judgment on the grounds that the award fell within the ambit of reasonableness required and there existed no basis on which to justify setting aside the award. The employee opposes the cross-appeal.

Background

- [5] The employee was employed as an Informal Housing Officer by the employer. She was dismissed after having been found guilty of insubordination in deliberately refusing to comply with an instruction issued by the Director of Social Development, Housing and Administration that she moves from the sub-directorate of Informal Settlements to the Development and Support sub-directorate. Both posts fell within the same Directorate and were located in the same building.
- [6] Aggrieved with her dismissal, the employee referred an unfair dismissal dispute to the SALGBC for determination. By agreement between the parties, the arbitrator was asked to determine the matter on the record of the disciplinary hearing and no new oral evidence was led at arbitration.
- [7] From the record of the proceedings before the arbitrator, the evidence was that the employee reported to Assistant Director, Ms Hlela, and then to Acting Director, Mr Nogampula. Both Ms Hlela and Mr Nogampula testified as to the serious breakdown in their relationship with the employee and the impact that this had on service delivery. Mr Nogampula stated that:

‘The situation was becoming untenable...[the employee] led a delegation of staff members to stage a sit-in in the office of the executive director. That created chaos in my department...after our management meetings where she was present she would call her staff members and distort the information that was discussed in the meeting. So there was no proper communication with the entire staff.’

- [8] Ms Hlela's evidence supported that of Mr Nogampula. She put the problem down to the fact that after she was promoted into the position of Assistant Director, a post for which both she and the employee had applied, the employee would not take instructions from Ms Hlela or accept her decisions. The employee lodged an unfair labour practice dispute regarding the employer's failure to promote her, but the promotion of Ms Hlela was not set aside. Mr Nogampula said that there was chaos in the sub-directorate due to the breakdown in the relationship with the employee. Various attempts were made to resolve the matter until finally a third-party service provider was contracted *inter alia* to attempt to resolve the conflict. That process was unsuccessful, and the issues persisted, particularly between the employee and Ms Hlela.
- [9] The employee in evidence accepted that there were problems between herself, Ms Hlela and Mr Nogampula. She described the working environment as 'very tense'. She stated:

'There were problems in the department between myself and the assistant director Tembikasi Hlela together then with the acting director Mr Nogampula. Problems started after the appointment of Ms Hlela after I was disputing that appointment. So ever since then it has been very tense working environment between the three of us. At one stage in January in the boardroom on the 17th floor 2009 Mr Nogampula called in a staff meeting saying that we needed to resolve these issues, whatever issues that were there because I am the link between management and the staff personnel. In an attempt from my side in resolving problems of the department I initiated a meeting with the executive director whereby he promised that...he will try and intervene on all problems that are within the department...The staff also went to the executive director. After seeing that the executive director is not assisting with all the cries that have been within the department we went to – we tried to secure meetings with the municipal manager. But to no avail because we were following protocol before we even landed up in the office of the portfolio councillor...There were meetings, separate meetings, between myself and the portfolio councillor and together with the portfolio councillor with the staff of informal settlement. The portfolio councillor is in, I don't want to say close relations, but whatever happens with staff matters...the union is

obliged to make a report to him of how departments are handling their staff. So hence now the meeting took place between myself...and the portfolio councillor since there was an outcry about my situation in the department...The portfolio councillor wanted to...settle the matter in a resolved and humble way...’.

- [10] On 22 April 2010, the employee was called to a meeting, which was attended by Mr Mali, Mr Nogampula and her union representative, Mr Fundani. At this meeting, the employee’s transfer was discussed and she was informed that she would be transferred to another sub-directorate. The same day the employee was given a letter from the Executive Director, Mr Maqethuka, in which it was stated:

‘...You are hereby officially notified of your transfer to the Development and Support Sub-Directorate as from Monday, 26 April 2010 on your current conditions of service and salary.

This decision is in light of the service delivery challenges that the SDEA Sub-Directorate faces at the moment, especially with regards to the relocation programme. This is therefore purely an operational decision in response to the poor relations between yourself, Ms Hlela and Mr Nogampula that is negatively affecting relocations.

As per your Union’s request, please find attached hereto the letter of the Acting Municipal Manager authorising the proposed transfer. Also attached is a letter from the Portfolio Councillor supporting the proposed transfer. Please report for duty with Mr Brummer on Monday, 26 April 2010 for your new duties to be performed.’

- [11] The employee did not report to the new sub-directorate, as instructed, on 26 April 2010, 28 April 2010 or 29 April 2010. A letter dated 29 April 2010 reiterating that she should report to the post as instructed was not received by the employee. At some point during the day on 29 April 2010, the appellant was booked off sick. On her return to work, she was suspended from duty. In evidence, the employee stated that she was not satisfied with the transfer and did not report to the new sub-directorate -

'....because of the advice that I got from my Union was to say that we haven't met and we haven't dealt with those issues. What is important is that you need to be accountable for your whereabouts. You are employed in this Department so you need to remain in this Department until there is a decision that has been reached between ourselves and the Executive Director and the Portfolio Councillor.'

[12] The employee took the view that she was entitled to act on the view of the portfolio councillor, Councillor Mfunda, that she could remain in her post and that she was entitled not to comply with the instruction given to her on 22 April 2010 to move to the new post. Mr Nogampula stated that he found it "strange" and "rather odd" that the portfolio councillor as a politician would issue an "administrative instruction" to the employee when the Executive Director was responsible for the administrative functions of the department. Mr Nogampula stated that in her move to another sub-directorate nothing was to change in the employee's conditions of service, her benefits or her salary, but that the move would directly benefit service delivery.

[13] In a letter to the employee from the Acting City Manager on 20 May 2010, she was informed of her suspension from duty. The letter recorded that she had been given an opportunity to make representations why she should not be suspended from duty *"following allegations that you blatantly refused direct instructions from your Superiors and that your general attitude towards your Superiors is interfering with service delivery and towards the relocation of residents"*. The letter continued:

'In your reply you have denied refusing instructions and claimed that there was no basis to suspend you. You further claimed that the relocation of residents is hampered due to political instability and that you were still awaiting reasons from the Directorate for the instruction to report for duty in the Sub-Directorate Development and Support. You further claimed that you submitted a grievance against your Supervisors at Labour Relations. The grievance is however not yet received by Labour Relations nor by the Directorate. Your representative also claimed that the Union agreed to certain arrangements with the Executive Director to resolve the poor relationship

between yourself and your Supervisors. This is denied by the Executive Director...

...it is clear that there are bad relations between you and your Superiors and this is negatively affecting service delivery in the Sub Directorate. Since you said that you are not prepared to be transferred, I have no option but to suspend you with full pay until the allegations against you are fully investigated.'

- [14] From the arbitration award, it is apparent that the arbitrator had regard to the evidence that the employee was instructed to report to another sub-directorate by the Executive Director; that the instruction was communicated in writing; that the employee received the instruction; and that the employee did not report as instructed on 26 April 2010 or at all. Account was taken of the fact that there was no dispute that far from a good working relationship, there was a strained relationship between the employee, on the one hand, and Ms Hlela and Mr Nogampula, on the other. It was also not in dispute that there had been unsuccessful attempts made to resolve these strained relationships. The arbitrator had regard to the fact that the decision to move the employee was made so as to address the conflict and that as much was accepted by the employee. The arbitrator did not accept that the instructions given to the employee were unlawful and unreasonable; that she was not consulted prior to the decision to transfer her; that she was presented with a *fait accompli* since the decision to transfer her had already been taken by the Acting Municipal Manager; and that she was not given an opportunity to make representations to the employer. Nor was it accepted that the decision to transfer the employee was overtaken by her discussion with the Portfolio Councillor on 23 April 2010, who the employee claimed would contact the Executive Director to address the issue. The arbitrator did not share the view that it was in order for the employee not to give effect to the instruction until further notice when the employer's evidence went unchallenged that the decision to transfer the employee vested in the Executive Director. The arbitrator stated that:

'Councillors, as politicians, have no involvement in the day to day administration of employees in a Municipality. The Municipal Manager is the Accounting Officer responsible for the administration of a municipality.

Further, if one has regard to the [employee's] evidence stated above, the real reason for disobeying the instructions was based on the advice given to her by the Union. Unfortunately, such advice was incorrect and the Applicant must suffer the consequences...'.

[15] The arbitrator, therefore, found that the employee had been consulted by the third respondent about her transfer at the meeting of 22 April 2010, as Mr Nogampula testified, and that the third respondent had proved its case against the employee on the insubordination charge.

[16] As to sanction, the arbitrator determined that in spite of the employee's personal circumstances, five years of employment and clean disciplinary record, as well as the fact that she had received advice from her union and the Portfolio Councillor, the sanction of dismissal was an appropriate and fair sanction given that she had "*deliberately defied and/or ignored*" the instruction given to her. The arbitrator concluded that:

'...fairness comprehends that regard must be had not only to the position and interests of the employee, but also those of the employer in order to make a balanced and equitable assessment. The [employee] should have lodged a grievance if she was not satisfied with her transfer...However, the [employee] did not lodge a grievance but continued to defy and/or ignore the instruction.'

[17] The dismissal of the employee, for these reasons, was found to be substantively fair and the unfair dismissal dispute was dismissed.

The proceedings before the Labour Court

[18] Dissatisfied with the arbitration award, the employee sought that it be set aside on review by the Labour Court and substituted with a finding that her dismissal was unfair. In her founding affidavit in support of that application, the employee reiterated that, after she had received the instruction to move to

a different sub-directorate, she had approached the Portfolio Councillor and was under the impression that he would “address” the situation.

- [19] It was argued for the employee that the instruction to transfer her was unlawful and unreasonable and that she had the right to a fair administrative process before the decision to transfer her was taken. Issue was taken with what was submitted to be the arbitrator’s failure to have regard to the employee’s state of mind in finding that she was insubordinate, given the evidence of her genuine belief that she was entitled to ignore the instruction on the basis of the Portfolio Councillor’s assurance that she could remain in her post until the matter was sorted out.
- [20] The Councillor did not testify at the arbitration proceedings and the employer submitted that on the evidence it was apparent that the Councillor did not have the authority to give the employee any assurance, nor could any intervention on his part have suspended the instruction given to her. It was denied that the employer’s instruction had been unlawful or unreasonable, more so when there was no evidence that the employee’s contractual duties would alter in the new position and no bar on the employer taking an operational decision to place the employee in that sub-directorate in the interests of service delivery. The finding that the employee’s conduct had amounted to gross insubordination was reasonable and the award, it was contended, did not fall to be set aside on review.
- [21] The Labour Court found the dismissal of the employee substantively unfair in that the arbitrator had erred by disregarding the involvement of the Councillor when there was evidence that councillors frequently intervene in such matters. Furthermore, the Court found that the employee’s insubordination was not gross; and that the employer had to shoulder part of the blame because of the manner in which the employee was transferred. The arbitrator was found to have failed to consider the employee’s clean disciplinary record and possible progressive discipline. In spite of this, the Court found that the employee had not come to the arbitration “*with clean hands*” and was herself in large measure to blame for the circumstances that led to her dismissal.

- [22] The arbitration award was consequently reviewed and set aside, with the decision of the arbitrator substituted with an order that the dismissal of the employee was substantively unfair and that she should be reinstated with effect from 3 October 2016 into *“the same position or a position similar to the one she held on the date of her dismissal on conditions not less favourable than those which governed her employment on dismissal.”* Retrospective reinstatement was not ordered on the basis of the Court’s finding that the employee’s hands in the matter were not clean.

Submissions on appeal

- [23] On appeal, it was submitted for the employee that it was presumably due to the Labour Court’s finding that the appellant’s hands were not clean that retrospective reinstatement was not ordered. Since the misconduct committed was not gross and dismissal was not warranted, it was argued that the employer should have imposed a sanction short of dismissal, in which case the employee would not have lost any remuneration. Once the Labour Court decided to substitute its own decision for that of the arbitrator, it was duty-bound to award relief consistent with what the arbitrator was empowered to award when he presided over the matter in 2012. Even if the arbitrator had decided not to award retrospective reinstatement in 2012, it was contended that the employee would nevertheless have been reinstated from 2012. At worst for the appellant, the Labour Court should therefore have awarded reinstatement from the date of the arbitration award, being 23 July 2012, and the employee should not have been penalised for the loss of retrospective remuneration.

- [24] As to the cross-appeal, the employee contended that on review the arbitration award did not fall to be set aside on the grounds advanced by the employer. It was submitted that the instruction given to the employee was neither lawful nor reasonable and that there was no genuine operational reason for the transfer, but rather it was based on an ulterior motive. Since the employee was of the view that the Councillor would get involved in the matter and address the situation, she considered it in order for her not to give effect to the instruction until further notice. In doing so, it was submitted, she was not

insubordinate but her stance was reasonable and, at worst for her, even if there was insubordination, it was not gross. Since only gross insubordination justifies dismissal for a first transgression and the employee's insubordination, if it existed, was not serious, persistent or deliberate, dismissal was not warranted. In addition, as a first offender and the sole breadwinner in her family with two minor children, an appropriate sanction, if it was to be found that she was insubordinate, was one short of dismissal.

- [25] Counsel for the employer submitted in respect of its cross-appeal that the Labour Court erred in setting the arbitration award aside. Although the Labour Court clearly disagreed with the arbitrator, this was no basis on which to interfere with the arbitration award. Since the interference of the Councillor would have been improper, the employee was obliged to comply with a reasonable instruction given to her by her employer and the Court's criticisms of the employer are unjustified. There was no change to the employee's terms and conditions of employment in the transfer within the same directorate and a meeting was held to discuss the move, attended by the employee's union representative. The employer was thereafter entitled to instruct that the move occur in an attempt to improve service delivery and defuse personal tensions. The employee, in response, wilfully refused to comply with the lawful and reasonable instruction given to her by her employer. Her insubordination was gross in that it was persistent, deliberate and public. With reference to *Motor Industry Staff Association & another v Silverton Spraypainters & Panelbeaters and Others*,¹ counsel for the employer contended that the sanction of dismissal was justified when her defiance flowed from conflict with her immediate superiors, destroying the trust relationship. It was a mere speculation whether progressive discipline could have been applied in light of the employee's conduct. Consequently, the employer sought that its cross-appeal be upheld with costs and that the order of the Labour Court be set aside and substituted with an order that the review application is dismissed.

Evaluation

¹ (2013) 34 ILJ 1440 (LAC); and *SA Municipal Workers Union and Others v Ethekwini Municipality and Others* [2016] 12 BLLR 1208 (LAC).

- [26] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*² found that arbitration awards of the Commission for Conciliation Mediation and Arbitration (CCMA) constitute administrative action, reviewable not under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but in terms of s145 of the LRA; and that s145 was “suffused” by the constitutional standard of reasonableness. In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*,³ the Supreme Court of Appeal stated:

‘After Sidumo the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be ‘suffused’ with the constitutional standard of reasonableness. What this meant simply is that a ‘gross irregularity in the conduct of the arbitration proceedings’ as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case.’

- [27] The Court concluded that:

‘In summary, the position regarding the review of CCMA awards is this: 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 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.’⁴

² [2007] 12 BLLR 1097 (CC) at para 110.

³ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 14.

⁴ At para 25.

- [28] The contract of employment between employer and employee is one to be interpreted subject to the constitutional right to fair labour practices and the legislation which gives effect to that right.⁵ An appropriate degree of mutual trust, respect and courtesy is to be shown by both employer and employee towards the other in the context of an employment relationship.⁶ Our courts have traditionally viewed respect and obedience as implied duties of an employee under the employment contract,⁷ with the outdated reliance on obedience intended to refer to the employee's duty to act in good faith and adhere to the lawful and reasonable instructions of the employer.⁸
- [29] Insubordination involves a persistent, wilful and serious challenge to, or defiance of the employer's authority; a "calculated challenge" to the employer's authority, which is deliberate or intentional.⁹ An employee's wilful flouting of, or refusal to accept the reasonable and lawful instruction of the employer constitutes misconduct because it poses a deliberate and serious challenge to the employer's authority,¹⁰ with the sanction of dismissal reserved for instances of gross insubordination.¹¹
- [30] The respondent is a municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998. The Code of Conduct annexed to its disciplinary procedure requires employees to "(o)bey all lawful and reasonable instructions given by a person having the authority to do so" and recognises that an employee may be dismissed for gross insubordination on the first occasion.

⁵ Section 23 of the Constitution.

⁶ *NUMSA obo Mkhwanazi v Ellies Holdings (Pty) Ltd* (2012) 33 ILJ 516 (BCA); *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd* (2013) 34 ILJ 1440 (LAC) at para 47.

⁷ *Mqhayi v Van Leer SA (Pty) Ltd* 1984 (5) ILJ 179 (IC) at 182A-D.

⁸ *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) at para 57 (minority judgment of Froneman J).

⁹ *National Union of Public Service & Allied Workers and Others v National Lotteries Board* 2014 (3) SA 544 (CC) at para 213, minority judgment per Dambuzza AJ; *Lynx Geosystems SA v CCMA and Others* (2010) JOL 26424 (LC); *Transport and General Worker Union and Another v Interstate Bus Lines (Pty) Ltd* (1988) 9 ILJ 877 (IC) at 880-1.

¹⁰ *National Trading Co v Hiazo* (1994) 15 ILJ 1304 (LAC); [1994] 12 BLLR 53 (LAC) at 1308H-J; *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 314H-J.

¹¹ At para 22.

- [31] The Court found that “*the applicant refused to carry out the third respondent’s instructions*” but that her misconduct was “*not gross in that it was influenced by the manner in which her transfer was handled*”, the lack of details she had been given about the new position and that she “*reasonably believed that [the Portfolio Councillor] Mfunda would intervene and assist her*”. Although it was contended on appeal for the employee that her transfer had been unlawful in that it had not been preceded by consultation, the Labour Court did not determine this to be so and no appeal lies against the Court’s failure to find as much.
- [32] The Labour Court in arriving at the findings that it did overlooked the fact that it was sitting as a review court, in circumstances in which the evidence before the arbitrator showed clearly that, on the employee’s own version, there was breakdown in her relationship with her two superiors, that the working environment was “*very tense*”, that service delivery was affected and that repeated efforts had been made to resolve the problems without success. The arbitrator had regard to the fact that the employee refused to comply with the instruction on the basis of advice from the union and her consultation with the Portfolio Councillor, when the unchallenged evidence was that the decision to transfer an employee vested in the Executive Director and that councillors, as politicians, have no involvement in day to day employee relations in the municipality.
- [33] The arbitrator found that the employee had been consulted by the third respondent about her transfer at the meeting of 22 April 2010, as Mr Nogampula testified, and that the third respondent had proved its case against the employee on the insubordination charge given that her refusal to comply with the instruction given was clearly wilful, deliberate, persistent and serious.
- [34] This finding was supported by the evidence before the arbitrator which indicated that the employee had refused to respect the authority of her superiors over an extended period; and, after failed attempts to resolve the personal difficulties which existed, the employee refused to accept a transfer as an attempt to resolve these difficulties. This refusal went to the heart of the

employment relationship and posed a deliberate and serious challenge to the employer's authority and its ability, in the public interest, to advance service delivery. The employer was not obliged to leave in place a dysfunctional situation which impacted directly on its operational imperatives, as the employee would have had. Furthermore, the employee's approach was impractical insofar as she sought to have a political appointee intervene on her behalf in her employment dispute and conducted herself on the basis that she was entitled to take instructions from such political appointee and not her employer. In the circumstances, the arbitrator's finding that the employee was not entitled to act on an apparent instruction received from the Portfolio Councillor as a politician, and that her conduct was sufficiently serious and insubordinate to make her dismissal fair, were findings which were reasonable having regard to the evidence before him.

[35] It is as well to be reminded of what was stated in *Sidumo*

'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'¹²

[36] The arbitrator's finding that the employee had committed serious misconduct, having regard to the evidence and all relevant circumstances before him, cannot be said to amount to a decision that was one that a reasonable arbitrator in the circumstances could not reach. That arbitration award was one which fell within the bounds of reasonableness required and the Labour Court's conclusion to the contrary cannot stand.

[37] It follows that the cross-appeal must succeed and that the appeal must fail. Having regard to considerations of law and fairness, an order of costs against the employee is not warranted.

Order

¹² At para 79.

[38] For these reasons, the following order is made:

1. The appeal is dismissed.
2. The cross-appeal succeeds.
3. The order of the Labour Court is substituted as follows:

'The application is dismissed.'

Savage AJA

Waglay JP and Phatshoane ADJP agree.

APPEARANCES:

FOR THE APPELLANT:

P Le Roux

Instructed by Kaplan Blumberg Attorneys

FOR THE THIRD RESPONDENT:

J G Grogan

Instructed by Gray Moodliar Attorneys