CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 284/17

In the matter between:

DUNCANMEC (PTY) LIMITED Applicant

and

JEANNE GAYLARD N.O. First Respondent

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL Second Respondent

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA obo DESMOND MPAHLENI & 7 OTHERS Third Respondent

Neutral citation:	*Duncanmec (Pty) Limited v Gaylard N.O. and Others* [2018] ZACC 29
Coram:	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J
Judgments:	Jafta J (unanimous)
Heard on:	31 May 2018
Decided on:	13 September 2018
Summary:	[struggle songs] — [racism in the workplace] — [racially offensive conduct] [misconduct] — [unprotected strike] — [unfair dismissal] — [*Sidumo* test]

JUDGMENT

JAFTA J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

Introduction

[1] This matter concerns the reasonableness of an award issued by an arbitrator appointed by the Metal and Engineering Industries Bargaining Council (Bargaining Council). The arbitration related to a dismissal of nine employees of Duncanmec (Pty) Limited (Duncanmec) who were found guilty of misconduct. These employees were members of the National Union of Metal Workers of South Africa (NUMSA).

[2] The dismissed employees were charged and found guilty of racially offensive conduct. Racism and racially offensive behaviour are antithetical to our constitutional order. At the heart of this order lies the concept of equality, which is not only entrenched as a right, but also as a value that constitutes the bedrock of the democratic order.

[3] Racism and discrimination were the hallmarks of the policy of apartheid that was implemented in the previous order. That policy rested on the false notion and belief that the white race was superior and that the other races were inferior. Consequently, black people were denied their dignity and other fundamental rights. The institutionalisation of racism brought intolerable suffering, hurt and humiliation to them. As observed by this Court in *Brink*:

"Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all

aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society."[1]

[4] In its equality jurisprudence, this Court has interpreted the equality clause in the Constitution in a manner that rejected racism and embraced equality as a cornerstone of our democratic order. In *Hugo* it said:

"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievements of such a society in the context of our deeply in-egalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[2]

[5] While the adoption of the Constitution had the legal consequences of dismantling the institutionalised inequality that was characterised by racism and other forms of discrimination, this Court was alive to the long road and difficulties that South Africa, as a nation, would have to face on the way to establishing the equal society envisaged in the Constitution. The guarantee of equal rights and dignity may not prevent racist or racially offensive conduct on the part of those who do not uphold the Constitution. As was stated in *Fourie*:

"Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human dignity requires the affirmation of self, not the denial of self. Equality therefore does not imply a

[1] *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40.

[2] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at para 41.

levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma."[3]

[6] Regrettably, so far the Constitution has had a limited impact in eliminating racism in our country. Its shortcomings flow from the fact that it does not have the capacity to change human behaviour. There are people who would persist in their racist behaviour regardless of what the Constitution says. It is therefore the duty of the courts to uphold and enforce the Constitution whenever its violation is established.

[7] The increasing number of complaints of racism at the workplace which come before our courts is a matter of concern.[4] The approach adopted by the Labour Appeal Court in *Crown Chickens* must be followed if we hope to succeed in stemming the tide against racism in the workplace. In that case Zondo JP declared:

"[T]he courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another. They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human rights. This court is alive to this role and will seek to play it fully, fairly but firmly."[5]

[8] Notwithstanding this caution, which was sounded more than 10 years ago, the presence of racism at the workplace continues unabated. This much is apparent from the cases collected by the Chief Justice in *South African Revenue Service*.[6] In that matter the Chief Justice stated:

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[3] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 60.

[4] *Modikwa Mining Personnel Services v CCMA* (2013) 34 ILJ 373 (LC) at para 23.

[5] *Crown Chickens (Pty) Ltd t/a Rockland Poultry v Kapp* (2002) 23 ILJ 863 (LAC); [2002] 6 BLLR 493 (LAC) (*Crown Chickens*) at para 35.

[6] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC).

> "My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies."[7]

[9] The firmness demanded in dealing with the scourge of racism in the workplace suggested in *Crown Chickens* was reaffirmed by Mogoeng CJ in *South African Revenue Service*. This is the backdrop against which complaints about racism in the workplace must be assessed and determined.

Background

[10] On 30 April 2013 NUMSA's members who were also Duncanmec's employees participated in an unprotected strike at the employer's premises. During that strike the workers danced and sang struggle songs. They refused to listen to managers who attempted to address them. The lyrics they sang in isiZulu were translated into the following words: "Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer".

[11] The employees rejected the employer's ultimatum that they end the strike and resume work. The employees' conduct gave rise to charges of misconduct. In count one they were charged with participation in an unprotected strike. The second charge was formulated in these terms:

> "Gross misconduct being inappropriate behaviour in that on the 20th April 2013, while participating in an unprotected strike action, you behaved inappropriately by dancing and singing racial songs in an offensive manner while you were on duty and continued to do so while defying management's lawful ultimatum to return to work."

[7] Id at para 9.

[12] A disciplinary hearing chaired by Mr Raymond Joubert was held within the period of 14-28 May 2013. Mr Joubert is not an employee of Duncanmec. At the hearing the employees were represented by Mr Simphiwe Sithole who was NUMSA's shop steward. Nine employees were charged with misconduct.

[13] At the conclusion of the hearing, the chairperson rendered a comprehensive ruling in which he found all employees guilty in respect of both charges. Regarding the penalty, he considered that other workers were not dismissed for their participation in the strike and that they were issued with final written warnings. He concluded that the same sanction should be imposed on the employees who appeared before him.

[14] In relation to the second charge, the chairperson held that the singing of the song and the dancing amounted to racism. He rejected NUMSA's averment that the video material shown at the hearing revealed that not all employees participated in the singing. The chairperson ruled that those who were captured in the video not singing were equally guilty because they were dancing to the singing of the offensive song. It is not clear from the record who of the employees fell into this category.

[15] The chairperson concluded that the charge relating to racism was so serious as to warrant dismissal, regardless of the fact that Duncanmec's disciplinary code did not make it a dismissible misconduct. He reasoned thus:

> "It is common cause that [in] ensuring efficiency, success and excellent working conditions and relationships within the workplace, there must not be any racism between various races. To thus sing out loud that the 'blacks' would be happy when 'beating' the whites/boere, amounts to hatred speech towards the 'white' race and this would undoubtedly affect relationships between 'blacks' and 'whites'.

The Chairperson does not see any reason why such conduct must be overlooked and not regarded as a dismissible offence. It is therefore that the Chairperson recommends that the accused be summarily dismissed based on charge two (2) and the accused be given a final written warning for charge one (1)."

[16] The ruling concluded by advising the employees to refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a relevant bargaining council, if they were unhappy with the outcome. NUMSA and its members were aggrieved by the ruling and challenged the dismissal in the Bargaining Council which appointed an arbitrator to decide the dispute. Ms Jeanne Gaylard was the one appointed to arbitrate the dispute. The arbitration hearing was held on 16 May 2014 and on 19 May 2014 she submitted her ruling.

[17] Although the arbitrator held that the singing of the song was inappropriate, she did not conclude that it constituted racism. She reasoned:

"While I regard the singing of the song translated to 'stand on top of the rooftop and shout that my mother is rejoicing if we hit the boers' as inappropriate, particularly within the context of a workplace, I am of the view that a differentiation between singing this song and referring to someone with a racist term needs to be drawn. This is since this song is a struggle song and there is a history to it. While this is the case the song can be offensive and cause hurt to those who hear it."

[18] Having viewed a DVD recording of the singing, the arbitrator held that the employees' conduct was not violent and that the strike was "peaceful and short-lived". She disagreed with the employer's view to the effect that the relationship between Duncanmec and the employees had been "tarnished irrevocably". She concluded:

"Thus when the evidence is considered holistically, I am of the view that the company did not discharge the onus and prove that the sanction of dismissal was

appropriate in the circumstances. I accordingly find the Applicants' dismissal substantively unfair."

[19] With regard to remedy the arbitrator stated:

"There has been no reason placed before me as to why the Applicants should not be reinstated. As discussed above, the evidence before me does not demonstrate that the trust relationship has broken down. Thus the Applicants must be reinstated into the same positions that they occupied prior to the dismissal, on the same terms and conditions that existed prior to the dismissal."

[20] The arbitrator ordered the employees' reinstatement but to show her disapproval of the singing, limited their compensation to a salary of three months in respect of each employee. The amount to which each employee was entitled was calculated in the award and Duncanmec was ordered to pay on or before 15 June 2014.

Award review

[21] Duncanmec was dissatisfied with the award and launched an application to have it reviewed and set aside by the Labour Court. NUMSA and the affected employees opposed the application. Although the arbitrator was cited as the first respondent, it does not appear from the record that she participated in the review proceedings in the Labour Court.

[22] In impugning the award, Duncanmec relied on its administrative justice right to a lawful and reasonable decision, as well as some of the grounds listed in section 145 of the Labour Relations Act[8] (LRA). Section 145 of the LRA authorises the review of arbitration awards if–

[8] 66 of 1995.

(a) the arbitrator has committed misconduct in relation to the duties of the commissioner as an arbitrator;
(b) the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings;
(c) the arbitrator has exceeded the arbitrator's powers; or
(d) the award has been improperly obtained.

[23] The grounds of review advanced by Duncanmec were formulated in these terms:

"[T]he first Respondent, both on the facts and the law, simply failed to rationally and reasonably determine this matter as a reasonable decision maker could have done."

To this Duncanmec added the following:

(a) The arbitrator failed to comply with the provisions of the LRA, pertaining to conducting of fair and proper proceedings in terms of the LRA.
(b) The arbitrator did not properly, reasonably and lawfully determine the factual issues and evidence properly before her.
(c) The arbitrator did not properly, rationally and justifiably apply her mind to the facts or the law in this instance.
(d) The arbitrator exceeded her powers in terms of the LRA.
(e) The arbitrator failed to properly apply the provisions of the Constitution of the Republic of South Africa in this instance.
(f) The arbitrator failed to afford the Applicant a fair and proper hearing in the circumstances and failed to properly conduct the arbitration proceedings in the circumstances.
(g) The award made by the arbitrator is not justifiable in relation to the reasons given for such award, and such award is not rational or justifiable in its merits or outcome, and is not an award a reasonable

decision maker could have come to, in respect of the determination of the relief afforded to the individual employees in this instance.

(h) The arbitrator in fact contradicted herself in her own award.

[24] In opposing the relief sought by Duncanmec, NUMSA disputed that the singing of the relevant lyrics constituted hate speech or incitement to commit violence on white people. NUMSA explained that the song was an old struggle song which was sung by workers from the time of the apartheid order. This singing was done to show defiance of authority of employers in the context of a strike. While accepting that the practice of singing such songs was more suited to the time of apartheid and that the constitutional dispensation affords workers' rights they were denied under the old order, NUMSA contended that the effects of apartheid continue to afflict the workplace in this country. The economic structure has not changed. In many companies, management still consists of whites and the general labour force comprises blacks.

[25] NUMSA argued that the singing of struggle songs during a strike serves the purpose of marshalling the workers to stand together in "solidarity and defiance of the authority of the employer whose rules and authority they were defying by holding an unprotected strike". It disputed that the singing was done as a result of racial hatred. NUMSA pointed to the non-violent manner in which the singing and dancing were carried out to make the point that the song was a rallying call for workers to unite.

[26] The Labour Court held that in the context of a strike which ordinarily involves the singing of struggle songs in support of the demand for workers' rights, it cannot be said that the arbitrator's award was so unreasonable that no arbitrator could have made it. That Court also rejected the contention that the award was vitiated by gross irregularity.

[27] On the contrary, the Labour Court endorsed the arbitrator's approach to the matter, especially to paying appropriate attention to the relevant context and the peaceful nature of the strike. In this regard the Labour Court said:

> "This Court further agrees with the distinction that the Commissioner drew between other racist cases and the current scenario in this case. It is this Court's view that the Equality Court in which the then ANC Youth League Leader, Julius Malema, now the EFF President, was found to have sung a song like this and the same needed to be balanced with the dignity of those who feel targeted by radical and militant songs is unconvincing.
>
> An argument that singing the song at the workplace had compromised the continued trust relationship between the employer and the striking employees is unsustainable. An alleged lack of remorse is in itself far-fetched in this Court's view. The employees conceded they sang the song, however they deny that it is wrong to sing it in a work environment and had the potential to cause hurt to other employees particularly white employees, however these employees' denial is understandable considering the history of the song. This denial should not be construed as a sign that the employees were not remorseful of their participation in an unprotected strike.
>
> It was not unreasonable, in this Court's considered view, of the Commissioner to have found that there was no threat to management and that the strike or protest was relatively peaceful. It is recorded that the strike was a few hours after lunch and the employees returned to work on the next working day. The Court notices that when the employees stopped work on 30 April 2013, the next day was supposed to be Workers Day."[9]

[28] Consequently, the Labour Court dismissed the application and made the award an order of court. Later, that Court dismissed an application for leave to appeal. Similarly, the Labour Appeal Court rejected the request for leave by Duncanmec, hence the present application.

[9] Labour Court judgment at paras 78-80.

Leave to appeal

[29] For Duncanmec to obtain leave, it must show that the matter falls within the jurisdiction of this Court and that it is in the interests of justice to grant leave. With regard to jurisdiction, it cannot be gainsaid that the matter raises constitutional issues. This is manifest from the grounds of review advanced in the Labour Court. The majority of them relate to the exercise of public power by the arbitrator. For example, Duncanmec complained that the arbitrator had exceeded her powers under the LRA and that she had failed to properly apply the provisions of the Constitution in this instance.

[30] Moreover, with reference to the decision of this Court in *Sidumo*,[10] Duncanmec asserted that in the process of arbitrating the dispute the arbitrator breached its administrative justice right to a lawful and reasonable decision. In *South Africa Revenue Service*, the challenge of an award based on unreasonableness was regarded as raising a constitutional issue. This Court said:

> "[T]he requirement that an administrative action be reasonable is a constitutional requirement. In challenging the reasonableness of the reinstatement, SARS is in effect questioning whether the award meets the constitutional requirements that an administrative action must be reasonable. And that is a constitutional issue."[11]

[31] What remains for consideration under the rubric of leave is whether it is in the interests of justice to permit Duncanmec to appeal. This is an inquiry that requires consideration and the weighing up of various factors, including prospects of success. Although not determinative of the enquiry, the prospects of success are a weighty factor. This is so because the granting of leave where there are no reasonable prospects may serve no purpose.

[10] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

[11] *South African Revenue Service* above n 6 at para 30.

[32] In determining whether it would be in the interests of justice to grant leave here, we must evaluate, albeit briefly, the submissions advanced by Duncanmec. It put forward two main contentions. First, Duncanmec argued that the singing of the relevant song constituted hate speech and racism. Therefore, the sanction of dismissal was justified. Second, it contended that the arbitrator applied her own sense of fairness in determining whether the dismissal was substantively unfair. Duncanmec argued that this approach was at variance with the test laid down by this Court in *Sidumo*.[12]

[33] Heavy reliance was placed on the following statement:

> "In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair."[13]

[34] With reference to the minority judgment of Ngcobo J in *Sidumo*, Duncanmec argued that the arbitrator failed to consider all the evidence placed before her in deciding the fairness of the dismissal.[14] It concluded by submitting that it was irregular and unreasonable for the arbitrator to hold that a final written warning was a fair sanction in present circumstances.

[35] Proceeding from the premise that the employees' singing amounted to hate speech and racism at the workplace, Duncanmec argued that the arbitrator's reasoning was "out of kilter with the . . . prevailing jurisprudence" which requires that racism be rooted out of the workplace. These contentions were foreshadowed in the grounds of review raised against the award in the Labour Court. If these submissions are upheld,

[12] *Sidumo* above n 10.

[13] Id at para 79.

[14] Id at paras 178 and 180.

Duncanmec would be entitled to succeed. Therefore, leave to appeal should be granted.

Issues

[36] Two issues arise on the merits. The first is whether the conduct of the employees in singing the struggle song in question constituted racism. The second is whether the impugned award was vitiated by unreasonableness.

Were the employees guilty of racism?

[37] At the outset it is important to note that the word to which Duncanmec objected is not an offensive racist term.[15] It became clear during the hearing that the only word that referred to race was "boer". Depending on the context, this word may mean "farmer" or a "white person". None of these meanings is racially offensive. This much was conceded by Duncanmec's legal representative during the hearing. However, he argued that it was the context in which the word in question was uttered which rendered the singing a racist act.

[38] Crucial to this enquiry are the arbitrator's findings which appear in the impugned award. Notably the arbitrator did not hold that the song contained racist words. Instead, she concluded that the song was inappropriate and that "it can be offensive and cause hurt to those who hear it". More importantly, the arbitrator drew a distinction "between singing the song and referring to someone with a racist term". These factual findings were accepted as correct by Duncanmec in the affidavit filed in the Labour Court in support of the review.

[15] *September v CMI Business Enterprise CC* [2018] ZACC 4; 2018 (39) ILJ 987 (CC); 2018 (4) 483 BCLR (CC).

[39] NUMSA did not take issue with the finding that the singing of the song at the workplace was inappropriate and offensive in the circumstances. Therefore, I am willing to approach the matter on the footing that the employees were guilty of a racially offensive conduct. The question that arises is whether the award issued by the arbitrator was vitiated by unreasonableness.

Unreasonableness

[40] As is apparent from *Sidumo*, the genesis of the reasonableness standard of review is section 33(1) of the Constitution which confers on everyone the right to administrative action that is lawful, reasonable and procedurally fair. Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in section 145 of the LRA. However, to some extent the latter grounds may overlap with the constitutional requirements. But the reasonableness standard is sourced from section 33 of the Constitution alone. It does not form part of the overlap.

[41] *Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with

them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.[16]

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.

Duncanmec's attack

[44] In support of the proposition that it was unreasonable for the arbitrator to conclude that a final written warning was a fair sanction, Duncanmec argued that she had failed to consider factors she was required to take into consideration like the breakdown of the trust relationship; the existence of dishonesty; the possibility of progressive discipline; the existence of remorse; the job function; and the employer's disciplinary code and procedure.

[45] There is no substance in this submission. With regard to the relationship of trust, the arbitrator held that "the evidence before me does not demonstrate that the trust relationship has broken down". This demonstrates that she considered the issue. She concluded that the employees must be reinstated on the same terms and conditions that existed before the dismissal.

[46] Some of the factors mentioned by Duncanmec as having been overlooked are not even relevant. For example, dishonesty has no bearing on whether it was fair to dismiss employees for committing a racially offensive misconduct. And so was the failure to take into account the employer's disciplinary code and procedure. The ruling of the disciplinary

[16] *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council* [2010] ZALAC 25; (2011) 32 ILJ 1057 (LAC) at para 18.

hearing makes it plain that Duncanmec's disciplinary code did not prohibit the singing of struggle songs. As a result, the employees were not charged with violating the code. It would have served no purpose for the arbitrator to have paid regard to the code.

[47] Duncanmec also accused the arbitrator of having gone soft on racism and argued that dismissal was the only sanction appropriate for such misconduct. The argument lacks merit and rests on a mistaken premise. The arbitrator's award does not say that the employees were guilty of racism. Instead, the arbitrator held that the song was inappropriate and could be offensive; hence a distinction was drawn between the singing and the use of racist terms.

[48] But even if the singing had amounted to uttering racist words, dismissal of the employees could not follow as a matter of course. There is no principle in our law that requires dismissal to follow automatically in the case of racism. What is required is that arbitrators and courts should deal with racism firmly and yet treat the perpetrator fairly. Thus in *South African Revenue Service* this Court said:

> "*None of this should lead to the mistaken belief that the use of very strong derogatory language like kaffir would always militate against the reinstatement of an offending employee*. *Crown Chickens* does not purport to lay that down or articulate it as an inflexible principle. On the contrary, the Court underlined the particularly crucial role that courts have to play of ensuring that racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly. *The notion that the use of the word kaffir in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irreconcilable with fairness*. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable."[17]

[17] *South African Revenue Service* above n 6 at para 43.

[49] Realising that the law did not support the proposition that every employee guilty of racism should be dismissed, Duncanmec's legal representative changed course and urged this Court to lay down such rule to facilitate the eradication of racism in the workplace. This invitation should be declined because such a rigid rule would be inconsistent with the principle of fairness which constitutes the benchmark against which dismissals are tested.

Was the award unreasonable?

[50] The issue that remains for consideration is whether the impugned award was vitiated by unreasonableness. In determining this question the Court is required to examine the award for the reasons motivating the decision reached. If the reasons advanced rationally support the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified. This would be the position even if the Court does not agree with the reasons furnished. Section 33 of the Constitution does not guarantee a perfect or correct administrative action but a reasonable one.

[51] It is apparent from the award that, having held that the singing of the song was inappropriate but distinguished it from crude racism, the arbitrator paid attention to the context in which the misconduct was committed. She took account of the fact that this occurred during a strike within a tense atmosphere. But underscored the fact that the strike was "peaceful and short-lived". Following consideration of the evidence which included the findings made by the chairperson of the disciplinary enquiry and the employees' personal circumstances and the fact that all had clean records, the arbitrator held that the dismissal was substantively unfair.

[52] It will be recalled that in determining the fairness of the dismissal the arbitrator was applying a "moral or value judgment to established facts and

circumstances".[18] A reading of the award shows that the arbitrator considered the competing interests of Duncanmec and the employees. Having weighed them up, she concluded that a final written warning and reinstatement, coupled with a limited compensation was a fair outcome. All of this illustrates rationality in the reasoning leading up to the impugned decision. Therefore, the reasonableness requirement has been met. Since the other grounds of review were not established it follows that the appeal must fail. For reasons set out in the judgment of the Labour Court which accord with the general rule in labour matters, there should be no order as to costs.

Order

[53] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[18] *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd* [1996] ZASCA 69; 1996 (4) SA 577 (A) at 589.

For the Applicants:	S Snyman instructed by Snyman Attorneys.
For the Respondents:	C Orr and N Mncube instructed by Ruth Edmonds Inc.