Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 491/10

In the matter between:

SAMWU	**FirstApplicant**
S. B. MKHUNGO	**Second Applicant**
R. NTAKA	**ThirdApplicant**

and

SOUTH AFRICAN LOCAL BARGAINING COUNCIL	**FirstRespondent**
N DUBAZANE	**SecondRespondent**
ETHIKWINI MUNICIPALITY	**ThirdRespondent**

Heard: **21 August 2012**

Delivered: **20September 2012**

Summary: Review: Application to review arbitrators finding that applicants guilty of misconduct and that dismissal appropriate sanction but that dismissal procedurally unfair. No cross review. Award not reviewable. Application dismissed.

JUDGMENT

GUSH J

1] This is an application by the applicants to review and set aside the award of the second respondent who found the third respondent's dismissal of the second and third applicants to have been procedurally unfair but substantively fair. The second respondent ordered the third respondent to pay to the second applicant compensation in an amount of R6,289.20 and to the third applicant R15,866.18. Coupled with this award was a cost order that the second and third applicants pay wasted costs occasioned by postponement of the arbitration on 14 December 2009 and both the second, third applicants and the third respondent to pay certain arbitration fees in equal proportions.

2] The first applicant is the trade unionof which the second and third applicants are members. The applicants' application is to review and set aside the second respondent's award and substitute it with a finding that the dismissal of the second and third applicants was substantively unfair and an order that they be reinstated.

3] There is no cross-review by the third respondent.

4] The second and third applicants were employedby the third respondent as a small plant operator and electrician respectively. Both the second and third applicants were duly appointed shop stewards and had 20 and nine years service respectively.

5] On 15 July 2008, at the third respondent's South Western depot, where the second and third applicants' were stationed, there had beena disruption amongst the third respondent's employees and had resulted inthe gates to the depot had been locked thereby preventing anyone, including employees of the third respondent and contractors employed by the third respondent from entering or leaving the premises and performing their duties.

6] The depot manager had summoned the second and third applicants to his office where he had advised the applicants that it was unacceptable that the gates had been locked and that they were to be opened. The applicants had advised the manager that the gates would only be opened if he agreed to meet with the staff. The manager had agreed and had proceeded to the venue where he was to meet with the staff. Despite this the applicants had not immediately opened the gates, but had done so only after the manger had once again asked that the gatesbe opened after he had arrived at the venue for the meeting. After the incident, involving the disruption and thefailure by the second and third applicantto open the gates after having been told to do so , the second and third applicants were both accused of and charged with misconduct. The charges of misconduct levelled at both second and third applicants were:

1. '... Illegally locked the gate of South Western depot, preventing the electricity staff and contractors from entering and leaving the depot to perform their duties, i.e. repairs to electrical infrastructure and construction of electrical infrastructure. In so doing, you disrupted the operation of the employer, thereby contravening clause 1.2.11.

2. In view of the above you acted against the organisational rights agreement clause 8.6.1 and 8.6.3 thereby contravening clause 1.1.

3. In having locked the gates to the depot [you] were insolent, provocative and intimidatory toward your manager, Mr Dalton, thereby contravening clause 1.2.9.

4. Refused to open the gates when Mr Dalton told you to open the gates showing gross insubordination, thereby contravening clause 1.2.4.'

(Mr Dalton is the third respondent's manager of its South Western maintenance division and depot where the incident took place.)

7] The references in the charge sheet to "clauses" are references to clauses in an annexure to the Disciplinary Procedure Collective Agreement: Conduct

and Sanctions, which regulates the disciplinary proceduresapplicable to the third respondent and its employees and is part of a collective agreementto which the first applicant and the third respondent are parties.

8] The applicants included in the bundle of documents in this matter the entire record of the disciplinary enquiry the enquiry chairperson's finding regarding the second and third applicant's guilt and the chairperson of the disciplinary enquiry's finding as to sanction. The disciplinary enquiry into the second and third applicants' alleged misconduct was conducted over a number of days, commencing in August 2008 and was eventually finalised in February 2009.

9] The enquiry chairperson's finding in relation to the charges isthorough and well reasoned. . The chairperson having examined the evidence in detail came to the conclusion, seemingly correctly, that the second and third applicants were both guilty of all four counts of misconduct, and in a separate written finding, having heard evidence in mitigation, dismissed both second and third applicants.

10] It is this decision that the applicants referred to the first respondent and which was the basis of the arbitration that followed.

11] In contrast with the finding of the chairperson of the disciplinary enquiry the second respondent somewhat surprisingly, on essentially the same evidence, came to the conclusion that the second and third applicants were not guilty of the misconduct set out in charges one two and three, and specifically that they had not "illegally locked the gate".

12] In respect of charge 1,the second respondent in her award, recorded that the third respondent had only led one witness,namely the security guard Ndlazi, whohad identified the second and third applicants as the persons who had taken the keys from him and had locked the gate. The second respondent then referred to the fact that the second and third applicants had simply denied this, and came to the astounding conclusion 'it is the law that if there are two conflicting versions, the party that has to discharged the onus must

lose'.

13] On the strength of this conclusion regarding charge one, the second respondentthen held that as charges two and three "talk to charge number 1" that the second and third applicants were accordingly not guilty of the misconduct set out in these two charges

14] The second respondent persisted with this somewhat confused logic in coming to the conclusion that the dismissal of the second and third applicants was procedurally unfair.

15] The reasoning behind the conclusion that the disciplinary enquiry was procedurally unfair was simply that the collective agreement's disciplinary procedure provided that the presiding officer of a disciplinary enquiry should be a senior employee or if this was not possible any other suitably qualified person and that the presiding officer was not such an employee.

16] In the award, the second respondentnoted that: 'with regard to procedure, a person who chaired hearing was not council employee'.The second respondent recordedin respect of the issue of procedural fairness the following:

> 'No evidence was led by the respondent to suggest that it was not possible or desirable to employ a senior employee in its employee which then necessitated appointment of another suitably qualified person. In the absence of evidence to this effect, I am led to conclude that the respondent committed an irregularity with regards to procedure.'(sic)[1]

17] Without any evidence regarding, or further consideration of, the effect that this might have had on the fairness or otherwise of the disciplinary enquiry the second respondent simply concluded in the award that:

> 'On the balance of probabilities I find that the dismissal of the applicants was procedurally unfair...'[2]

1Award para 5.14 pleadings page 48.
2Award para 5.20 pleadings page 49.

18] The second respondent however in respect of charge four,concluded that the second and third applicants were guilty of this charge in that the second and third applicants had"... refused to open the gates when Mr Dalton told [them] to open the gates showing gross insubordination, thereby contravening clause 1.2.4". The second found that the applicants' were guilty not only of "showing gross insubordination" by refusing to open the gates when told to by the third respondent's manager misconduct but that their conduct was serious enough to justify thesanction of dismissal.

19] It is appropriate to record that the second respondent's conclusions as set out in the award, in finding of the second and third applicants guilty of misconduct and dismissing them, accord largely with the disciplinary enquiry chairperson's comments regarding charge four viz:

> Charge 4: the two employees [second and third applicants] were no doubt that Dalton was upset about the gates being closed ... were in no doubt that he wanted the gates opened ... Instead of immediately opening the gates they ... informed Dalton that the gates would be opened if he agreed to hold a meeting with the staff... Clearly their behaviour ... amounts to a refusal to open the gates and accordingly the two employees are guilty of this charge as well'

20] The decision of the chairperson of the disciplinary enquirywas that the applicants were guilty of all the charges of misconduct but however in respect of charge 4, the chair of the disciplinary enquiry said the following:

> 'Their duty [second and third applicants] is not to carry out orders from the employees. Their duty is to obey the lawful and reasonable instructions from their manager. Mr Dalton gave an eminently reasonable and lawful instruction i.e. 'it is unacceptable that the gates are closed please open the gates.' They refused to do so unless the meeting was held. Gross insubordination has always been accepted by courts as an appropriate sanction for dismissal.'[3]

21] In applying to review and have the award of the second respondent set aside,

3 Disciplinary enquiry record volume 1 page 84.

the applicantsconfined their applicationsolely to two grounds of review:

a. Firstly that 'given the second and third applicants years of service and clean disciplinary record dismissal was not warranted':[4] and

b. Secondly that the second and third applicants were not guilty of insubordination and in particular gross insubordination.[5]

22] In the surprising absence of a cross-reviewin respect of the findings of the second respondent regarding charges 1 2 and 3 and that the dismissal was procedurally unfair,the court is confined to considering the reviewability or otherwise of the award based on thetwo grounds of review raised by the applicants. Having elected not to challenge the award of the second respondent, apparently satisfied with the outcome of the arbitration, the third respondentconfined itself in opposing the applicationto these grounds of review only.

23] In explanation of the grounds of review, the second and third applicants in their supplementary affidavit state the following:

> 'Dalton's evidence was that he called the second and third applicants tomeeting at his office to enquire about the closure the gates, during which meeting he "asked them to open the gates" and, after some discussion, "it was eventually agreed that if (Dalton) went and had a meeting ... the gates would be open
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> Dalton attended the meeting, and the gates were opened. The second respondent found that an instruction had been given to the second and third applicants to open the gate.
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> What the second respondent ignored is the fact that they discussion ensued after Dalton's request (not an unequivocal instruction), after which discussion and agreement was reached on the opening the gate -this does not amount to a flat-out (sic) refusal to open the gate (which could amount to

4Founding affidavit para 35 page 16 of the pleadings.
5 Founding affidavit para 36 page 16 of the pleadings and paras 11 and 12 page 64 of the pleadings.

insubordination).'

24] The applicants in additionaverred that evenif the second and third applicantswere insubordinate, it was not gross insubordination and that the sanction of dismissal was not reasonable.

25] Faced with two conflicting versions of what transpired on the day in question, the second respondent in making the award preferred the version offered by Dalton and the third respondent's witnesses, (set out in more detail below)namely that Dalton had summoned the second and third applicants to his office where he had asked them to open the gate. Dalton's evidence was that in response to his instruction that the gates be opened he was advised by the second and third applicants and the gates would only be opened if he agreed to meet with the staff, despite having agreed to meet with the staff the gates had not been opened immediately.

26] The second and third applicants' versions as to what transpired appear from the record: Mkhungo gave evidence to the effect that he had had a meeting with Dalton in his office after Dalton had advised him that the gates were closed whilst he was at his motor vehicle in the depot yard. Later when referring to his meeting with Dalton in his office he said the following:

> 'Mr Mkhungo [second applicant]: Dalton mentioned that the gate was locked ... and he said it was unacceptable for the gate to be locked. ... When he said that the gate must be opened ...'[6]

Ntaka on the other offered the following version:

> 'Mr Ntaka [third applicant]: we've never closed the gate so therefore I don't see any reason why I should refuse to open a gate that I have never closed ... I never refused to open the gates and in fact I've never received an instruction to open the gate'[7]

27] In her award,the second respondent, in finding the applicants' guilty of gross

6Record page 675.
7Record page 606.

insubordination recorded:

a. The applicants breached rule referred to in charge 4;

b. Reject[ed] the second applicant's version that Dalton had approached him whilst he was seated in his motor vehicle in the yard;

c. Accept[ed] Dalton's version of what transpired on the grounds that it was more probable and corroborated; namely that he (Dalton) asked the applicants to open the gate and that he was told that the gate would be opened only if he attended a meeting with the staff at the lecture room;

d. That both applicants admitted that Dalton had said that the gate must be opened, that this was an instruction;

e. That there was no evidence to suggest that the instruction was unreasonable and unlawful; and

f. That both applicants conceded that the locking of the gate was illegal and unacceptable.[8]

28] The relevant evidencewhich the second respondent took into account and accepted, in reaching the decision in the award is Dalton's explanation of the exchange between himself and the second and third applicants. Dalton had been advised that the gates to the depot had been locked by the second and third applicants preventing contractors from entering or leaving the premises. He called the second and third applicants to his office in order to deal with this issue. He enquired from the second and third applicants what was the reason for the gates to be locked and was advised by them that they had been locked because the staff wanted to meet with him. He evidence was that he advised the second and third applicants that it was unacceptable that the gates been locked. He said that he asked the second and third applicants to open the gates. In response thereto he was told that the gates would only be opened if

8 Award para 5.7 and 5.8 page 45 and 46 of the pleadings

he, Dalton, had a meeting with the staff. He had agreed to meet and had proceeded to the lecture room to attend the meeting. On arrival,he ascertained that the applicants' had still not opened the gates despite his agreement to meet with the staff and he again asked them to open the gates. The transcript of Daltons evidence reflects:

> 'I was told that the gates would only be opened if I had a meeting with the staff, and after a short discussion with the shop stewards agreed that they would unlock the gates if I had a meeting with the staff,...the discussion was about opening the gates and attending the meeting. Eventually it was agreed that if I went and had a meeting at the gate would be opened.
>
> The Labour and staff were eventually assembled in the training room and I proceeded to the training room with Denzel Greeves and Dougie Miles.
>
> We proceeded to the training room and when I arrived there I spoke to the shop stewards and asked them to unlock the gates before I proceeded with the meeting. The two shop stewards left the meeting area, the training room, and I asked Dougie Miles just to check and see whether the gates were open. He informed me that the gates had been opened, and I proceeded with the meeting once two shops goods and return to the meeting area.'

29] Dalton went further to explain:

> '... I would have agreed to a meeting without any gates been locked or anything like that, and when they said that the gates would only be opened once I held a meeting with them, I felt intimidated into making a decision that I would have agreed toanyway without any threats being made to me or anything like that'[9]

30] Based on this evidence, the second respondent in the award reasonably concluded as follows:

> 'The question then is did the applicants open or get the gate opened on receiving the instructions? Evidence led is that this did not take place but

9Record page 358.

> Dalton was merely informed that the gate would only be opened if he attended the meeting with staff at the lecture room. It was also evidence that the gate was opened after Daltonsaid again at the lecture room that the gate must be opened before he commences meeting as he had then heeded staff call to the meeting. His instruction to the applicants was still not carried out when he arrived at the lecture room.
>
> Insubordination requires either disobedience or challenge to authority which is deliberate and serious.In this case I find that the instruction was reasonable and lawful. I also find that there was a challenge to authority which was deliberate and serious. I therefore in the circumstances conclude that the respondent's version that the applicants committed gross insubordination is more probable than that of the applicants that they did not.'

31] Having so concluded the second respondent continued to consider "whether the dismissal [was] an appropriate sanction". The second respondent took into account the second and third applicants' length of service their disciplinary record and the circumstances of the misconduct and concluded that dismissal was the appropriate sanction.

32] The test on review was enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[10]and is succinctly summarised*in Edcon Ltd v Pillemer NO and Other*s[11]. In this matter, Mlambo JA said the following:

> 'Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.'[12]

33] Whilst this is the overarching consideration when determining the reviewability or otherwise of an award of a Commissioner, it is also so that consideration isbe given to the provisions of section 145 of the Labour Relations Act in order to determine whether the process adopted by a commissioner in reaching a decision constitutes "a defect" in the arbitration proceedings.[13]

10 (2007) 28 ILJ 2405 (CC).
11(2009) 30 ILJ 2642 (SCA).
12*Edcon*at para 15.
13Section 145 of the Labour Relations Act 66 of 1995 (LRA).

34] When considering whether an award is "one that a reasonable decision maker" could arrive at, considering the evidence or material placed before the decision maker, the process the arbitrator applied in consideration of the evidence is relevant. Thefailure by an arbitrator to consider evidence or properly apply his or her mind thereto may well amount to a defect as envisaged by section 145 of the LRA.In such circumstances it cannot be said thatthe arbitratorhas actedas a reasonable decision maker would.[14]

35] The applicants during their argument sought to rely on not only the "*Sidumo*" test but also what they referred to as the so-called "process related" test. Their argument was that the second respondent had not applied her mind to nor taken into account the material placed before her, in making her award and that accordingly her award feel to be reviewed.

36] While the applicants in their notice of motion apply to review the entire award, it is clear from the pleadings and the argument that it is only that portion of the award in which the second respondent found that the second and third applicants' dismissal was substantively fair that forms the subject matter of the review. As a result, the applicants sought only retrospective reinstatement and the issue of compensation for procedural fairness that is part of the award is not the subject of this application. It is accordingly necessary to consider not only whether the award is one that 'a reasonable decision maker could arrive at considering the material' but also whether there was"a defect in the arbitration proceedings"[15] in that the second respondent committed misconduct or a gross irregularity.

37] In so doing however the Court is essentially confined on reviewto the the applicant's two grounds of review;

a. Firstly that "given the second and third applicants years of service and clean disciplinary record dismissal was not warranted"; and

b. Secondly that the second and third applicants were not guilty of

14*MEC for Education, Gauteng v Mgijima* [2011] 3 BLLR 253 (LC).
15 Section 145(1) LRA

> insubordination and in particular gross insubordination but if they were guilty of insubordination it was not gross.[16]

38] The first issue to be decided is whether the conclusion by the second respondent that the applicants' conduct justified their dismissal is reviewable.

39] The third respondent's Disciplinary Procedure Collective Agreement records under the heading "standard of conduct" clause 1.2.4 the requirement that employees obey all lawful and reasonable instructions given by a person having authority to do so. The agreement includes guidelines regarding appropriate sanctions for misconduct and records that the sanction imposed must be based on the seriousness of the offence and must take into account the employees disciplinary record, that discipline is progressive and that sanctions will be applied by issuing warnings except in cases of misconduct constituting grounds for immediate dismissal. Clause 2.7.7 describes gross insubordination as conduct warranting immediate dismissal.

40] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[17] the Constitutional Court set out the approach commissioners should follow when determining the fairness of a sanction imposed.

> '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.
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> To sum up. 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

16 Founding affidavit para 36 page 16 of the pleadings and paras 11 and 12 page 64 of the pleadings.
17 (2007) 28 ILJ 2405 (CC).

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.'[18]

And

'What this means is that the commissioner . . . does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.[19]

41] In *Fidelity Cash Management Service v CCMA andOthers,*[20] Zondo JP enumerated what had been held in *Sidumo* viz:

'In terms of the *Sidumo* judgment, the commissioner must:

(a) "take into account the totality of circumstances"...;

(b) "consider the importance of the rule that had been breached"...;

(c) "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"...;

(d) consider"the harm caused by the employee's conduct"...;

(e) consider"whether additional training and instruction may result in the employee not repeating the misconduct';

(f) consider"the effect of the dismissal on the employee"...; and

(g) consider the employee's service record.

18*Sidumo* at paras 78-79.
19*Sidumo* at para 178
20(2008) 29 ILJ 964 (LAC).

...

> Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.'[21][22]

42] There can be no doubt from the reading of the award that the second respondent took into account these factors in concluding that dismissal was the appropriate sanction and satisfied the principles enunciated above.

43] The applicants raised a further factor in considering the appropriateness of the sanction during argument by arguing that the second respondent had regarded the fact that the second and third applicants were shop stewards as an aggravating factor. Ms Linscott,who appeared for the applicants, suggested in her supplementary, heads that as 'the conduct of the applicants was related to their functions as shop stewards ... that their communication to Dalton of the workers demands was both fair and acceptable'.

44] Apart from the fact that this issue was not dealt with in the pleadings it is clear not only that the applicants conduct was not related to their function as shop stewards but the applicants' misinterpreted the second respondent's conclusion and the nature of the misconduct of which the second and third applicants were accused.

45] The second respondent did take into account the fact that the applicants were shop stewards and appropriately dealt with this issue. The second respondent recorded the following:

> 'I have also considered the fact that the applicants were shop stewards. A

21 *Fidelity Cash Management* at paras 94-95.
22 See the second respondents award at pages 48 and 49 of the index to pleadings paras 5.15 – 5.20

shop steward is meant to lead by example and furthermore he or she remains an employee and the employer is entitled to expect conduct appropriate of that relationship. It can never be right therefore for a shop steward to advance as an excuse the argument that what he or she did was done whilst pursuing the interests of its members'[23].

46] It must be born in mind that the conduct complained of, the misconduct of which the applicants were found guilty and for which they were dismissed was their refusalto open the gates when Mr Dalton told them to open the gates which the second respondent found to amount to "showing gross insubordination".

47] As far as the applicants' second ground of review is concerned, viz that the second and third applicants were not guilty of insubordination alternatively if they were it was not gross insubordination, there is no substance to the applicants' argument that the exchange between Dalton and the applicants was merely'a discussion [which] ensued after Dalton's request (not an unequivocal instruction), after which discussion and agreement was reached on the opening the gate'.(their emphasis)

48] I am not persuaded that the conclusion reached by the second respondent that Dalton had issued a lawful and reasonable instruction and that the response by the applicants prosecuted a 'challenge to authoritywhich was deliberate and serious' can be said to be a decision atwhich a reasonable decision maker could not arrive, given the material placed before the second respondent.

49] The second respondent, correctly in my view, concluded that Dalton had issued an instruction that was both lawful and reasonable, and thatthe evidence clearly established that the second and third applicants refused to comply with the instruction.

50] In any event, the test on review is not whether the second respondent was correct but whether the decision is one at which a reasonable decision could

23 Second respondent's award pleadings page 49 para 5.18.

arrive.

> It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz, supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensurethat this distinction, however difficult it is to always maintain, is respected.[24]

51] In fact, the applicants' argument is essentially that of an appeal as opposed to a review, viz. that the second respondent came to the wrong conclusion. It is a clearly established principle that this Court may not have regard to grounds of appeal when considering an application to review an award of a Commissioner.[25]

52] I am satisfied that the averments made in regard to the nature of the exchange between Dalton and the applicants,viz that it was no more than a discussion followed by an agreement, accord with what was held by Davis JA in *Bestel v Astral Operations Ltd and Others:*[26]

> 'This speculationis insufficient to justify a conclusion that [the arbitrator's] findings on facts supported by the evidence was insufficiently reasonable to justify his decision or made in ignorance of uncontradicted evidence. On the *Sidumo* test for review as I have outlined it, there was no basis by which [the commissioner's] award should have been set aside[27]

53] It is so that I have no doubt that had the third respondent applied to review and set aside the second respondent's finding that the second and third applicants were not guilty of the conduct describing charges 1,2 and 3 and the finding on procedural fairness that such a review would have succeeded. This issue however is not a matter before me and is therefore not an issue which I

24*Bestel v Astral Operations Ltd and Others*[2011] 2 BLLR 129 (LAC) at page 362 para 18.
25*SA Municipal Workers Union V SA Local Government Bargaining Council and* Others (2012) 33 ILJ 353 (LAC).
26 [2011] 2 BLLR 129 (LAC)
27*Bestel* at para 30.

have taken into account nor has it influenced the reviewability or otherwise of the second respondent's award with regard to the fairness of the second and third applicants' dismissal. To take into account the evidence that clearly linked the second and third applicants to the misconduct described in charges 1 2 and 3, which the second respondent did not accept and in respect of which the second respondent found the second and third applicants not guilty would in effect be tantamount to a review of that part of the award which neither party seeks to review.

54] I am satisfied that it is clear from the evidence/material placed before the second respondent that the finding by the second respondent that the applicants were guilty of gross insubordination by refusing to open the gate unless the second respondent's Dalton agreed to meet with the staff is "one that a reasonable decision maker" could arrive at and is accordingly not reviewable.

55] The applicants sought only an order reviewing and setting aside the award and substituting it with a finding that the dismissal of the second and third applicants was unfair.

56] Having decided that the award is not reviewable,it remains to consider the question of costs. I am of the view that requirements of law and fairness do not warrant an order for costs.

57] Accordingly, I make the following order:

a. The applicants' application is dismissed;

b. There is no order as to costs.

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D H Gush

Judge

APPEARANCES

FOR THE APPLICANT: Adv S J Linscott

Instructed by Tomlinson Mnguni James Inc

FOR THE THIRD RESPONDENT: Adv V Naidu

Instructed by Hughes-MadondoInc