IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1043/18

In the matter between:

SAMWU obo MP MAKIBINYANE & OTHERS **Applicant**

and

SA LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

SURIA VAN WYK **Second Respondent**

NALA LOCAL MUNICIPALITY **Third Respondent**

Heard: **24 July 2020**

Delivered: **11 August 2020**

Summary: **Review – peremption – repudiation of contract – procedural unfairness based on failure to comply with *audi alteram partem* rule – insubordination – review dismissed with costs**

JUDGMENT

DEANE AJ

Introduction

[1] This is an opposed application brought in terms of section 145 of the Labour Relations Act 66 of 1995 (LRA) for the reviewing and setting aside of an arbitration award made by the Second Respondent (the Commissioner) under case number FSD011802, wherein it was found that the dismissal of the Applicant's members (employees) was procedurally unfair but substantively fair and ordered compensation to be paid to the employees in the cumulative amount of R102 140.00.

[2] The relief sought by the Applicant is for this court to remit the matter back for arbitration to the First Respondent to be heard *de novo*, and or substituting the arbitration award with an order that the employees were unfairly dismissed and that such dismissal was procedurally and substantively unfair, which dismissal warrants retrospective reinstatement with full benefits alternatively compensation.

[3] The Third Respondent raises the issue of peremption in that the Applicant never indicated any intention to challenge the arbitration award at the outset of receiving it and that the Applicant's members were paid in terms of the award and retained the award without dispute or protest on their part and prays for an order dismissing the review application.

[4] The Third Respondent also argues that the review application is defective because whilst the Applicant refers to Annexures A and B, neither was attached. Considering the missing annexures, the Third Respondent claims that the review application is incomplete and is, therefore, not a valid review application which should be corrected and that only until such time that the defect is corrected can this review be considered a valid review application.[1]

[1] Third Respondent's Opposing Affidavit at pg 51 of the Index of Pleadings.

Points *in limine*

The issue of peremption

[5] Before considering the Applicant's grounds of review, I will first deal with the issue of peremption.

[6] Peremption is a well-known principle in our law and has been applied by this court and the Labour Appeal Court (the LAC) in numerous labour disputes.[2]

[7] In *Dabner v South African Railways & Harbours,*[3] Innes J said that "*the rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held nonproven*".

[8] In *NUMSA & others v Fast Freeze,*[4] the LAC stated that "*if a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, i.e., he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it*".

[9] The court is, therefore, enjoined to look at all the facts and circumstances and in light thereof to make a determination based on the facts of the particular case. Peremption is, therefore, fact-specific.

[2] See the cases of *Doorgesh v Commission for Conciliation, Mediation and Arbitration and others*, unreported judgment, case number CA4/2014 (dated 6 November 2015), *National Union of Metal workers of SA & others v Fast Freeze* (1992) 13 ILJ 963 (LAC), *Singh v FNB & others* unreported judgment, case number D397/2011 (dated 9 September 2014) and *Jusayo v Mudau NO & others* (2008) 29 ILJ 2953 (LC).
[3] (1920) AD 583 at para 594.
[4] (1992) 13 ILJ 963 (LAC) at pg 969.

[10] Applying the well-known principles of peremption to the facts of this case, from the papers before me, the Applicant did not acknowledge receipt of the payment as full and final settlement of the issue between themselves and the Third Respondent.

[11] The award is dated 16 April 2018. The Applicant launched the review application on 28 May 2018, within the six weeks prescribed by the LRA for reviews. Although the Applicant accepted the money, payment of which was made on 4 May 2018, they also challenged the award timeously. It is therefore clear what the attitude of the Applicant was towards the arbitration award - they did not accept it.

[12] I, therefore, find that the Third Respondent, who bore the onus of proving that the Applicant accepted the payment in compliance with the terms of the award and, as such, waived its right to subsequently challenge it, failed to discharge its onus. The acquiescence was, therefore, not proven.

[13] I now turn to the issue raised that the review application is defective.

Regarding the defective review application

[14] The Applicant has failed to attach the annexures as indicated.

[15] However having regard to the Index of Pleadings and from the Founding Affidavit, reference to the Annexures is as follows; "A copy of the Award is attached marked 'Annexure A'",[5] and "I attach hereto a copy of the questionnaire marked annexed herein marked 'Annexure B'".[6] I find that whilst it was not specifically attached as indicated the arbitration award is attached to the Pleadings and the questionnaire as referred to in the Founding Affidavit as 'Annexure B' is referenced in the arbitration award. It supports the questionnaire that was attached to the Index of Documents used at the Arbitration Hearing at pages 24-25.

[5] Index to the Pleadings pg 7.
[6] Index to the Pleadings pg 9.

[16] I am therefore satisfied that the documents are available, the review application is not defective, and I will, therefore, continue with the review application on its merits.

Material Background Facts

[17] There are three Applicant's members in this matter who were employed at the Third Respondent until the termination of their contracts and they are as follows:

Minah Pulane Makibinyane, employed in 2002, was a senior cashier at the time of termination; Mamosi Franscinah Matsela, employed in 2005, was also a senior cashier at the time of termination of contract; and Medupe Peter Mohlamme, employed in 2013 and he was a cashier at the time of termination of contract.

[18] The Third Respondent headed an investigation into financial discrepancies relating to the issuing of electricity vouchers and the employees were all suspended in May 2017, pending the investigation.

[19] In August 2017, information in the form of a list of questions was sought by the Third Respondent, from the employees.

[20] None of the employees complied as they believed the Third Respondent intended to take disciplinary action against them; same was voiced in various communications to the Third Respondent by the employees' Representative, SAMW, including in a letter dated 29 September 2017.

[21] After follow-up letters to the Applicant seeking compliance, the Third Respondent terminated the employees' contracts of employment; reason given- repudiation of contracts. None of the employees was formally charged and no disciplinary hearings held.

[22] The Third Respondent disputes that the Applicant's members were dismissed and instead argues that "*the contracts of employment were never terminated for reasons relating to allegations of financial misconduct for which they were*

placed on suspension, but rather for gross insubordination";[7] in that the Applicant's members "*refused to obey a lawful and reasonable instruction given by myself, the Municipal Manager of the Third Respondent. The refusal by the Applicants to obey my instruction was deliberate, continuous and gross. They were given ample opportunity to comply with my instruction through several letters written to them, but they still elected not to comply*."[8]

[23] An arbitration hearing was held on 12 March 2018. Both parties were represented, and the parties agreed to argue the matter in writing based on a factual matrix as indicated in the Arbitration Award.[9] Closing arguments were submitted and is attached to the Index of Documents used at the arbitration hearing. The commissioner wrote that she was provided with two bundles of documents that formed part of the proceedings and no objection was raised against any document from either party. The commissioner, therefore, considered the documents as part of the evidence in front of her.[10]

Grounds of review

[24] There are various allegations made against the commissioner the crux of which revolves around submissions that the Commissioner committed an irregularity in the proceedings when he misconceived the facts/enquiry and reached a decision that no reasonable decision-maker could make;[11] in that in considering the evidence presented to her by the Applicant, the Commissioner "*on its own accord proceeded to formulate a new charge of insubordination which was never a case advanced by the Third Respondent*";[12] that the Commissioner when finding that the dismissal was procedurally unfair but substantively fair "*reached such a decision without affording us an opportunity to present oral evidence except written submissions*";[13] that the Third Respondent's "*failure to afford us an opportunity to present our case was itself unfair and the presumption that we*

[7] Index of Pleadings pg 56 at para 11.2.
[8] Index of Pleading pg 57 at para 11.3.
[9] Index of Pleading pg 57 at para 8.
[10] Index of Pleadings pg 20 at para 9.
[11] Index of Pleadings Founding Affidavit pg 14 and see Applicant's Short Heads of Argument at para 23.
[12] Index of Pleadings Founding Affidavit pg 14 at para 9.4.
[13] Index of Pleadings Founding Affidavit pg 15 at para 9.6.

were guilty without being afforded an opportunity to state my case was shocking"[14] and that they were denied justice in that the *audi ad partem* rule was never exercised.[15]

Test for Review

[25] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable. In terms of the well-known authority of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[16] the Court said that the question to be asked was: "…*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...*".

[26] In short, for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd* (*Congress of SA Trade Unions as Amicus Curiae*) *(Herholdt*)[17] the Court stated that "…. *a result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.*"

[27] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others*[18] said "….*in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator*

[14] Index of Pleadings Founding Affidavit pg 15 at para 9.7.
[15] Index of Pleadings Founding Affidavit pg 15 at para 9.8.
[16] [2007] BLLR 1097 (CC).
[17] (2013) 34 ILJ 2795 (SCA) at para 25.
[18] (2014) 35 ILJ 943 (LAC) at para 14. The *ratio* in *Gold Fields* was followed by the LAC itself in *Monare v SA Tourism & others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers & another v Commission for Conciliation, Mediation and Arbitration & others* (2015) 36 ILJ 2038 (LAC) at para 16.

arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material."

[28] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[19] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed.[20] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others*[21] it was held: "…. *the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.*"

[29] Against the above principles and tests, I will now proceed to consider the Applicant's application to review and set aside the arbitration award of the Second Respondent, in respect of both components of the review application.

Evidence and Analysis

Ascertaining the true nature of a dispute

[30] Faced with whether there was in fact a dismissal and a subsequent jurisdictional challenge, in the Arbitration Award, the first issue that the Commissioner had to determine was, if in fact, there was a dismissal and if there was a dismissal, whether the dismissal was procedurally and substantively fair.

[19] See *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 102.
[20] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC) at para 32.
[21] (2015) 36 ILJ 1453 (LAC) at para 12.

[31] It was argued by the Applicant that the Second Respondent was called upon to decide whether their dismissal by the Third Respondent was both procedurally and substantively fair but the Commissioner failed to determine and adjudicate the true dispute by "*inventing facts not presented or which did not form part of the proceedings, such as reference to the [employees'] contract of employment*",[22] and that the Second Respondent's analysis of the evidence is incorrectly based on repudiation.

[32] There is always a duty on the Second Respondent as Commissioner in a dispute to ascertain the real nature of the issue in the dispute. In *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another (Bader Bop),*[23] it was held that "*it is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. …*"

[33] In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman N) & others*[24] the court applied the above dictum in *Bader Bop* and held that "*I accept that an arbitrator has the duty to determine the true nature of the case before the arbitrator. So much is clear. …*"

[34] In *Commercial Workers Union of SA v Tao Ying Metal Industries & others*[25] the court gave the following guidance in order to decide what the real dispute between the parties would be in a particular case: "*… a commissioner is not necessarily bound by what the legal representatives say the dispute is. The*

[22] Applicant's Short Heads of Arguments at paras 2 and 11.
[23] (2003) 24 ILJ 305 (CC) at para.52.
[24] (2013) 34 ILJ 2347 (LC) at para 57.
[25] (2008) 29 ILJ 2461 (CC) at para 66. See also *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 ILJ 2313 (LAC) at para 9; *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 ILJ 925 (LAC) at para 16.

labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration.... The dispute between the parties may only emerge once all the evidence is in."

[35] *In casu*, in deciding whether there was a dismissal or not it was argued by the Third Respondent that it accepted the repudiation of the contract by the Applicant's members and therefore no dismissal had occurred.

[36] Recently, in *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation Mediation and Arbitration & others*, Judge Van Niekerk re-emphasised the notion that the employee's breach of contract (often referred to as a "repudiation") and the acceptance thereof by an employer is in its very nature a dismissal. Judge Van Niekerk did not take lightly to having to explain a principle so trite in South African labour law.[26] The Judge further writes that: "*the definition of 'dismissal' in s 186 of the LRA expressly includes circumstances where the employer 'has terminated employment with or without notice. Whether the employer casts the termination in the contractual language of acceptance of the repudiation of a contract of employment and an election to cancel the contract, this is no more or no less than a termination of employment, with or without notice (i.e. a summary termination), which in turn, by definition, constitutes a dismissal for the purposes of s 186*".[27]

[37] Considering the nature of the dispute as it emerged from all the evidence herein, it is clear that the Commissioner had a duty to determine the true nature of the dispute in front of her and that she is not only bound by what the parties say the dispute is.

[38] The evidence before the Commissioner showed that what was not in dispute was that the Third Respondent terminated the contracts of employment after it

[26] *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation Mediation and Arbitration & others* (J2055/19) (2019) ZALCJHB 318; (2020) 41 ILJ 493 (LC) (18 October 2019)
[27] *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation Mediation and Arbitration & others* (J2055/19) [2019] ZALCJHB 318; (2020) 41 ILJ 493 (LC) at para 12.

alerted the employees in writing that their conduct was viewed as repudiation and informed them that a failure to comply with the lawful and reasonable instruction would result in the Third Respondent withdrawing from the contracts of employment.[28] Therefore it was imperative to determine whether the acceptance of the alleged repudiation amounts to dismissal. She rightly found that it was a dismissal.

[39] The Commissioner, therefore, found that there was accordingly no substance in the Third Respondent's jurisdictional challenge. There was nothing wrong in the First Respondent entertaining the dispute that was before them.

In relation to procedural unfairness

[40] It is trite that any dismissal of an employee, in order to be fair, must satisfy a prescribed requirement of procedural fairness.[29] It is equally trite that a failure to comply with the prescribed procedure in bringing about the dismissal of an employee could render a dismissal procedurally unfair.

[41] *In casu* the Applicants contracts were terminated without a disciplinary hearing.

[42] The Commissioner found "*that from the common cause facts, it was very clear that the [employees] were not provided with an opportunity to state their case before the termination of their contracts were affected. Even if the reason for the termination was the acceptance of the alleged repudiation, case law dictates that the [employees] should have been provided with an opportunity to state why their contracts should not be terminated.*"[30]

[43] The employees were dismissed without a disciplinary hearing having been convened, and therefore the Third Respondent violated the *audi alteram partem* rule, a basic tenet of procedural fairness in dismissals. In terms of the LRA, an employer must follow a fair procedure before dismissing the employee. Procedural fairness may in fact be regarded as the "rights" of the

[28] Index of Pleadings Award pg 21 at para 13.
[29] See Section 188(1)(b) of the LRA.
[30] Index of Pleadings Arbitration Award pg 26 para 29.

worker in respect of the actual procedure to be followed during the process of discipline or dismissal.

[44] I am therefore in agreement with the Commissioner's finding that the dismissal was procedurally unfair as the Third Respondent had a duty to ensure that the termination of the employees' contracts complied with the required standard of fairness.

[45] On the grievance that the employees were denied justice and that the *audi alteram partem* rule was never exercised, I agree that whilst the employees were denied this when their contracts were terminated on 15 December 2017, it should be noted that a preliminary investigation is an exercise designed to test allegations or suspicions, to find out what really happened and to establish whether there are grounds for disciplinary action.

[46] When an employer has reason to believe that an employee has committed serious misconduct, it may be necessary to conduct an investigation prior to commencing a disciplinary process. The Code of Good Practice: Dismissal (Schedule 8 of the Labour Relations Act, 66 of 1995) recommends that an investigation be undertaken by an employer to establish if there are grounds for misconduct which may warrant dismissal.

[47] The purpose of an investigation prior to a disciplinary enquiry is to establish whether factual evidence exists to show that on a balance of probabilities, the employee committed the allegations of misconduct. An investigation may also demonstrate that there is insufficient evidence against an employee to institute disciplinary proceedings and accordingly guards against hasty and potentially baseless disciplinary proceedings. Such investigations ensure that there is at least some evidence indicating that an employee has committed the allegations of misconduct.

[48] By suspending the employees pending the outcome of an investigation the Third Respondent was within its rights to do so. The Applicant contends that

"*there is no clause permitting the Third Respondent to suspend without any charges levelled against us*".[31]

[49] In *Long v SA Breweries (Pty) Ltd & others,*[32] the Constitutional Court (CC) has confirmed that where a suspension is precautionary, there is no requirement that an employee be given an opportunity to make representations,[33] "*instead, the suspension must be linked to a pending investigation and serve to protect the integrity of that ongoing process. There is an additional consideration of prejudice, though this can be ameliorated by a salary being paid during the period of suspension.*"[34]

[50] The CC continued that "*the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one.*"[35] This is supported by *Mogale*,[36] *Mashego*[37] and *Gradwell.*[38] The CC further stated that consequently, "*the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations*."

[51] In determining whether the precautionary suspension was permissible, the LC reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee.[39]

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[31] Index of Pleadings pg 12 at para 8.11.2
[32] [2018] ZACC 7 (2019) 40 ILJ 965 (CC).
[33] At para 12 citing *SA Breweries (Pty) Ltd v Long*; *SA Breweries (Pty) Ltd v Sonamzi NO*, unreported judgment Case No PR 121/16 and PR 122/16 (8 June 2017) (Labour Court judgment) at para 52.
[34] *Long v SA Breweries* at para 12
[35] *Long v SA Breweries* at para 24.
[36] *SAMWU v Mogale City Local Municipality* 2014 JDR 2216 (LC) at paras 31-2.
[37] *Mashego v Mpumalanga Provincial Legislature* (2015) 36 ILJ 458 (LC) at para 10.
[38] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) ZALAC 8; (2012) 33 ILJ 2033 (LAC) at para 44.
[39] *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* [1991] ZASCA 168; 1992 (1) SA 700 (A) at pg 739.

[52] *In casu,* the suspension was for a fair reason, namely for an investigation to take place and the reason cannot be faulted. The Courts have found that generally where the suspension is on full pay, cognisable prejudice will be ameliorated. I, therefore, find that the suspension was precautionary and did not materially prejudice the employees, even if there was no opportunity for pre-suspension representations.

[53] In this instance, regarding suspension pending an investigation, I am satisfied that the *audi alteram partem* rule was therefore not violated. Furthermore, the indication by the employees in their Founding Affidavits and Short Heads of Argument as well as their Answering Affidavits that they were not aware of the charges is rejected as the documents notifying them of their suspension details the reason for their suspension and investigations against them.

Substantive fairness

[54] From the records before me, it is evident that there are two different acts on the part of the Third Respondent that is the cause of contention in this matter.

[55] The first is in relation to the Third Respondent's suspension of the employees pending an investigation and the second act relates to the repudiation of the employee's contract based on a failure to follow lawful instructions of the employer. I have already dealt with the first part regarding the employee's suspension pending investigation above. I will therefore now deal with the second part that relates to a failure by the employees to comply when they were given an instruction by the Third Respondent to complete a questionnaire as part of an investigation into financial discrepancies. They were requested to do so on more than one occasion, but the employees refused to comply and this refusal on their part led to the repudiation of their contracts.

[56] The offence of insubordination in the workplace has been described by our courts as "*a wilful and serious refusal by an employee to obey a lawful and*

reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority.[40]

[57] Whereas in some cases, defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority,

[58] Turning to the facts of this case, I will attempt to give a timeline of events leading to the termination of the employee's contracts of employment as extrapolated from the documents before me.

- On 03 May 2017, all the employees received a Notice of Intention to Suspend regarding allegations of financial misconduct indicating that "*you have failed to receipt all electricity sales and therefore did not bank all the money received for electricity sales. In terms of a preliminary investigation it was found that for the period July 2016 to November 2016 an approximate amount of R812 000 was not banked and therefore the municipality suffered a financial loss*".

- It goes further to state that "*you have the right to make a written representation to the Municipal Manager as to why you should not be suspended*".

- On 10 May 2017, SAMWU on behalf of the employees responded to the Notice of Intention to Suspend.

- On 16 May 2017, the Third Respondent gave notice of suspension and the reasoning was as follows: "*After careful consideration I am not satisfied that your continued presence at the workplace will not jeopardise the investigation and/or hamper the investigation and/or interfere with the evidence and or witnesses*." They further write that they have decided to suspend the employees "*in order to conduct a*

[40] *Commercial Catering & Allied Workers Union of SA & another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 314H-J.

proper investigation into the allegations of financial misconduct".[41] The employees were suspended with full pay.

- On 01 August 2017, the employees were sent a letter "*Instruction to submit comprehensive written reports on financial discrepancies*" where it was stated that "*As an employee of the municipality, you are hereby instructed to provide, in writing, comprehensive answers to the following questions below….*"[42]

- On 12 September 2017, a letter was sent to the employees informing them that the investigation is still ongoing and that the period of suspension with pay was to remain in force until the investigation was finalised.[43] The communication gave reasons as to why the investigation was still pending and that it had increased its scope of the financial misconduct investigations to include the 2016/2017 financial year.

- On 29 September 2017, the employees' representative sent a letter to the Third Respondent indicating that "*our members will not provide your office with the answers as per the questions in your letter*" and indicated that their members will be represented at a disciplinary hearing.[44]

- On 29 November 2017, a letter entitled "*Final Demand to Submit Comprehensive Written Reports on Financial Discrepancies*" wherein it was stated that the investigation process was still ongoing and they view the response of the employees with "great concern" as the employees were "*only prepared to answer the questions during a disciplinary hearing*."[45] The Third Respondent writes that "*the instructions I had put to you in my letter are fair, reasonable and legal and your outright refusal to provide full and satisfactory answers on my questions amounts to nothing less than a repudiation of your contract*

[41] Index of Documents used at Arbitration Hearing pg 30.
[42] Index of Documents used at Arbitration Hearing pg 23.
[43] Index of Documents used at Arbitration Hearing Pg 26.
[44] Index of Documents used at Arbitration Hearing pg 27.
[45] Index of Documents used at Arbitration Hearing pg 46.

of service…you are hereby given until 01 December 017 to fully comply with my instructions….".[46]

- On 15 December 2017, all employees received "*termination of services due to repudiation of contract of service*" letters.[47] The contents of this letter reference another communication by the employees Representative dated 30 November 2017 wherein it is stated that the employees are only prepared to answer questions during a disciplinary hearing. The Third Respondent notes that "*I have made it clear that your continued refusal to comply with fair, reasonable and legal instructions amounts to a repudiation of your contract of service and that your continued refusal will force us into a position to accept your repudiation and our withdrawal from the contract of service*"[48] and informs the employees that the Third Respondent accepts their repudiation.[49]

[59] From the evidence before me and the timeline discussed above, the employees were requested to provide information, in the form of a questionnaire sent to them, relating to the investigation into financial misconduct. The questionnaire sought to elicit responses around reasons relating to login times of the employees, cash handling and depositing procedures, user codes and security of passwords, login details etc. They refused to comply despite being requested to do so on more than one occasion. The request to comply came from the Municipal Manager, who was considered to hold the most senior position within the municipality.

[60] The Commissioner in his award writes that "*the facts before me therefore confirm that indeed the applicants were guilty of misconduct in that they refused to obey a lawful and reasonable instruction from the respondent*" and that they were given ample opportunities to do so.[50]

[46] Index of Documents used at Arbitration Hearing pg 46.
[47] Index of Documents used at Arbitration Hearing pg 47.
[48] Index of Documents used at Arbitration Hearing pg 61.
[49] This letter dated 30 November does not form part of the bundle of documents before this court, but it is not denied by the Applicants that it existed.
[50] Index of Proceedings pg 28 at para 41.

[61] The employees, however, contend that the Commissioner formulated a new charge and to "*conclude that we refused to obey a purportedly lawful instruction to be unheard of (sic)*".[51] This grievance of the employees is also rejected as a commissioner is enjoined to go to the true nature of a dispute irrespective of what representatives say it is; and it becomes clear that the true nature of this dispute is insubordination relating to a failure to follow instructions of their employer, which refusal led to their dismissal. The reason given for their refusal was out of fear that the information will be used against them.

[62] Insubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her. It is misconduct because it assumes a calculated breach, by the employee, of the duty to obey the employer's lawful authority.[52] When an employee disregards the authority of or a reasonable and lawful instruction by an employer that amounts to insubordination.[53]

[63] As noted in *Palluci Home Depot (Pty) Ltd v Herchowitz & others*[54] ". . . *[A]cts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. The failure by an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to or defiance of the authority of the employer may justify dismissal, provided it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her.*"

[51] Index of Proceedings pg 14 at para 9.3.
[52] *National Union of Public Service and Allied Workers obo Mani &others v National Lotteries Board* 2014 (3) SA 544 (CC) at para 213.
[53] *National Union of Public Service and Allied Workers obo Mani & others* at para 57.
[54] (2015) 36 ILJ 1511 (LAC) at para 22.

[64] The Commissioner's starting point, in deciding whether or not this was gross insubordination, was to note that an employee has a fiduciary duty towards an employer and employee is expected to always act in the best interest of the employer and to comply with all reasonable and lawful instructions.[55] She then proceeded to make a distinction between the offences of gross insolence and gross insubordination. She had regard to Grogan's book on Dismissal,[56] and concluded that "*insubordination can take many forms and is obviously a matter of degree. To justify a dismissal, the issue is whether the insubordination is gross and depends on the circumstances, including the manner in which it was expressed, the position of the person whose authority is repudiated, reason for the employee's defiance and the number of times it occurs*".[57] The Commissioner went on to find that the reason given for non-compliance was not justified as the right against self-incrimination only applied in criminal proceedings when an accused testifies. The Commissioner also found that the written instruction came from someone occupying the "highest position in the municipality" and that the refusal to obey was deliberate, continuous and gross.

[65] In *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[58] the court stated that insubordination "*involved the defiance of an express direct and unequivocal instruction. The employer/employee relationship dynamic is premised on instructions being obeyed. It is intolerable that an employer is forced to negotiate day to day organisational arrangements with employees. The effect of the refusal was to undermine the working relationship …….*"

[66] Taking into account the numerous requests from the Third Respondent to the employees and the communication from the employees' representative refusing to comply with the instructions; the dicta in the *TMT Supplies* case holds true herein that an "*employer's perogative to command its subordinates is the principle that is protected by the class of misconduct labelled*

[55] Index of Proceedings pg 28 para 39.
[56] Index of Proceedings pg 28 para 42.
[57] Index of Proceedings pg 28 para 42.
[58] *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2019] 2 BLLR 142 (LAC) at para 21.

'insubordination' and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur".[59]

[67] The (wilful) deliberate and serious failure on the part of the employees to comply with a reasonable and lawful instruction of the Municipal Manager is a challenge to, or defiance of the authority of the employer and in my opinion justifies the dismissal. Furthermore, respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her.[60] Insubordination undermines an organisation's operational effectiveness; therefore there is an obligation on employees to obey an employer's instructions.

[68] Furthermore, the argument by the employees that the Commissioner "*reached such a decision without affording us an opportunity to present oral evidence except written submissions"* and that they were not given an opportunity to represent themselves is also rejected. There was an arbitration hearing. The parties were all represented. At the hearing, they all agreed that the matter would be argued on paper. This agreement can be ascertained from a reading of the transcript as a whole as well as when the Commissioner stated that "*if the whole argument falls within the parameters of common cause then the matter can simply be argued in writing*". [61]

[69] In this case and after having regard to the opening arguments of the parties in the transcribed records, the Commissioner started off by listening to the issues raised and thereafter stated *"I am kind of getting the idea that there is not too much in dispute between the parties either than the issue of whether or not there was in fact a dismissal or not*".[62] She chose to guide the proceedings and found that the most expedient manner in which to deal with the issues was to deal with it by way of written arguments. The Commissioner together with all parties established the common cause issues

[59] *TMT Services and Supplies* at para 19
[60] *Mqhayi v Van Leer SA (Pty) Ltd* (1984) 5 ILJ 179 (IC) at 182A-D.
[61] Transcribed Records pg 16 in the Index of Documents used at the Arbitration Proceedings at pg 19.
[62] See page 16 of the Transcribed Records at lines 5-9.

first and only thereafter did she guide the process in a manner that she thought was best in the circumstances. The common cause issues were established, by the Commissioner, from pages 16 – 26 of the Transcribed Record and the parties including the Applicant were requested to confirm and provide information thereupon.

[70] Once the common cause factors were established, it is evident from the transcribed records that the employees' Representative was required to confirm by the Commissioner "*from the side of the Union are you going to base your argument on any facts that I now not mentioned?*" to which the Representative states "*Madam Commissioner we are going to face our argument on our submission on the basis that there was a termination (sic)*".[63] The Commissioner confirms "*so you do not need to lead any evidence in addition to these facts to me, is only your argument that now comes together with tis facts?(sic)*"[64] and agreement was once again reached.[65]

[71] Thereafter, the Commissioner goes onto the submission of arguments and closing arguments and how it is going to be dealt with. From the transcribed records she makes it very clear that it is up to the representatives to ensure that they deal with all aspects of the common cause issues as well as the closing arguments as they are "*not goanna re-convene after I find that yes there was a dismissal and we goanna come back and listen to procedure and substance (sic)*" and she proceeds to explain to the representatives their duties in terms of the submission of written and closing arguments.[66]

[72] Regarding closing arguments, it is a fairly common practice that written closing arguments are usually sent and accepted via electronic means as opposed to oral closing arguments. In this case, agreement was reached in advance that written arguments and written closing arguments was an acceptable method and the transcribed record bears witness to this. The

[63] Transcribed Records Pg 26 at lines 1-5 in the Index of Documents used at the Arbitration Proceedings at pg 29.
[64] Transcribed Records Pg 26 at lines 5-10 in the Index of Documents used at the Arbitration Proceedings at pg 29.
[65] Transcribed Records Pg 26 and 28.
[66] See pages 28-32 of the Transcribed Records.

Applicant cannot now successfully claim that they were not granted an opportunity to be heard orally as such a statement is not a true reflection of what was agreed upon at the arbitration.

[73] The framework of the LRA accords to different decision-makers the authority to make certain decisions. Adjudging the severity of misconduct in context, is a power conferred on an arbitrator. It is partly, at least, a value judgement. The choice made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion. The defiance of managerial authority was the dominant factor, and thus dismissal was appropriate in the present circumstances. The Commissioner herein did not misdirect herself by reaching that conclusion, one which a reasonable Commissioner could certainly reach.

[74] The Commissioner's award passes the test for reasonableness set out in *Herholdt* in that it cannot be said to be entirely disconnected with, or unsupported by the evidence. The evidence before me clearly bears out the fairness and reasonableness of confirming the sanction of dismissal.

[75] In light of these considerations, the decision of the Commissioner in finding that the dismissal was procedurally unfair but substantively fair does not in my view, fall outside of a range of reasonable responses to the Applicant's case.

[76] Having due regard to the reasoning of the Commissioner on the evidence provided to her before the arbitration hearing as well as on the documents provided, it is clear from an analysis of the award that the Commissioner properly weighed up all of the evidence before her – the totality of the circumstances, in the parlance of *Sidumo* – and it is in the light of all those circumstances that she found that dismissal was a fair sanction in the face of gross insubordination of the Applicants.

[77] I see no reason, in law or fairness, why costs should not follow the result.

Conclusion

[78] In conclusion, the Applicant's review has no basis as the Commissioner's finding of procedural unfairness, but substantive fairness was substantiated by the evidence and is not in any way irregular.

[79] The conclusion that the Commissioner reached is one that a reasonable decision-maker would have come to and I am, therefore, unable to conclude that her decision was one that a reasonable decision-maker could not reach.

[80] The finding must accordingly be upheld.

Order

In the premise, I make the following order:

1. The review application is dismissed with costs.

2. The order of the Commissioner is confirmed.

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T Deane

Acting Judge of the Labour Court

Appearances:

For the Applicant: Qhali Attorneys

For the Third Respondent: Christo Dippenaar Attorneys