



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR380/24

In the matter between:

PHUMUDZO RAKGOGO

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

First Respondent

SEELE MOKWENA

Second Respondent

COLLINS CHABANE LOCAL MUNICIPALITY

Third Respondent

Heard: 12 March 2025

Delivered: 31 July 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] This is an application brought by the Applicant, Phumudzo Rakgogo in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award issued by the Second Respondent (the arbitrator) under the auspices of the Third Respondent, the South African Local Government Bargaining Council (SALGBC), in case no LDP102311 issued on 1 February 2024. The Applicant prayed that the matter be remitted back to the Third Respondent to be started *de novo* under a different arbitrator/ commissioner other than the Second Respondent; and to reinstate the Applicant to her work under similar terms and conditions with effect from 19 October 2023 with all benefits, including back salary pending the finalisation of the arbitration proceedings *de novo*.

[2] In terms of the award, the arbitrator found that the dismissal of the Applicant was substantively fair and dismissed her claim. The Applicant furthermore prayed for costs if the application is opposed.

[3] The review application is opposed by the Third Respondent with a prayer to dismiss the application with costs.

Background

[4] The Applicant was employed by the Third Respondent as a supply chain clerk since 01 July 2021, working in procurement reporting to the manager in the finance department. Her manager reported to the chief financial officer, and the chief financial officer reported to the municipal manager.

[5] The contract of employment the Applicant entered into is between her and the then acting municipal manager Shilenge Risenga Richard on 1 July 2021.

[6] It is common cause that around September 2022, the municipal manager initiated a transfer of employees including the Applicant in the finance supply chain

¹ Act 66 of 1995, as amended.

management and budget and treasury sections. The affected employees were called for a consultation meeting by management, but the Applicant did not attend as she did not report for work that day.

[7] On 4 November 2022, another meeting was called to consult with the Applicant and thereafter her transfer was implemented. According to the Applicant, she was instructed to transfer, and when she asked why she was reshuffled, she was told that there were allegations against the employees for fraud and/or collusion with the service providers and /or corruption in her division. The Applicant did not comply with the written transfer instruction dated 14 April 2023.

[8] The Applicant wrote a letter to the municipal manager on 2 May 2023 indicating that she did not want to be transferred because there was a case of sexual harassment she referred to the Labour Court against the municipal manager. On 18 May 2023 the Applicant was again instructed by the municipal manager in writing to immediately report at the unit she was transferred to and to provide an explanation why she failed to report at that unit. On 22 May 2023, the Applicant responded to the municipal manager's letter of 18 May 2023 and referred to the contents of her initial letter of 2 May 2023 with reasons for her non-compliance with the transfer instruction.

[9] The Applicant told the municipal manager that her transfer was not part of her employment contract and she could not be transferred to wherever he liked. She further told the municipal manager that she was not involved in acts of fraudulent or corrupt or collusion activities and it must be her immediate line manager or the chief financial officer who could reshuffle her and as such she views her reshuffling as baseless and illegal.

[10] It is common cause that the Applicant refused to be transferred. She was charged for insubordination misconduct and attended a disciplinary hearing. At the disciplinary hearing she was found guilty for insubordination and subsequently dismissed on 19 December 2023.

[11] The Applicant then referred a dispute of unfair dismissal to the First Respondent, which was heard before the Second Respondent who issued an arbitration award on 1 February 2024, finding that the Applicant's dismissal was substantively fair.

Arbitration proceedings and award

[12] The arbitrator in paragraph six of his award stated that from the evidence, the Applicant did not dispute that she did not comply with the instruction issued to her in writing by the municipal manager to report at expenditure section of the finance department on 1 May 2023; and that the instruction followed representations she made why she could not adhere to the instruction.

[13] The arbitrator concluded:

'I am of the view that if the transfer of the whole supply chain staff compliment was for allegations of soliciting bribes from service providers, the respondent would have a reasonable justification to remove the employees from that unit to as a risk management measure. This is even so if the respondent did not have evidence that implicated specific employees in the unit. There is no evidence to suggest causal nexus between the transfer and the applicant's sexual harassment case which she referred against the municipal manager. That probability appears even remote considering that about fifteen employees were transferred, and the applicant was the only one who found a reason not to be transferable'.

[14] The arbitrator further found that:

'the Municipal Manager, being its accounting officer, is the respondent's most senior manager and is not only obliged to make decisions to protect the interest of the municipality but was also entrusted with the authority to enforce that decision. The arbitrator reasoned that he found nothing unlawful or unreasonable about the decision. In addition to the above, the applicant's contention that the staff regulation made provision for an affected employee to give consent to the transfer, was read selectively, in isolation to the whole provision related to transfer of officials and consequently, is incorrect.'

[15] The arbitrator found the Applicant's conduct a sheer defiance as if she was not happy with the instruction which he viewed it as an administrative action. He further held that the Applicant had a recourse to challenge it through the grievance procedure or approaching the Council for resolution, and the fact that the Applicant continued to report elsewhere other than where she was instructed to report from the date of the instruction to date of her dismissal demonstrates that the defiance was deliberate and persistent.

[16] Regarding the sanction, the arbitrator reasoned that in the circumstances, contrary to the Applicant's contention, he was cognisant of the corrective and progressive nature of discipline and that a corrective action must fit the transgression, that the misconduct of the Applicant was of a serious nature, exacerbated by her defiance of the authority of the most senior manager of the respondent, demonstration of lack of remorse in praying reinstatement to the same position from which she was transferred, he found the dismissal sanction to be appropriate.

Grounds of review

[17] The Applicant's first ground of review is that the municipal manager did not lead any evidence at the arbitration hearing, whereas the Third Respondent alleged that she disrespected the municipal manager or showed insubordination towards the municipal manager.

[18] The second ground of review is that the arbitrator relied on the inadmissible evidence of the labour relations officer of the Third Respondent who was the only witness, whereas the labour relations officer was not the one whose instruction she allegedly refused to carry out.

[19] The third ground of review is that the award is not consistent with the evidence tendered.

[20] The last ground of review is that the arbitrator ignored the glaring improbabilities and contradictions in the evidence of the witnesses of the Third Respondent.

Evaluation

[21] The test for review is fairly settled. The principal enquiry is whether the arbitration award sought to be reviewed, can be said to fall within a range of reasonableness.

[22] In *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality*², it was held:

‘The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?’ To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.’

[23] The Applicant challenged the arbitrator’s award on grounds, that the municipal manager did not lead any evidence at the arbitration hearing, to show that the Applicant disrespected him or showed insubordination towards him, that the arbitrator relied on the inadmissible evidence of the labour relations officer of the Third Respondent who was the only witness, whereas the labour relations officer was not the one whose instruction she allegedly refused to carry out, and lastly that the award is not consistent with the evidence led, as the arbitrator ignored the glaring

² (JA 64/2019) 2020 JDR 2826 (LAC) at para 27.

improbabilities and contradictions in the evidence of the witnesses of the Third Respondent.

[24] The Labour Appeal Court (LAC) in *Fidelity Cash Management Services v CCMA & Others*³ (*Fidelity Cash*) held that:

‘It seems to me that even if there may have been a debate under Carephone and prior to Sidumo on whether a commissioner’s decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner’s decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where he commissioner gives reasons A, B and C in his award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E. and F upon which he did not reply but could have relied which are enough to sustain the decision.’

[25] The LAC in *Fidelity Cash*⁴ concluded that:

‘Whether or not the arbitrator award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason way an arbitration award or finding or decision that, viewed objectively, is reasonable should he held to be unreasonable and set aside simply because the commissioner

³ [2008] 3 BLLR 197 (LAC) at para 102.

⁴ Id at para 103.

failed to identify good reasons that existed which could demonstrate the reasonableness of that decision or finding or arbitration award.'

[26] The Supreme Court of Appeal (SCA) in *Herholdt v Nedbank Ltd & Another*⁵ (*Herholdt*) concluded as follows:

'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 material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside but are only of consequence if their effect is to render the outcome unreasonable.'

[27] I will deal with the two first grounds of review together as they are intertwined.

[28] The Applicant submitted that the municipal manager did not lead evidence during the arbitration proceedings to show that the Applicant disrespected and showed insubordination towards him.

[29] The Applicant was dismissed for gross insubordination in that she failed and/or refused to take the instructions of the municipal manager. During the arbitration proceedings, the Third Respondent called one witness, Hlulani Cecil Mabunda, the labour relations officer who testified that the municipal manager initiated the transfer of employees in the supply chain management unit and instructed the chief financial officer to do consultations in October 2022, which was done by the management team with the affected employees on 21 October 2022.

⁵ (2013) 34 ILJ 2795 (SCA) at para 25.

[30] However, the Applicant was consulted in a separate meeting on 4 November 2022, as she was not in attendance in the initial consultation meeting held with other employees. The witness further testified that the transfer was effected in terms of the Third Respondent's staff provisioning policy, staff regulation and employee's contract of employment.

[31] The record of the arbitration proceedings further reflects the testimony of the Third Respondent with reference to the minutes of the consultation meeting with the Applicant as a follow-up meeting held with other employees on 21 October 2022, with substantiated operational reasons given by the municipal manager, further reference to the policy giving the municipal manager such authority to transfer employees, as well as the benefits that would accrue to the employees as a result of those transfers. This witness testified that he was also present in the consultation meetings when the municipal manager made presentations to the affected employees.

[32] To this extent there was a concession by the Applicant in her testimony during the arbitration proceedings according to the record that she refused to take the instructions from the municipal manager to be transferred to another unit twice and even in writing giving various reasons for such refusal.

[33] Firstly, according to her, there was a case of sexual harassment she referred to the Labour Court against the municipal manager. Secondly, as the municipal manager told her that there were employees in her unit who solicited bribes from the service providers and according to her the municipal manager should have dealt with those employees who committed the alleged misconduct. Thirdly, she was not consulted regarding the transfer. Lastly, that her transfer was not part of her employment contract and she could not be transferred to wherever the municipal manager liked.

[34] The record of the arbitration proceedings indicates that the Third Respondent's witness presented evidence of the Staff Provisioning Policy, specifically clause 10.13 which reads as follows:

‘The Municipal Manager, as head of the administration, have authority to transfer, or rotate any municipal employee to any equivalent post for operational requirements of the municipality.’

The witness presented evidence of the Applicant’s contract of employment she signed on 1 July 2021, and specifically clauses 4.3 and 7.3. Clause 4.3 thereof states that:

‘The employer, in accordance with the operational requirements, and after consultation with the employee, may place or transfer her or him to other geographical areas.’

Clause 7.3 of the same contract reads:

‘In accordance with operational requirements, and after consultation with the employee, the employer may require the employee to perform other work for which she or he is qualified or capable.’

[35] The evidence of the labour relations officer cannot be regarded as hearsay evidence at all. This argument is misplaced. His evidence was never that he was told by the municipal manager that the Applicant refused to take an instruction by the municipal manager. It is in writing by the Applicant in her letters that she consistently refused to take an instruction by the municipal manager and in her letters, she gave reasons why she refused to comply with the instruction of transfer. In anyway.

[36] It became clear at the arbitration hearing that there was no dispute of fact that the Applicant was given an instruction by the municipal manager and she did not comply with it. There was no need for the municipal manager to be called as a witness to come to testify on a common cause issue. It can therefore not be said that the arbitrator accepted inadmissible hearsay evidence in this matter as the principles of hearsay evidence are not applicable here.

[37] I will also deal now with the third and fourth grounds of review together as well as they are also very closely related.

[38] The Applicant contended that the job she was transferred to perform was not within her job description. It is immaterial that the instructions must fall within the job

description of the Applicant. What is critical is whether the instruction is reasonable and lawful.

[39] Most employees are appointed in a specific position which contains a description of their duties. It is, however, difficult, or almost impossible, to list and specify all the duties of an employee. It is at this point where an employee will usually refuse an instruction in defence that the type of work he/she is instructed to perform, is not contained in their job description or that it constitutes a unilateral change in their terms and conditions of employment. This defence will, however, not always hold water.

[40] *In A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & Others*⁶ (*Mauchle*), the employees were normally operating one machine. Due to an urgent order, the employer instructed the employees to operate two other machines to dispose of the urgent order. The employees refused the instruction in that they were appointed to operate only one machine and that this instruction constitutes a unilateral change of the terms and conditions of their employment contracts.

[41] The Court noted the following:

‘On those facts, it was not a term of the contract of employment that the applicants would operate only one machine. A description of the work to be performed as that of “operator” should not, in my view, be construed inflexibly provided that the fundamental nature of the work to be performed is not altered.’ (Wallis Labour and Employment Law para 45 at 7-9). I agree with the view expressed by the learned author at 7-23 n9 that employees do not have a vested right to preserve their working obligations completely unchanged from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner.’⁷

⁶ [1995] 4 BLLR 11 (LAC).

⁷ *Id* at p 18.

[42] In addition to the above case, it was also emphasised in *National Union of Metalworkers of SA on behalf of Members v Lumex Clipsal (Pty) Ltd*⁸ that as long as the instruction given to perform work did not alter the nature of an employees' work to such a degree that it was no longer work that the employees had agreed to perform under the terms of their contracts, it will constitute a reasonable instruction. The court further stated that if the nature of an employee's work is changed to a large degree, it will amount to a unilateral change in terms and conditions of the employment contract.

A reasonable instruction depends on when it falls outside the employee's job description, namely: the terms and/or conditions of the employee's contract; the nature of the task to be performed; the circumstances in which the instruction is given; and the employer's operational requirements.

[43] In her testimony, the Applicant conceded that she did not agree to her transfer as it was unreasonable even if provided in the municipality staff regulations merely because she did not understand what the operational requirements meant. She was instructed twice in writing by the municipal manager to transfer, on 14 April 2023 and again on 18 May 2023 but in both occasions she refused to comply with the instruction in her letters of 2 May 2023 and 22 May 2023. The tone of the language used by the Applicant with demands in her response is not an acceptable one between such a junior employee in the municipality to the municipal manager, the accounting officer and administrator of the organisation. The Applicant was not singled out of the other employees in the unit for transfer. The whole unit was transferred but she was the only one who refused the transfer after the consultation process.

[44] It is apparent from her response letter of 2 May 2023 that the Applicant had a legal team that advised her to refuse her transfer due to the labour court sexual harassment case. If that was the advice, she was clearly ill-advised. The letter said:

'Kindly note that I have been advised by my legal team to write this correspondence to you regarding my unlawful transfer from my current position to Expenditure Payroll Clerk. At the outset, I wish to advise that

⁸ (2001) 22 ILJ 714 (LC).

myself and my legal team.... I am advised that it will be unlawful for the municipality to effect any transfer whilst my case is still being litigated by the courts.'

This Court really finds no relevance of the pending court litigation and the Applicant's transfer. The two are distinguishable processes and her legal team should have been observant of that and advised her correctly.

[45] It is clear that the Applicant did not agree with the reason the Third Respondent gave for the transfer regardless of whether it was supported by the policies and her own contract of employment. She did not raise a defence that she was perhaps transferred to a position that she was not capable of performing its tasks nor provided any reasons how the transfer would disadvantage or prejudice her in any manner. It is clear that the Applicant was to be transferred to the position of expenditure payroll clerk in another unit but still in the finance department on the same salary level, same benefits and conditions of service. Her refusal was not backed by any valid reasons taking into account that all of her colleagues in the unit agreed to the transfer after the consultation meeting.

[46] However, it appears clearly from the record of the proceedings that there was a concession by the Applicant that she was given an instruction by the municipal manager. The Applicant had issues with the person who gave her instructions due to her sexual harassment case against him and the reasonableness of the transfer. It is on record that during the arbitration proceedings, the Third Respondent's witness presented the minutes of 21 October 2022 and 4 November 2022 respectively for the consultation meeting with the affected staff and the Applicant, Titled: '*Minutes. Transfer rotational staff meeting*'.

[47] The meeting of 21 October 2022 excluded the Applicant as she was consulted alone regarding her transfer on 4 November 2022. This piece of evidence was not challenged by the Applicant during the arbitration proceedings. It does not need the municipal manager's evidence to show that the Applicant refused his instruction and it amounts to a misconduct.

[48] The Applicant herself has indicated in writing the reasons she refused to take the instruction, and the Third Respondent presented the evidence of the labour relations officer, who was tasked by the Third Respondent to investigate whether the Applicant's actions amounted to misconduct, and the labour relations officer testified during the arbitration hearing to that effect. that his investigations found that the Applicant refused to comply with the instruction of hen municipal manager and he recommended that the Applicant be subjected to a disciplinary hearing for misconduct charges as he found that the Applicant's transfer was fair and reasonable, governed by the Third Respondent's prescripts.

[49] On the third ground that that the arbitrator's reasoning is not consistent with the evidence tendered and he ignored improbabilities and contradictions in the evidence of the witnesses of Third Respondent not the witness of the Third Respondent. The Applicant has not even indicated in details which were those material contradictions and on which witnesses. For that matter, the Third Respondent only called one witness during the arbitration hearing, and therefore there cannot be any contradictions and improbabilities of witnesses of the Respondent. On that basis, the evaluation of this ground becomes unnecessary.

[50] The Court observed that the arbitrator in the analysis of the evidence presented by the parties, was alive of the onus that rested on the Third Respondent to prove the fairness of the dismissal of the Applicant on substantive grounds and he made findings based on the evidence presented, and found that the evidence of the Third Respondent was aligned with the Applicant's evidence that she was issued with an instruction, which the arbitrator found was a reasonable justification to remove the employees from the unit as a risk management measure even if the Third Respondent did not have evidence that implicated specific employees in the unit; and the arbitrator found furthermore that there was no evidence to suggest causal nexus between the transfer and the Applicant's sexual harassment case she referred against the municipal manager.

[51] This Court finds it reasonable that the arbitrator based his findings on the evidence presented that the municipal manager as the accounting officer is the Third Respondent' s most senior manager and is not only obliged to make decisions to

protect the interest of the municipality but also entrusted with the authority to enforce those decisions, and that the Applicant's view that that the transfer can only be made with her consent was selectively read in isolation of the provision related to transfer of officials.

[52] It is apparent that the Applicant's reasons for refusal to be transferred was based on her view on how the municipal manager should have managed the allegations of certain employees soliciting bribes from the services providers. The Applicant may not be happy that the Third Respondent has not dealt with the implicated employees but rather opted to do the transfer, but it is clearly not within the Applicant's authority to dictate how the municipal manager should deal with the operational issues and it was management's prerogative to handle the matter in the manner they deemed it fit.

[53] The totality of the evidence presented showed that the Applicant refused to obey a lawful and reasonable instruction and her view that the municipal manager is not her direct superior and has no authority to give her instruction is very much misplaced and has no basis. Section 55 of the Local Government Municipal Systems Act⁹ empowers the municipal manager with such authority to administer the municipality as the head of Administration, which includes issuing instructions to employees at all levels.

[54] The cross-examination of the Third Respondent's witness did not challenge the transfer powers or authority of the Municipal Manager in terms of the staff provisioning policy and the Applicant's contract of employment but it was rather put to the witness that an ordinary employee would not understand what operational requirements means, and that the contract does not explain the process the employer has to follow in consulting the employees.

[55] The transfer of the municipality employees was furthermore in compliance with the provisions of the Local Government Municipal Systems Act. Local Government: Municipal Staff Regulations, specifically clause 25 that the Municipality

⁹ Act 32 of 2000.

may transfer any staff member in the service of that municipality to an equivalent post in the municipality in the absence of consent by the employee, and such must be fair taking into consideration the operational requirements of the affected institution, including whether the transfer or staff member will address such requirements, taking into account written representations of the staff member and the extent to which the interests and circumstances of the staff member may be fairly accommodated, salary and other conditions of the staff member may be adversely affected by the transfer and lastly the staff member may not be demoted, promoted or transferred in a position at a level which is lower or higher than staff member's current post level. The arbitrator took cognisance of those provisions in his findings.

[56] Regarding the sanction for insubordination, it must be emphasised that Insubordination may be described as resistance to or defiance of authority, disobedience, refusal or failure to obey reasonable and lawful instructions. The characteristics present in insubordination would be a wilful, verbal or written refusal of instructions, wilful disregard and or disrespect of management authority. The disciplinary sanction will normally depend on the severity of the offence. Every employee not only has the duty to come to work and be on time, but also the duty to obey all reasonable and lawful instructions of the employer and to do as he/she is told, within the parameters of what is accepted as being a reasonable and lawful instruction.

[57] In *TMT Services and Supplies (Pty) Ltd v CCMA and Others*¹⁰ the LAC clarified the issue of when dismissal would be appropriate for acts of insubordination. The LAC held that the employer's managerial prerogative to issue instructions to its employees is a principle that is protected by the misconduct known as insubordination. This principle ensures that the operational requirements of the organisation are not weakened by insubordination on the part of employees. The LAC further held that the foundation of the employer and employee relationship is premised on the employer's instructions being followed by the employee and that it is intolerable that an employer is forced to engage in negotiations regarding day-to-day organisational arrangements with employees. The LAC stated that the effect of the

¹⁰ [2019] 2 BLLR 142 (LAC).

employee's refusal to attend the meeting was to undermine the working relationship with her manager. The LAC upheld the appeal and confirmed the Commissioner's finding that dismissal was fair.

[58] In this instance, the evidence proved that the Applicant deliberately and intentionally failed or refused to carry out the instruction in writing twice and she also continued to sign the attendance registers at her old workplace, and despite the two letters written with the transfer instruction, she persisted with her refusal. This misconduct constituted a wilful, deliberate and persistent of the most senior manager's instruction by the Applicant and it makes it a serious offence under the circumstances because it undermines the Respondent's authority. It is therefore this Court's considered view that the arbitrator's finding that the Applicant's conduct was correctly meted out with a dismissal for this offence as well is a reasonable finding. This Court fully agrees with the contentions made on behalf of the Third Respondent, and further adds that the findings and conclusions of the Commissioner on the issue of the appropriateness of the sanction and the relief granted, are entirely connected with the evidence that was placed before the arbitrator, thus cannot make the award reviewable.

[59] This Court has also observed that the arbitrator properly analysed the appropriateness of the dismissal sanction, took cognisance of the purpose of the corrective and progressive discipline, the seriousness of the misconduct and that it paralysed management's authority as it demonstrated the deliberate and persistent defiance of the instruction, and in particular of the most senior manager of the Third Respondent by continuing to sign the attendance registers in the original unit even after her transfer, lack of remorse by the Applicant for her conduct and continued defiance with her prayer to be reinstated in the same position as a supply chain clerk.

[60] The arbitrator made a fair and proper assessment of the nature of the misconduct in question, determined whether, combined with other factors and the evidence led together with the gross nature of the misconduct. His assessment and the conclusion reached is that the misconduct in question is of such gross nature that it attracts the sanction of dismissal as appropriate is a reasonable one that a

reasonable arbitrator could have arrived at having been presented with the material evidence before him.

[61] In the end, the Commissioner took into account the totality of circumstances as stated in *Sidumo*¹¹, when considering the appropriateness of the sanction of dismissal in this case. To this end, the sanction of dismissal in this case was appropriate in considerations of the stated factors under the circumstances. The gross nature of the Applicant's conduct is such that trust and a good working relationship between her and the Third Respondent, cannot by all accounts be sustainable. It follows that a dismissal was indeed an appropriate sanction.

[62] In the end however, in the light of the evidence led at the arbitration proceedings, the egregious nature of the Applicant's conduct, and its impact on the Respondent, the arbitration award of the arbitrator completely falls the bounds of reasonableness. It is in the light of all of these considerations that an order must be made to confirm the arbitrator's award that the dismissal of the Applicant was substantively fair. The arbitrator has applied his mind to the evidence presented before him, and I find no irregularity in his award. The arbitrator has arrived at an outcome that is reasonable under the circumstances.

Costs

[63] In so far as costs are concerned, the rule that costs follow the result does not apply in labour matters. This Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

¹¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); it was held at para 78: '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.'

[64] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[65] The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place, whether opposed or not.

[66] In my view, this is a case where the interests of justice will be best served by making no order as to costs.

[67] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

Grace Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

S Sikhwari SC

Instructed by:

M K Mulaudzi Attorneys Inc

For the Third Respondent:

G Mohlabi of GSM Mohlabi Incorporated Attorneys