(1) Reportable ~~Yes~~/No
(2) Of interest to other Judges: ~~Yes~~/No
(3) Revised

Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA 32/2025

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTIONS WORKERS UNION (AMCU)

On behalf of OTSHEPENG KGOTLANG **Appellant**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

BACA TEMBINKOSI N.O **Second Respondent**

SIYANDA BAKGATLA PLATINUM MINE **Third Respondent**

Heard: **20 November 2025**

Delivered: **13 March 2026**

Coram: **Van Niekerk JA, Chetty *et* Kganyago AJJA**

JUDGMENT

CHETTY, AJA

Introduction

[1] This appeal lies against the decision of the Labour Court (Manchu AJ), with leave being granted by the court *a quo* in respect of its decision of 23 February 2025 dismissing the review application in which the dismissal of the appellant was confirmed as being substantively fair. The issue giving rise to the dismissal of the employee, Mr Otshepeng Kgotlang, stems from his refusal to obey an instruction from his superiors to carry out his underground duties as a miner. The employee was at the time of his dismissal a part-time shop steward and branch secretary of the Association of Mineworkers and Construction Union (AMCU) at the Siyanda Bakgatla Platinum Mine (the mine). He was charged with gross insubordination and clocking fraud, and after a procedurally fair disciplinary hearing, he was found guilty and dismissed. The application to review the fairness of his dismissal was dismissed, with the Labour Court concluding that the finding of the arbitrator was not open to interference on either count. It upheld his dismissal as an appropriate sanction after considering the totality of the evidence.

Background

[2] A brief background is that Mr Kgotlang commenced employment at the mine in January 2007, progressing to become a team leader responsible for supervising a crew of miners. In 2019 he was elected as an AMCU shop steward and became AMCU's branch secretary. By virtue of his role as a shop steward, the mine contended that he would have been responsible for representing

employees who were AMCU members at grievance and disciplinary proceedings. In so doing, he would have been *au fait* with the company policies and procedures, as well as the terms of collective agreements concluded between the union and the mine.

[3] As will appear from what follows, Mr Kgotlang denied knowledge of the applicable rules at the mine, particularly the terms of a recognition agreement between the mine and recognised unions, including AMCU, that regulated the role of part-time shop stewards like Mr Kgotlang. In addition, he denied knowledge of a memorandum addressed to the trade union branch chairpersons and part-time shop stewards dated 8 January 2020. This memorandum addressed the problem, from the mine's perspective, of shop stewards not being at their places of work, unless excused by management. The mine contended that Mr Kgotlang refused to comply with numerous requests by his supervisors to perform his underground duties, which refusal was persistent and in breach of the relevant recognition agreements as well as a recent instruction which clarified the role of part-time shop stewards.

[4] The terms of the 2009 Employee Relations Recognition Agreement (ERRA) (recognition agreement) concluded between the mine and various trade unions are relevant to the charges against Mr Kgotlang. Of particular importance are the following:

> '(i) the Part time shop stewards represent the trade union members during deliberations with Management.
>
> (ii) the recognition of Part Time Shop Stewards is subject to the condition that Trade Union activities *will not interfere with their work* or with the work of other employees, provided that Part Time Shop Steward will, within reasonable limits, be permitted by his supervisor to attend to employees' problems and grievances during working hours.
>
> (iii) it is the responsibility of each Part Time Shop Steward to promote sound industrial relations by, inter alia, investigating any problems and

grievances brought to his/her attention thoroughly and submitting full details to the supervisor or manager concerned.

(iv) Part Time Shop Stewards are expected to be conversant with the provisions of the Conditions of Service and with any Agreements concluded between Anglo Platinum and the Trade Unions; and

(v) the Trade Union parties undertake to ensure that their Part Time Shop Stewards will comply with the provisions of the Agreement and will endeavour to take such reasonable steps as may be necessary to remedy any material breach of the Agreement or any actions which may be contrary to the spirit of the Agreement.'

[5] The recognition agreement accords a particular status to a shop steward in the context of their duty to represent employees in their interaction with management. Generally, this would take the form of representation at grievances and disciplinary enquiries. A fair reading of these provisions further requires shop stewards to be 'conversant' with the company's policies and procedures. Absent such knowledge, their ability to adequately represent employees would be severely undermined.

[6] It became necessary on 8 January 2020 for the mine to issue a further communiqué to all shop stewards clarifying the provisions of the recognition agreement. According to the respondent, the memorandum titled '*Reporting at Work areas by all Shop Stewards*' was intended to address management's observation that most part-time shop stewards were not reporting for duty at the places where they should be (underground) but were mainly noticed to be on the surface.

[7] The contents of the memorandum read as follows:

'Dear Colleagues

Kindly be informed that Management has observed and taken note of the fact that most of the Part-time Shop Stewards are not reporting to their working areas but are instead seen more often on surface rather than where they are supposed to be performing their work.

Management herewith wishes to advise and inform all Shop Stewards to report to their working areas with effect from the 8th January 2020 going forward.

The below extract from ERRA (Employee Relations Recognition Agreement) is very clear and MUST be complied with by all the Shop Stewards henceforth.

The recognition of Part Time Shop Stewards is subject to the condition that Trade Union activities will not interfere with their work or work of other employees, provided that a Part Time Shop Steward will, within reasonable limits, be permitted by his supervisor to attend to employees' problems and grievances during working hours.

All Part Time Shop Stewards must always report at their places of work except when they are authorized through formal releases.

HR Coordinators and ER Officers must ensure that the above is applied with immediate effect.'

[8] The memorandum reinforced management's view that part-time shop stewards should be underground when not undertaking trade union business, and only after this has been sanctioned by a supervisor. Further, the memorandum directs that shop stewards are required to '*always report at their places of work*' except when they are formally permitted to do otherwise. Against this backdrop of rules adopted by the mine and conveyed, by all accounts, to the shop stewards, it is alleged that Mr Kgotlang failed to adhere to the strict rules of reporting for duty at his allocated place of work, although he denies knowledge of the receipt of the memorandum. Disciplinary action was instituted against him where he was charged with gross insubordination in refusing to comply with a lawful instruction by the Mine Overseer to report for his normal duties underground from the period 21 to 28 August 2020. In addition, a second charge of 'clocking fraud' was levelled against him, alleging that he clocked in for the purposes of receiving payment from the company, but during the period 21 to 28 August 2020 did not

report to his workplace for his normal underground duties. After a hearing he was found guilty on both counts and dismissed.

The arbitration

[9] At the commencement of the arbitration, the employee's representative confirmed that there was no challenge to the procedural fairness of the dismissal. The sole issue was whether there was a fair reason to find him guilty of gross insubordination and clocking fraud, justifying his dismissal. The basis of his defence, as outlined at the arbitration, was that special arrangements had been in place as to when a shop steward reports for duty. This was referred to as a 'gentleman's agreement' concluded between the Production Manager and the union leadership which effectively exempted shop stewards from reporting for duty underground as they were required to assist employees on the surface. The agreement was an informal one and not reduced to writing.

[10] Apart from his reliance on the gentleman's agreement, his representative clarified that they intended challenging the manner in which the instruction was issued to Mr Kgotlang. Significantly, there was no dispute that an instruction was indeed issued to him to report underground for duty. During the course of the arbitration, the employee changed his stance, contending that no instruction had been issued to him.

[11] The company called two witnesses, the first being Mr Daniel Mosetlhe, a Mine Overseer since 2019. He also served as a supervisor over Mr Kgotlang, with whom he had a cordial relationship. It had come to his attention that Mr Kgotlang was refusing to report underground for duty. Mr Mosetlhe denied the existence of any arrangement that permitted shop stewards to remain on the surface. He stated that he issued an instruction on 21 August 2020 to both Mr Kgotlang and the branch chairperson of the union, Mr Juda, to report to their respective section underground. Only Mr Juda complied. As regards the offence of 'clocking fraud' he equated this to stealing from the company in circumstances where an employee gets paid without rendering any service. He further confirmed that Mr

Kgotlang was not assigned to represent any employees as a shop steward at the time when he issued his instruction, and accordingly there was no reason for him not to have reported underground.

[12] Mr Mosetlhe stated that he issued numerous instructions to Mr Kgotlang to report underground for duty and 'warned' him that he needed to do so. He also issued an instruction on 21 August 2020 to Mr Kgotlang to report to his working area under the shift supervisor, Mr Abel Lerefolo. This instruction was also not complied with as the supervisor reported in a statement that he had never seen Mr Kgotlang in his section. Mr Kgotlang contended Mr Lerefolo was absent on the day. As a result of his failure to comply with the instructions, together with the 'clocking-in' practice which Mr Mosetlhe considered to be dishonest, he became the complainant in respect of the two charges against Mr Kgotlang.

[13] The second witness for the company was Mr Collet Penyenye, a human resources assistant. With reference to a statement which he read into the record, he confirmed that on 15 August 2020 he informed Mr Kgotlang and his branch chairperson, Mr Juda, to report to their respective crews underground. He informed Mr Kgotlang that he would be working with Mr Abel Lerefolo, to which the employee stated that he would not do until he was given a 'stopping crew or ASD'. Mr Juda reported underground but not Mr Kgotlang. When Penyenye met Mr Kgotlang two days later, he enquired from him when he was going underground. Mr Kgotlang replied that he would go underground, but had not yet reported to Mr Abel Lerefolo's section despite being asked to do so. Mr Penyenye reported Mr Kgotlang's refusal to comply with the instruction to Mr Mosetlhe.

[14] Mr Penyenye went on to explain the transfer procedure which entailed the handing over of Mr Kgotlang to his shift supervisor Mr Abel Lerefolo. However, in the case of Mr Kgotlang, he did not present himself to be transferred, unlike Mr Juda. The evidence further revealed that another supervisor, Mr Alfred Joya, had on an earlier occasion refused to work with Mr Kgotlang.

[15] The evidence presented by the company's witnesses was not shown under cross- examination to be inconsistent, speculative or based on ulterior motive to falsely implicate the employee. On the contrary both witnesses testified of a cordial relationship with Mr Kgotlang and even went to the extent of trying to counsel him to change his behaviour. The repeated refusal by Mr Kgotlang to report for underground duty led to the charges being brought against him. His persistent refrain was the existence of the 'gentleman's agreement' which he contends permitted him to remain on the surface rather than reporting for duty underground. He failed to adduce any corroborative evidence in support of this 'gentleman's agreement', nor did he call as a witness the Production Manager who supposedly concluded this agreement with the unions or any of the union leadership who could validate these claims.

[16] Apart from the gentleman's agreement being offered as an explanation for him not reporting underground, Mr Kgotlang then offered the explanation that he was not afforded a "stopping crew" or an "ASD", and that the procedure for the handing over of him to the shift supervisor, Mr Abel Lerefolo, had not been complied with. It was submitted on behalf of the appellant that his failure to be handed over to his shift supervisors, Mr Abel Lerefolo and Mr Alfred Joya should not be interpreted as a refusal to obey instructions. Rather, it was contended that in one instance Mr Alfred Joya refused to work with Mr Kgotlang, and in the other Mr Abel Lerefolo was absent on the day. In both instances it was contended that the employee was willing to accept being assigned underground duties. This willingness to obey instructions is contrary to his response to Mr Penyenye and Mr Mosetlhe. When he was confronted with the existence of the memorandum of 8 January 2020 which was intended to ensure that part-time shop stewards report for their allocated duties underground, except where their trade union duties required them to remain on the surface, he responded that he did not have knowledge of the memorandum. In support of his denial, he called Mr Mdutyullwa, a part-time shop steward who also stated that he had no knowledge of the memorandum nor of the contents or instruction contained in the ERRA (the recognition agreement) of February 2009.

[17] In evaluating the evidence of Mr Kgotlang and his witness Mr Mdutyulwa, the arbitrator who had the benefit of observing their testimony, found that their evidence was rehearsed and that it was highly improbable that neither of them were knowledgeable of the instructions contained in either the recognition agreement or the memorandum of 8 January 2020. Mr Mdutyulwa also offered himself as an example of the company's inconsistency in applying its policies, stating that he too did not report underground for duty and yet no disciplinary action had been taken against him.

[18] The arbitrator dismissed Mr Kgotlang's version of a 'gentleman's agreement' which was contrary to the provisions of the recognition agreement of 2009, and expressly in conflict with the directives issued to part-time shop stewards in the January 2020 memorandum. It was only when Mr Kgotlang testified that had he been made aware of the January 2020 memorandum that he said would have reported for duty underground. This version was never canvassed with the company's witnesses when they testified and appears to be a rear-guard manoeuvre. However, more importantly, it exposes the paucity of his reliance on the absence of a transfer procedure (the parading of part-time shop stewards) and the requirement of a "stopping crew or ASD" before he could take up underground duty. His version is further dismantled by the apparent acceptance of the branch chairman of AMCU, Mr Juda, of the correctness and authority of the instructions conveyed by the Mine Overseer, Mr Mosetlhe, requiring him to report underground. Unlike Mr Juda's compliance, Mr Kgotlang remained belligerent in his refusal to comply.

[19] Perhaps most damning for Mr Kgotlang is the arbitrator's conclusion that it was improbable that a shop steward who is responsible for representing miners at disciplinary enquiries and grievances would not be knowledgeable of policies requiring employees to report at their allocated work sites. The arbitrator concluded that the:

> 'applicant's conduct was calculated to undermine the ability of the mine overseer and the HR officer. His conduct was unjustified and had the propensity to cause

> managerial paralysis. The evidence of Mzukisi was shameful and amounted to a poorly rehearsed submission. He was extremely evasive and contradicted himself on a number of locations'

Further adding:

> 'Both Mzukisi and the applicant were adamant that they were doing union work the entire time, yet when they were asked pertinent questions regarding union activities, they were quick to say that they had never been trained and therefore did not know anything. I find it mind-boggling that they spent all the time doing union work according to them, yet knowing nothing about such union activities. Their strategy, it seemed, was simply to deny anything.'

[20] The arbitrator found that Mr Kgotlang had no legitimate justification for refusing to obey the instruction issued to him to report underground, and that he was appropriately found guilty of gross insubordination. In addition, the arbitrator found that there was no justification for him clocking in and not reporting underground, yet receiving payment without the provision of any service to the company. He testified that he knew that it was imperative for him to clock in to receive his salary. In the circumstances, the arbitrator concluded that the dismissal was substantively fair.

<u>In the Labour Court</u>

[21] The court *a quo* considered the provisions of the recognition agreement of February 2009 and the memorandum addressed to all shop stewards, dated January 2020, and weighed this against the evidence of Mr Kgotlang in relation to the two counts of which he was found guilty. The Labour Court referred to a host of authorities including *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*[1] where it was pointed out that:

> 'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable,

[1] *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC) at para 100.

is a stringent test that will ensure that such awards are not lightly interfered with…'

[22] The Labour Court further considered the provisions of item 3(4) of the Code of Good Practice: Dismissal which provides that it is generally not appropriate to dismiss an employee for a first offence, but that the offences of gross misconduct and fraud are cited as exceptions. The court *a quo* was alive to the dearth of evidence of a breakdown of the trust relationship between the employee and the company, however relying on *Impala Platinum Ltd v Jansen and others*[2] it was satisfied that in the circumstances of the matter, even in the absence of evidence indicative of a breakdown of the trust relationship, it could not be expected that the company should retain the services of an employee who acted dishonestly.

[23] The Labour Court approached the matter on the basis of the decision in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[3] which held that to analyse every issue raised at the arbitration, and even an irregularity in the award *per se* is not sufficient to displace the reasonableness test enunciated in *Sidumo*.

[24] Insofar as the existence of a gentleman's agreement between the parties, the court *a quo* found no basis to interfere with the finding of the arbitrator, noting that the employee did not produce any supporting evidence to establish the existence of such an agreement. The court further found that even if such agreement were to have existed, the subsequent instruction (in the form of the 2020 Memorandum) should have superseded the earlier informal agreement. The employee's refusal to pay heed to the instruction issued to him constituted insubordination, having regard to two supervisors issuing repeated instructions to him to report underground. However, even if the employee failed to comply with a single lawful instruction, based on the decision in *TMT Services and Supplies*

[2] *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC).

[3] *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC).

(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others[4] '*defiance of authority can be proven by a single act of defiance'*. As regards the clocking fraud, the Labour Court found that this charge should be read together with the charge of gross insubordination. The court concluded that there was no justification for his conduct and that the conclusion reached in dismissing the review application was one that was considered reasonable.

Grounds of appeal

[25] It was contended on behalf of Mr Kgotlang that the court *a quo* ignored the fact that the arbitrator was bound to consider the Code of Good Practice: Dismissal in determining whether dismissal was appropriate and failed to consider the issue of inconsistency in the application of disciplinary proceedings for the same conduct. The court *a quo* concluded that there was no evidence of a gentleman's agreement, leading it to conclude that he was grossly insubordinate as well as being guilty of dishonest conduct.

[26] I should point out that no reasons were given by the court *a quo* in granting leave to this Court. As such, we do not have the benefit of what the court *a quo* considered to be worthy in the appellant's argument of warranting the attention of this Court. It is therefore desirable that when the Labour Court grants leave to appeal it should set out, even briefly, the reasons for its decision. In the absence thereof, this Court may face a deluge of appeals, without any indication that the court *a quo* has properly applied its mind to the application for leave to appeal, which is a jurisdictional prerequisite.

Analysis

[27] In assessing the respective arguments, it must be borne in mind it is neither the function of a review court, nor that of an aggrieved litigant, to microscopically analyse the evidence at the arbitration in an attempt to demonstrate that the

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[4] *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2019) 40 ILJ 150 (LAC) at para 19.

award under review is incorrect and should therefore be set aside. The question central to that enquiry is whether the arbitrator's decision is one that a reasonable decision-maker could reach. Sutherland JA in *Makuleni v Standard Bank of SA (Pty) Ltd and Others*[5] warned of a review court yielding '*to the seductive power of a lucid argument that the result could be different'*. The court went on to state that:[6]

> '…At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

[28] Before approaching this Court, Mr Kgotlang had the benefit of two reasoned decisions by an arbitrator and the Labour Court. Both fora considered very much the same arguments and reached essentially the same conclusion that the appellant was guilty of gross insubordination and clocking fraud, justifying his dismissal. A fair reading of the record reveals that Mr Kgotlang's supervisors had no malice towards him when they gave him the instruction to report underground. They were implementing company policy. His refusal to obey a reasonable and legitimate instruction was built on an edifice of a gentleman's agreement (for which no corroborative evidence was furnished) and procedural, technical or formalistic requirements of shop stewards having to be "paraded" or that a "stopping crew" was to first be in place before he could be handed over to a shift supervisor. None of this addressed the core issue that he was refusing to report for duty underground, and to perform the services for which he was being paid.

[29] Mr Kgotlang's problems were compounded by his attempt to evade liability, based on his denial of any knowledge of the 2009 recognition agreement or the 2020 memorandum addressed to shop stewards. His plea of ignorance of the rules was found by the arbitrator to be "highly improbable". I agree. If he spent his time as a shop steward attending to union duties rather than being posted

[5] *Makuleni v Standard Bank of SA (Pty) Ltd and Others* (2023) 44 ILJ 1005 (LAC) para 4.
[6] Ibid at para 4.

underground, it would be entirely reasonable to expect him to be familiar with company policies and procedures. The ineluctable reason for his denial is that the 2009 recognition agreement and the 2020 memorandum explicitly recorded what was required of a part-time shop steward. They jettisoned any reliance on the so-called gentleman's agreement and was aimed at correcting the exact conduct attributed to the appellant. Even Mr Kgotlang's own union branch chairperson saw it fit to comply with the instructions issued by Mr Mosetlhe.

[30] The arbitrator was severe in his criticism of Mr Kgotlang's witness, Mr Mdutyulwa. The findings made by the arbitrator can be equated to credibility findings by a trial court. In this case, the arbitrator found Mr Mdutyulwa to be evasive and that both he and Mr Kgotlang had rehearsed their evidence. Credibility findings should not be judged in isolation, but must be founded (as it was by the arbitrator) in light of proven facts and the probabilities of the matter. I can find no misdirection with the arbitrator's findings and approach in this respect. Whilst a court of appeal is generally reluctant to disturb findings which depend on credibility, it is trite that it will do so where such findings are plainly wrong.[7] In the present case, the Labour Court found no reason to disagree with the arbitrator's findings regarding the appellant's witness, Mr Mdutyulwa. I see no reason to conclude otherwise.

[31] Tuning to Mr Kgotlang's conduct, based on the Constitutional Court's decision in *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board*[8] it was submitted that it did not amount to a 'calculated breach'. The evidence reflects the opposite. He was issued with an instruction five times, which he refused to obey. Importantly, these instructions were issued by supervisors with whom he had a cordial relationship. Mr Penyenye stated that he engaged with the appellant on his stance, even describing him as a 'Brother'. He understood that he was an experienced team leader and therefor attempted to reason with him.

[7] See: *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at p 706.
[8] 2014 (3) SA 544 (CC); (2014) 35 ILJ 1885 (CC) at para 213.

[32] It was submitted on behalf of the employee that the arbitrator should not have found him guilty of dishonesty, but at worst for abusing the clocking-in procedure. This submission loses sight of the evidence of repeated instructions issued to the employee, and that he was clearly aware of the need to clock-in to ensure he was paid, despite not keeping his end of the bargain in reporting for duty underground. Mr Cook, who appeared on behalf of Mr Kgotlang, accepted that while the refusal to obey may have been persistent, it was not wilful in as much as the appellant *bona fide* believed that he first had to be paraded before he could report for duty underground. It was submitted that the absence of wilfulness should have warranted a lesser sanction than dismissal.

[33] In *Enviroserve Waste Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[9] the court considered the conceptual difference between insolence and insubordination and said the following:

> '[15] It is accepted that the offence of mere insolence is not in itself sufficient to result in a dismissal. What is defined as 'mere insolence' will obviously depend on the circumstances and the conduct in question, and its effects. However, for insolence to justify a dismissal, it must by all accounts be wilful and serious, with the result that the employment relationship irretrievably breaks down. Examples of gross insolence include some as already indicated above, and may extend to *inter alia*, verbal abuse and/or tirades which may be laced with crass profanities, making personal or crude insults or gestures toward a superior, coupled with violent conduct in some instances, or even making physical or other threats.
>
> [16] Insolence as directed towards persons in managerial or supervisory positions, especially in the presence of other junior employees, invariably results in the manager's or supervisor's authority being undermined, and has the effect of either belittling or humiliating that manager or supervisor. As a general rule therefore, employees are expected to show professionalism, courtesy and respect towards their managers and

[9] *Enviroserve Waste Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (P99/14) [2016] ZALCPE 23 (15 November 2016) at paras 15 to 17.

supervisors. If junior employees fall short of that expectation, ill-discipline and other unintended consequences may be the order of the day, which may have a negative effect on productivity and general harmony in the workplace.

[17] In *Palluci Home Depot (Pty) Ltd,* the Labour Appeal Court, also held that the sanction of dismissal should be reserved for instances of gross insolence and gross insubordination. To this end, the LAC accepted that respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her...'

[34] Mr Kgotlang was unable to point to anything that prevented him from resuming duties underground, even if the formalities he referred to (such as being 'paraded' or not having a 'stopping team') had not been in place at the time when he was issued with the instructions. I was not persuaded by the contention that the 'parading' of miners prior to them being transferred underground was a safety procedure. This was a contention advanced in argument but not elaborated in any way by evidence. It was further contended that the employee's conduct was not defiant but rather borne from a mistaken understanding of the processes before he could perform duties underground. I am not persuaded by this argument as the defence raised by the employee rested on various pillars, each of which was shown to be unsustainable. Finally, Mr Kgotlang could not point to anything unreasonable or unlawful in the instructions. As submitted by Mr Kgotlang his explanations for not complying vacillated from one excuse to another. Ultimately, he was solely responsible for events leading to his dismissal.

[35] The arbitrator carefully evaluated the evidence of the witnesses, considered the evidence of the company policies and procedures and the explanation tendered by the Mr Kgotlang for his conduct. The arbitrator was clearly alert to the issues he was required to determine, and there was no suggestion that he misconceived the enquiry to be undertaken. The employee's conduct which led to his dismissal

stemmed from a persistent, wilful refusal to obey a legitimate instruction. In as far as the clocking fraud count, it was accepted that the employee clocked in at work and did not report underground. Mr Cook informed the court at the hearing that the employee did not proceed underground for the period since he had been appointed a shop steward – almost two years. It was submitted that during this time he did trade union duties. If he did, it is inconsistent with his evidence that he was unaware of any policies or regulations applicable to the workplace. I am unable to find any misdirection or irregularity by the arbitrator in arriving at the conclusion he did.

[36] The Labour Court was tasked in determining, on review, whether the arbitrator's decision which found the employee guilty of two counts of misconduct and determined that he be dismissed, was a decision to which a reasonable decision-maker could have come on the available evidence. The Labour Court cannot be faulted for upholding the determination of the arbitrator, which ultimately is a value judgment, but is one which was not unreasonable and not one that no other arbitrator could have come to.

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

<u>Order</u>

1. The appeal is dismissed;

2. There is no order as to costs.

M. R. Chetty

Acting Judge of the Labour Appeal Court of South Africa

Van Niekerk JA and Kganyago AJJA concur.

APPEARANCES:

FOR THE APPELLANT : Mr AL Cook

Instructed by: LDA Attorneys

FOR THE RESPONDENT : Mr MD Madiba

Instructed by: Khanyisa Mogale Attorneys