REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 71/12

In the matter between:

DIRK WILLEM POTGIETER **Appellant**

and

TUBATSE FERROCHROME & OTHERS **Respondent**

Heard: **04 March 2014**

Delivered: **12 June 2014**

Summary: Appropriate remedy for unfair dismissal dispute- commissioner finding that employee's dismissal substantively unfair- commissioner granting compensation because employment relationship broken down because employee publishing report in newspaper. Labour Court upholding arbitration award Appeal Employee report to media not in violation of the PDA and NEMA- Commissioner overlooking the serious repercussions for non-compliance with NEMA and applying a narrow approach to the PDA. Disclosure not rendering employment relationship intolerable. Appeal upheld with no costs. Labour Court judgment set aside. Commissioner award reviewed and set aside. Employee re-instated retrospectively.

CORAM: TLALETSI DJP, MOLEMELA AJA, SUTHERLAND AJA

JUDGMENT

MOLEMELA AJA

Introduction

[1] The appellant appeals against the judgment of the Labour Court (Louw AJ) dismissing an application for the review of an award in terms of which the arbitrator ("commissioner") had found that the appellant's dismissal by his employer (the respondent) was procedurally and substantively unfair and awarding the appellant compensation equivalent to 12 months' compensation.

Background facts

[2] The respondent operates a mine. The respondent employed the appellant, a qualified engineer, on 16 January 1989. At the time of his dismissal, the appellant held the title of "project superintendent". One of his job responsibilities was to ensure that health and safety standards were maintained at the workplace.

[3] On 20 August 2006, the appellant sustained a fracture to his collarbone, as a result of which he underwent an operation. The injury was not sustained during the course of his duties. A medical practitioner issued a medical certificate in terms of which the appellant was "booked off" until 28 August 2006. While the appellant was on sick leave, his Manager contacted him and requested that he work from home due to the fact that his colleague, also a project superintendent, had resigned from the respondent's employment. The appellant agreed. A report prepared for the respondent by an independent consulting company, termed the Golder report, was delivered to him at his home two weeks later. The appellant's sick leave was extended several times, culminating in its extension by a specialist from 2 October 2006 to 15 October 2006.

[4] At some point, the appellant went to the workplace on the invitation of the respondent, in order to discuss the situation around his sick leave but apparently left without any discussion having taken place due to his immediate supervisor's unavailability. On 03 October 2006, the appellant received a letter from the respondent informing him that his medical condition had been re-evaluated by the respondent's resident doctor and instructing him to return to work for "restricted duty" with effect from 04 October 2006. The appellant did not return to work. Another letter to the same effect was sent on 04 October advising the appellant to resume duty on 05 October 2006. The appellant sent an e-mail informing the respondent that its request was not acceptable as he had a valid medical certificate booking him off until 15 October 2006.

[5] On 6 October 2006, the respondent sent an e-mail to the appellant, informing him that by failing to return to work as instructed, he was failing to obey a valid instruction. He was subsequently served with a notice of a disciplinary hearing in terms of which he was charged with:

(i) Failure to obey a reasonable instruction

(ii) Being absent without permission, and

(iii) Insubordination.

[6] A disciplinary hearing was held and he was found guilty on all charges and dismissed. Subsequent to his dismissal but before the hearing of his appeal, the appellant released a report to the media pursuant to which an article was subsequently published in a publication known as *Highland Panorama*. In that article, the appellant was quoted as having alleged that the respondent did not have adequate measures in place to address the water pollution that its mining operations had caused.

[7] After his dismissal, the appellant referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). The commissioner who arbitrated the dispute found the dismissal to be procedurally and substantively unfair. With regards to the appropriate

remedy, she found that re-instatement was impracticable and granted the appellant the maximum compensation.

Arbitration proceedings

[8] The only issue raised with regards to the commissioner's award relates to the remedy she granted, viz compensation, which she granted on the basis that reinstatement was impractical. Since the commissioner's finding on this aspect is central to the appeal, it is apt to quote *verbatim* from her award in respect of the remedy she granted:-

> 'The applicant seeks reinstatement. However I am of the view that it is impractical to reinstate him as the employment relationship has been irretrievably damaged by him disclosing the "Gerber Report" [Golder Report] to the media after his dismissal. The applicant's contention that this was a 'protected disclosure' made in terms of the Protected Disclosures Act is not plausible and probable, in my view. In terms of the Protected Disclosures Act, the disclosure that is being made is protected if it is made '**in good faith'** (own emphasis). It is highly improbable that the applicant made the disclosure in good faith, as it was only made after his dismissal, yet it is common cause that he had the report with him long before his dismissal. I am of the view that it is highly probable that the disclosure was made by a vindictive employee who wanted to humiliate and embarrass his employer to get even so to speak. It is for these reasons that I find that reinstatement would be impractical.'

Labour Court

[9] The appellant applied to the Labour Court (the court *a quo*) for a review of the commissioner's award pertaining to the commissioner's finding that the employment relationship had broken down and the resultant awarding of compensation instead of reinstatement. The appellant sought to review the arbitration of the commissioner on the basis that she had exceeded her powers as her findings in respect of the remedy were based on "insufficient/incorrect or no evidence at all". He accordingly prayed for the award to be reviewed and set aside and to be replaced by an order reinstating him to his previous position, alternatively referring the matter back to the MEIBC for arbitration by another commissioner.

[10] The Labour Court dismissed the review application on the basis that the commissioner's decision was one that a reasonable decision-maker could reach. Regarding the commissioner's finding that re-instatement was impractical the court *a quo* found that the commissioner's finding was justified by the fact that no evidence had been led by the appellant to show that he had made a protected disclosure or that the disclosure he made was in good faith.

The appeal

[11] The appellant has approached this court with leave of the court *a quo.* There is no cross-appeal. The appeal is directed at two main issues, *viz* (1) the granting of the remedy of compensation and (2) the costs order granted in favour of the respondent.

Evaluation

[12] The applicable test in review proceedings was laid down in the seminal judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] and there is no need to restate it in this judgment. In the case of *Heroldt v Nedbank Ltd,*[2] the court provided the following explanation of how the *Sidumo* test operates:

> 'That the test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. …The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.' (My emphasis)

At para 25, the court stated as follows:

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).
[2] (2013) 34 ILJ 2795 (SCA) at para 12.

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 particular facts are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[13] It is against the background of the afore-mentioned authorities that I now proceed to consider the merits of this matter. It is clear from the commissioner's award that she concluded that the employee's contention that his release of information to the media constituted a protected disclosure was not probable. Before consideration can be paid to the evidence on which the commissioner relied for her decision, it is important to consider the relevant legal framework applicable to whistleblowing.

[14] The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. This constitutional imperative is in compliance with South Africa's international obligations. Article 33 of the United Nations Convention against Corruption (UNCAC)[3] enjoins party states to put appropriate measures in place "to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences" established in accordance with that convention.

[15] In the case of *Guja v Moldova,*[4] the European Court of Human Rights confirmed that whistleblowing constitutes an exercise of an individual's internationally protected right of freedom of expression as contemplated in article 10 of UNCAC, which is inclusive of the right to impart information. The court recognised that this right extends to the workplace, where it may be

[3] The UNCAC came into force in 2005 and has been ratified by South Africa.
[4] Application no 14277/04 (at para 70) February 2008.

curtailed only to the extent necessary in a democratic society. In the preamble to the Protected Disclosure Act[5] (PDA) the relevance of the Bill of Rights is acknowledged. It is also clear from this preamble that the PDA is aimed at overcoming criminal and irregular conduct in organisations. In *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another*[6], the court stated that the PDA "seeks to encourage whistle-blowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation."

[16] Section 1(1)(i) of the PDA defines the term *disclosure* as follows:-

> 'any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) that the environment has been, is being or is likely to be damaged;
>
> (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
>
> (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed'.

[17] Section 1(1)(vi) of the PDA defines the term *occupational detriment* as follows:-

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[5] Act 26 of 2000.
[6] (2010) 31 ILJ 322 (SCA) at para [42].

'*occupational detriment*", in relation to the working environment of an employee, means-

(a) being subjected to any disciplinary action;

(b) being dismissed, suspended, demoted, harassed or intimidated;

(c) being transferred against his or her will;

(d) being refused transfer or promotion;

(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;

(f) **being refused a reference, or being provided with an adverse reference, from his or her employer**;

(g) **being denied appointment to any employment, profession or office**;

(k) being threatened with any of the actions referred to paragraphs (a) to (g) above; or

(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security'. (My emphasis)

[18] Section 9 of the PDA reads as follows:-

'9. General protected disclosure

(1) Any disclosure made in good faith by an employee-

(a) Who reasonably believes that the information disclosed and any allegation contained in it are substantially true and

(b) Who does not make the disclosure for personal gain, excluding any reward payable in terms of any law,

is a protected disclosure if-

(i) one or more of the conditions referred to in subsection (2) apply and

(ii) in all the circumstances of the case it is reasonable to make the disclosure".

(2) The conditions referred to in subsection (1)(i) are-

(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to-

(i) his or her employer; or

(ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.

(3)….

(4)…'

[19] Since the appellant asserted that his disclosure was also protected by The South African National Environmental Management Act[7] (NEMA), it is apposite to consider some of its provisions. Section 28(1) of NEMA provides as follows:-

'Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot

[7] 107 of 1998.

> reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.'

[20] Before amendment of section 31 in 2009, section 31(1) thereof provided that:

> '…no **person** is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of an environmental risk and the disclosure was made in accordance with subsection (5)'.(My emphasis.)

[21] It is evident from the afore-going provisions that NEMA protects whistle-blowers regarding disclosure of information in the public interest and in the interest of protecting the environment. It is also evident that its protection is not afforded only to employees but to all persons, including juristic persons. It is also clear from section 31(2)(b) of NEMA that it is intended to protect whistle-blowers against serious or irreparable harm from reprisals or to serve public interest. Among the categories of whistle-blowers granted this protection by virtue of NEMA are persons who disclosed information to news media under circumstances contemplated in the further subsections mentioned in section 31. Section 33 of NEMA also authorises private prosecutions.

[22] Section 34 of NEMA *inter alia* introduced strict criminal liability to companies and extended this liability to managers, agents and employees for environmental transgressions committed by their employers if they did or omitted to do an act which had been the employer's task to do or refrain from doing. It is common cause that the appellant was tasked with compliance with legal prescripts, including NEMA. Significantly, in terms of section 34(6), whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do, or to refrain from doing on behalf of the employer an act which would be an offence for the employer to do or omit to do, then the manager in question shall be guilty of the said offence as if he was the employer, if the act or omission occurred because of a failure to take all reasonable steps to prevent such act or omission.

[23] The appellant in his evidence pointed out that it was his duty to disclose some of the respondent's acts and omissions relating to compliance with NEMA. This evidence was not challenged. The exchange on p 359 of Vol 4 line 6 to p361 line 1 to 9 of the record is of importance.

> 'Ms Venter: The submission of the report to the newspapers is unfounded allegations that resulted in the breach of the trust relationship.
> Mr Potgieter: The disclosure was done in good faith to protect the public. This is stated on the first page of the disclosed report.
> Ms Venter: Refer to pages 98 and 99 of the bundle. Requested Potgieter to read out paragraphs 5 and 6 of the article appearing on page 98. So you agree you disclosed this confidential information to the press?
> Mr Potgieter: It is not confidential information. The law states that the public must be informed by means of public participation meetings.
> Ms Venter: I put it to you that you disclosed this report to the press after your dismissal because you were upset with the respondent and wanted revenge.
> Mr Potgieter: That is not true, the report had been compiled month's before dismissal and the statement on the first page clearly states the purpose of the report. The disclosure of the report was actually to the benefit of the employer as the correct information had been disclosed to the public and DEAT, Department of Environmental Affairs and Tourism. The report had been disclosed even before the appeal hearing took place. There was no way I could have obtained information after dismissal as the dismissal had been changed to a summary dismissal and I was escorted from the premises by the security manager.
> Ms Venter: I put it to you that the disclosure to the press was done intentionally to harm the reputation of the respondent and resulted in the breach of the trust relationship.
> Mr Potgieter: We can read the purpose of the disclosed report into the record, that information should be part of the proceedings. My affidavit to DEAT also contains information of numerous reports submitted to management about the environmental pollution. I believe that I am protected by the Protected Disclosure Act as well as NEMA the National Environmental Management Act. Some of these acts and omissions constitute offences and it is my duty to disclose it.
> Ms Venter: How can you be the only one that's telling the truth and everybody else is lying, how can you be the only one that's right?

> Mr Potgieter: My attorney agreed with me that the dismissal had been unfair. You also believe the same. I've overheard a telephonic conversation between you and my attorney, you did not know that I was present and you said that you don't know about the merits of this case.
> Ms Venter: Have you disclosed the Golder report?
> Mr Potgieter: No, The Golder Report was never disclosed, it contains technical and design information. The report that was disclosed is one that had been compiled by myself with the purpose to inform the public and to protect the public and the environment. The first page of that report clearly states the purpose, I can make a copy available, my attorney can supply you with a copy of that report.' *(sic)*

[24] The article that appeared in the journal was read by the respondent's witness into the record and stated *inter alia* as follows:

> 'This report describes the environmental pollution caused by the smelting concern in the Steelpoort valley. Special emphasis was placed on Cr6+ pollution. The purpose of this report is to ensure that the public is informed about the extent of the pollution and the dangers involved, to ensure that effective measures are put in place to ensure that the public is not exposed to the Cr6+ contaminated underground water, effective measures are put in place to prevent further contamination and effective measures are put in place to remove the existing contamination, said the author of the report in his submissions to the Highlands Panorama. "Limited measures are planned by the smelting concern to remove the existing pollution but are futile as the air, soil and water are continuously being contaminated…'

[25] In my view, the afore-mentioned exchange, considered with the stated purpose of the article as highlighted in the extract above addresses the "good faith" element of the appellant's disclosure, yet this did not feature anywhere in the commissioner's award. No matter how poorly articulated the appellant's explanation might be, what is clear from his evidence is that: (i) he made the disclosure because he feared criminal sanctions; (ii) he had previously made reports to the respondent; (iii) he regarded the release of the report as a protected disclosure, as he considered the information disclosed to be in the public interest.

[26] Some of the consequences for non-compliance with legislation were acknowledged as follows by the respondent's human resources manager, viz Mr Niewoudt:-

> 'At that stage, Mr Potgieter was involved in a few projects, one of which was this four term management project. (Inaudible) of pollution of ground water. At that point, we were busy with public participation sessions and so forth and the impact to the company is severe if we do not comply with the water permit, you could face a fine or jail sentence for the GM or the business could be (inaudible). So it is not as if it is a small little thing that can go wrong…'

[27] Mr Blignaut, the engineering manager for his part, testified as follows on this aspect (p195 vol 2):-

> 'Ms Venter: Okay, what was Mr Potgieter's function in this ground water project?
>
> Mr Blignaut: He was the project owner and the executor from project execution side and also then the lead on the owner's team from the project side on this project.
>
> Ms Venter: Sorry, lead on…
>
> Mr Blignaut: Lead on the execution of the project for the owner's team from the project side.
>
> Ms Venter: Okay, could you explain to the Commission why this project was so important for Samancor [respondent]?
>
> Mr Blignaut: The importance for Samancor was that if we did not execute the project as per the plan which was submitted to DWAF on various occasions we would risk losing our licence to operate on the Tubatse facility. In other words they would close the plant down.'

[28] Given the repercussions for non-compliance with NEMA as alluded to in the extracts of evidence set out in the afore-going paragraphs, I am unable to see how it can reasonably be concluded that it is more probable that the disclosure was motivated by vindictiveness. The text of the award suggests

that the commissioner did not take such consequences of non-compliance into account.

[29] In as far as the commissioner's reference to the "Gerber report" in her award, all indications are that she was referring to "the Golder" report as none of the witnesses mentioned a Gerber report. Nothing turns on this error. Of importance is that while the appellant admitted that the Golder report was confidential, he categorically denied disclosing the contents of the Golder report to the media. He maintained that what he published was a report that he had drafted.

[30] The respondent contended that irrespective of whether it was the Golder report or the appellant's own report that was published, the fact remained that what was disclosed was information of a sensitive nature. This seemed to imply that an employee's disclosure of sensitive information concerning an employer in itself renders the employment relationship intolerable. Some extracts of what was reported can be gleaned from the articles that appeared in the *Highlands Panorama* and I have no hesitation in agreeing that what was disclosed falls in the category of sensitive information. The definition of whistle-blowing in the Thesaurus of the International Labour Organisation,[8] is "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employer." The preamble to the PDA also refers to the curbing of "criminal" and "irregular" conduct of employers. Given the definition of whistle-blowing in the domestic legal framework and in terms of international standards, as well as authorities on whistleblowing, it seems to me that it is indeed envisaged that the information disclosed may well be information of a sensitive nature concerning an employer. While it is indeed so that not all disclosures are protected, I am not persuaded that the sensitivity of information disclosed ought to, without more, deny the whistle-blower of the protection granted by the prescripts already alluded to. Rather, a proper investigation of all the circumstances is warranted so as to ensure that the disclosure that has been made is not in contravention of the afore-mentioned prescripts.

[8] ILO Thesaurus 2005.

[31] While due regard must be paid to the reputational damage that an organisation may suffer as a result of disclosure of adverse information which is prejudicial to its commercial interests, I am of the view that a finding that the mere disclosure of sensitive information renders the employment relationship intolerable would, in my view, seriously erode the very protection that the above-mentioned legal framework seeks to grant to whistle-blowers. It is accepted that public interest may, in certain instances, outweigh the interests of protecting the reputation of an organisation. See *Heinisch v Germany.*[9]

[32] It was also contended on behalf of the respondent that during the cross-examination of Mr Blignaut and Mr Niewoudt, it was never put to them that the appellant did not disclose the Golder Report to the media or that the appellant would deny doing so. I am not persuaded by this submission. It must be borne in mind that arbitration proceedings are not court proceedings, and the formalities pertaining to the presentation of evidence in court need not be strictly enforced in arbitration proceedings. Section138 of the LRA provides that the commissioner must deal with the substantial merits of the dispute with a minimum of legal formalities. Under the circumstances, the stage at which the appellant made this assertion cannot be decisive. Furthermore, the respondent's contention that the appellant, in his evidence- in- chief, admitted disclosing the Golder Report is not borne out by the record.

[33] The respondent made much of the fact that the disclosure was made after dismissal and contended that this fact justifies the commissioner's conclusion that the disclosure was motivated by vindictiveness on the part of the appellant. This proposition fails to consider that it is not inconceivable that an occupational detriment can take place after termination of employment hence the reference to "being refused a reference, or being provided with an adverse reference"[10] and "being adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security"[11] in the PDA. In my view, these two subsections of the PDA

[9] Application no 28274/08 July 2011.
[10] section 1 (f) of the PDA.
[11] section 1(i) of the PDA.

clearly contemplate that victimisation that can go beyond an existing employment relationship.

[34] Furthermore, it is also clear from section 31 of NEMA that its protection is not confined to employees but to all holders of information pertaining to possible harm to people or the environment. From a reading of the entire section, it can be inferred that the criminal sanction alluded to therein can be visited upon an employee even after termination of employment. The critical consideration would obviously be the time at which the transgression occurred.

[35] While the commissioner may not have been aware of the various provisions of NEMA, the fact of the matter is that she did overlook the evidence on that aspect from three witnesses, viz, the appellant, Mr Blignaut and Mr Niewoudt who all testified about the serious repercussions for non-compliance with NEMA. The commissioner instead focussed on Mr Blignaut and Mr Niewoudt's evidence emphasizing their concern regarding the timing of the disclosure. Given this unchallenged evidence pertaining to the consequences for non-compliance, the commissioner's conclusion that the appellant released his report to the media out of vindictiveness is unreasonable. In overlooking such important evidence, the commissioner demonstrably failed to heed the warning sounded by this court against the adoption of a narrow approach when interpreting the PDA.[12] The narrow approach followed by the commissioner is borne out by the fact that despite the appellant having offered to make the full text of the disclosed report available, that offer was not explored any further and the commissioner was content to make her findings based only on excerpts of the disclosed report.

[36] It is settled law that courts must guard against a fragmented, piecemeal analysis of evidence as it defeats review as a process.[13] I am of the view that the evidence adduced in this matter, viewed in totality and considered in the light of the applicable legal prescripts that have already been alluded to earlier, clearly demonstrate that the disclosure made by the appellant was, on

[12] *Radebe & 4 Others v Premier Free State & others [2012] 12 BLLR 1246 (LAC)*
[13] *Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA and Others* (2012) 12 BLLR 1246 (LAC) at para 4.

a balance of probabilities, made in good faith and falls into the category of protected disclosures. The court a quo thus erred when it found that the appellant had not adduced evidence showing that the disclosure he made was in good faith.

[37] I now turn to the commissioner's decision pertaining to the remedy. I may mention in passing that although the commissioner in this matter found that re-instatement was "impracticable", which was also endorsed by the court *a quo* in its judgment, it is clear that the commissioner's finding that re-instatement was not appropriate was based on section 193(2)(b) of the LRA on the basis that the trust relationship was destroyed by the disclosure made by the appellant. The parties, in their heads of argument also seem to have used the terms "impracticable" and "intolerable" interchangeably. Although in this specific matter nothing much turns on this oversight, it ought to be noted that the terms refer to two distinct concepts: "impracticability" generally addresses unfairness in terms of operational or similar grounds, while "intolerability" generally addresses trust relationship issues between the employer and the employee.

[38] The respondent contended that the commissioner's conclusion that it was not reasonably practicable to re-instate the appellant was based not only on the finding about the disclosure, "but also on the evidence as a whole". This proposition is not borne out by the record and cannot hold any water as it is a distortion of the commissioner's stated reasons as set out in paragraph 8 of this judgment. It must be borne in mind that the commissioner exonerated the appellant on all the charges. Clearly, the commissioner's finding that the trust relationship had broken down was based solely on her conclusion that the appellant had maliciously disclosed information that reflected the respondent in a bad light. This court's own views about the disclosure and its timing have already been expressed. Despite this, what needs to be considered at the end of the day is whether the commissioner's decision not to reinstate the appellant is one that a reasonable decision-maker could reach in the light of the issues and the evidence.

[39] It is trite that re-instatement is the primary remedy available to an employee that has been unfairly dismissed, unless the exceptions listed in section 193(2) of the LRA[14] are found to exist. In *Mediterranean Textile Mills v SACTWU and Others,*[15] it was held that the focal point and overriding consideration in an enquiry concerning the appropriateness of re-instatement is the notion of fairness between the parties. In *Equity Aviation Services Ltd v CCMA and Others,*[16] the court held that fairness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.

[40] Considering all the circumstances mentioned above, I am of the view that the commissioner's finding that re-instatement was not an appropriate remedy on account of an irretrievable breakdown of the trust relationship is not supported by the objective facts. It is not a finding that a reasonable decision-maker could have made after consideration of all the material placed before her and after paying due regard to the notion of fairness between appellant and the respondent. In so far as the court *a quo* found that this was so, it erred.

[41] With regards to the order of costs made by the court *a quo,* it is clear that the order was largely motivated by the fact that the appellant was unnecessarily prolix in the documentation that he filed. It is indeed so that the appellant churned out a lot of documents for his review application and unnecessarily made such documents part of the record. Having stated this, regard must be paid to the fact that a lot of the unnecessary documents were filed by the appellant at the invitation of the respondent's attorneys, as they insisted that he must file "a full record" of the arbitration proceedings despite him having already filed a substantial record. This request, no doubt, set the tone and contributed to the appellant's unnecessary bulky supplementary affidavits that he, as an unrepresented litigant, subsequently filed. The respondent is thus

[14] In terms of section 193(2) of the LRA, "the Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless (a)the employee does not wish to be reinstated or re-employed; (b)the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure."

[15] [2012] 2 BLLR 142 (LAC) at para 28.

[16] [2008] 12 BLLR 1129 (CC) at para 33.

not completely blameless for the bulky record that the court *a quo* and this Court had to trawl through. Under the circumstances, I am of the view that it would be in accordance with the requirements of the law and fairness that each party should pay its own costs, both with regard to the proceedings in the court *a quo* and in this Court.

Order

[42] Wherefore the following order is made:

1. The appeal is upheld.

2. The order of the Labour Court is set aside and replaced with the following:

   2.1. "The award of the commissioner is reviewed and set aside and replaced with the following order:

   (i) The dismissal of the employee was substantively and procedurally unfair.

   (ii) The employee is re-instated retrospectively into his position and must be paid the salary he would have received had he not been unfairly dismissed.

   (iii) No order is made as to costs".

3. There is no order as to costs.

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Molemela AJA

I concur

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Tlaletsi DJP

I concur

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Sutherland AJA

APPEARANCES:

FOR THE APPELLANTS:	Mr Andrew Goldberg of Goldberg Attorneys
FOR THE THIRD RESPONDENT:	Advocate L Hollander
	Instructed by Webber Wentzel Attorneys