THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR2316/12

In the matter between:

CITY OF JOHANNESBURG	**APPLICANT**
and	
A H SWANEPOEL NO	**FIRST RESPONDENT**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**SECOND RESPONDENT**
DUMISANI JOB SITHOLE	**THIRD RESPONDENT**

Heard: **10 July 2015**

Delivered: **26 February 2016**

JUDGMENT

LEPPAN, AJ

Introduction

[1] A pre-dismissal arbitration award ("the Award") was issued by the First Respondent on 6 August 2012. The Third Respondent was found not guilty of gross insubordination. The Applicant has applied to this Court to have an award reviewed and set aside in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended ("the LRA").

[2] Since 1 June 2009, the Third Respondent held the position of Director of the Alexandra Renewal Project ("the ARP") which was listed as one of the Presidential priorities funded by National Government through the Gauteng Provincial Government. The aim of the ARP was to develop Alexandra Township with emphasis placed on high density housing. The ARP had been an ongoing project since 2001.

[3] The Third Respondent was employed on a fixed term contract but later employed on the same terms but in a full time capacity. He was required to manage and execute the objectives of the ARP. From January 2010, the Third Respondent reported to his immediate supervisor, Mr Christian Ehlers ("Ehlers") who was the then Acting Executive Director: Development Planning and Urban Management.

[4] When tensions arose between the Applicant and members of the Alexandra community, led by the ANC Youth League ("the ANCYL"), the Applicant sought to transfer the Third Respondent to a different position in its organisation. The Third Respondent refused and was subsequently disciplined for gross insubordination as a consequence of such failure to carry out reasonable and lawful instructions.

[5] In terms of the Third Respondent's contract of employment, should there be allegations of misconduct, then the parties would opt for the pre-dismissal arbitration option in terms of section 188A of the LRA. Hence the reason that the matter came before the First Respondent, as aforesaid.

The facts

[6] The MMC Councillor, Mr Ruby Matoung ("Matoung"), whose jurisdiction covered the Alexandra area, played a key liaison role between functionaries employed by the Applicant and community leaders. This was described as a form of political oversight relevant to the work of the ARP.

[7] It is common cause that Matoung requested Ehlers to attend a meeting on 11 November 2011 to discuss community grievances in respect of the ARP. This meeting was attended by representatives of the ANCYL. This meeting was precipitated by the issuance of a petition which centred upon dissatisfaction with the lack of progress of the ARP and its failure to deliver timeously on its objectives. Some examples were that poverty remained “the order of the day” and why the very slow progress of the ARP given that it had been in existence for more than 10 years. This petition claimed that “one person” stood in the way of such progress, namely, the Third Respondent. At that meeting with the ANCYL, the demand for the removal of the Third Respondent was voiced. Later that evening, another meeting followed, referred to as the "zonal leadership" meeting, with a much broader and larger audience. The issue of the Third Respondent remaining in his job was also raised but there were some community members advocating that he should stay in office. The Third Respondent called as a witness the chairperson of the Civic Association (SASCOV), Mr T Seetane, who testified to this effect, which evidence was not disputed by the Applicant.

[8] Importantly, this was not the first sign of dissatisfaction within the community as there had been previous demonstrations and a march on 27 October 2011. Ehlers testified that an "arson attempt" had occurred which was directed at the home of an official working with the Third Respondent. There was also a subsequent sit-in at the office of the Mayor.

[9] It is evident that there were concerns for the safety of the Third Respondent and others with whom he worked. It was the aim of the Applicant to "stabilise" matters and "calm" emotions down so that the Applicant could not only deliver on matters for which it was responsible but also get to the bottom of the community's grievances which would naturally take some time. Hence the motivation for the transfer of the Third Respondent to Region B as an alternative to him remaining at the ARP. This would constitute a lateral transfer[1]

[1] Transcript page 97.

but on the same or similar terms and conditions of employment. The move was supported by Matoung.

[10] Ehlers testified that the Mayor had approached both him and Matoung and indicated that:

> 'The department (the Applicant) must do something about this instability these dynamics that's taking place there, so, we had an engagement with Mr Sithole (the Third Respondent) and we said to Mr Sithole, we are not accusing him of anything but the dynamics are so sensitive and there (sic) are other threats as well that Mr Sithole has forwarded to us as well in terms of certain threats that he has received himself as well and based on that we said to them that for us to be responsible we suggest we move him sideways to another equivalent office position and that he takes that office up and that we remove him as a person in that particular office to calm the environment down in order so we can restore the order of the programme and make sure we achieve our objectives…'[2]

[11] It is also evident from Ehlers' testimony, at the arbitration, that safety was pivotal and that the Applicant was aware of its onerous obligations to maintain a safe working environment in accordance with the objectives and spirit of the Occupational Health and Safety Act, 85 of 1993, as amended ("the OHS Act").[3]

[12] The decision to seek the Third Respondent's lateral transfer was not an arbitrary one. Ehlers suggested one of the reasons for the tension was that the Third Respondent had been dealing with 'some fraudulent and corrupt matters in that office and he was exposing some of these things… He laid charges against certain people…'[4] It was evident before the First Respondent that during 2012, an article appeared in The Star newspaper in which the Third Respondent was quoted as saying he had received death threats from local ANC members following his decision to suspend 12 employees from the ARP project on allegations that they had possibly committed fraud.[5] The

[2] Transcript page 86.
[3] Transcript pages 86.
[4] Transcript pages 95-96.
[5] Transcript page 149 lines 1-11.

Applicant did not want to lose the Third Respondent's services but sought to utilise them elsewhere for reasons immediately not within its control.

[13] The Third Respondent sent a letter to Ehlers on 13 December 2011 requesting information to enable him to give positive input and respond to the proposed transfer. In particular, he sought the minutes of the meetings held on 11 November 2011.

[14] Ehlers replied on 14 December 2011 stating that it is in the best interests of the Third Respondent and his family if he was redeployed to Region B and that he should report there from 1 January 2012.

[15] On 21 December 2011, the Third Respondent emailed Ehlers advising that he still had not received the information that he had requested and that:

> 'The City has not even disclosed to me what are the details of the tasks that need to be undertaken should I consider the forced relocation. Do I have the requisite skills to perform that task[6] and further "the planning HR has not even ascertained that I know where those offices are located… how do you expect the employee to comply with an instruction if you have not empowered him with the necessary tools.'[7]

Without an explanation and documentation as requested, the Third Respondent claimed he was not in a position to make any decisions about the transfer. He said he would not carry out the instruction if not provided with the information sought.

[16] The Third Respondent was on leave from between mid-December 2011 until early and January 2012. Once he and Ehlers returned from leave after the festive season, Ehlers contacted the Third Respondent to set up a meeting with the City Manager for them to discuss the outstanding issues surrounding the move to Region B.[8] The meeting was scheduled for 30 January 2012 but later postponed to 6 February 2012 due to Ehlers' unavailability.[9] On 2 February 2012, Ms Karen Britz ("Britz"), the secretary to Mr Trevor Fowler

[6] Annexure "A" – Bundle to CCMA Hearing, page 48.
[7] Annexure "A" – Bundle to CCMA Hearing, page 48.
[8] Transcribed record page 113 paragraph 12 to 14; Annexure "A" – bundle to CCMA hearing page 48.
[9] Report prepared by Ehlers page 7 paragraph 1.

("Fowler"), the City Manager, contacted the parties informing both Ehlers and the Third Respondent that the City Manager wanted to see them urgently.[10] Ehlers and the Third Respondent attended at the City Manager's offices for the meeting. The meeting was initially conducted between the City Manager and the Third Respondent.[11]

[17] Once the Third Respondent left the offices, Ehlers had a further meeting with the City Manager. Ehlers was instructed to send the Third Respondent a letter requesting him to provide written reasons why he should not move to Region B as instructed.[12] The letter is dated 3 February 2012. The Third Respondent did not take up that opportunity. Instead, on 6 February 2012, the legal representative of the Third Respondent addressed a letter to Ehlers, requesting the reasons for the transfer and the information previously requested by the Third Respondent for him to make an informed decision.[13] A further letter dated 9 February 2012, was addressed by Ehlers to the Third Respondent and contained a request for him to report for duty at Ehlers office on 13 February 2012 at 09h00.[14] The Third Respondent emailed Ehlers on 12 February 2012 requesting a postponement of the meeting on 13 February 2012 at 09h00 due to him needing to first consult with his legal representatives. The request was duly granted and the meeting was set for 12h00 that day. On 13 February 2012, the Third Respondent contacted Ehlers to state that he had met with his legal representative and the meeting could be accelerated and hence why it took place at 10h30 that day.[15]

[18] The meeting of 12 February 2012 which was attended by Mr Domonic Zondo ("Zondo") the head of Human Resources, the Third Respondent and Ehlers. The Third Respondent communicated to Ehlers that:

18.1 He could not make a decision about his transfer because he did not have the information which he had repeatedly requested, namely the

[10] Report prepared by Ehlers page 7 paragraphs 3 and 5.
[11] Report prepared by Ehlers page 7 paragraph 6.
[12] Report prepared by Ehlers page 7 paragraph 8.
[13] Report prepared by Ehlers page 9; Annexures "A" – Bundle to CCMA hearing, page 45.
[14] Report prepared by Ehlers page 8 paragraph 1.
[15] Report prepared by Ehlers page 9 paragraph 6.

minutes of the meetings and the attendance register.[16] However, it was apparent during the arbitration that no formal minutes of these meetings were ever kept.

18.2 He did not believe he had done anything wrong or that there was valid reason to transfer him to Region B.[17]

18.3 He did not believe his life or that of his family was in danger;

18.4 He contended that the move was politically motivated.[18]

[19] The Third Respondent attended a meeting with the City Manager. The City Manager asked him whether he still wanted to pursue a political career and when he said "no", the City Manager suggested that he rather focus on building a career in administration and move to Region B. The Third Respondent continued with his refusal to transfer.

[20] Subsequent to the Third Respondent's suspension, on 19 March 2012, an arbitration hearing in terms of section 188A of the LRA was held. The charges against the Third Respondent were that in the period December 2011 to 13 February 2012, the Third Respondent had allegedly failed or refused to obey a lawful and reasonable instruction by Ehlers to be transferred from the ARP to Region B on the same or similar terms and conditions of employment. It was further alleged that the Third Respondent had ignored lawful instructions from "his superior" and that this misconduct constituted gross insubordination.

[21] The Third Respondent testified that he told the City Manager that he had no problem to move to Region B but wanted to be given a guarantee that whatever situation led him to being moved would not prejudice him. The City Manager advised that he could not give those guarantees. This was a new version which the Third Respondent gave for his unwillingness to transfer. This version regarding why he would not move, as instructed, was never put to any of the Applicant's witnesses.

[16] Report prepared by Ehlers page 9 paragraph 9 to 11.
[17] Transcribed record page 113 paragraph 24.
[18] Report prepared by Ehlers page 10 paragraph 1; transcribed record page 113 paragraph 12.

[22] The Third Respondent could have followed the instructions of Ehlers and taken up redeployment at Region B but he stalled by repeatedly asking for reasons why he should be moved. After the Third Respondent was told what the reasons were, he continued with his refusal to transfer.

[23] During January 2012 and February 2012, various meetings were held with the Third Respondent in order to persuade him to move to Region B but he continued to refuse.

[24] This led to the Third Respondent's superior suspending him and charging him with the misconduct described.

[25] The Third Respondent was subsequently found not guilty of gross insubordination by the First Respondent and that he should report for duty on 13 August 2013 at the Alexandra offices. The Applicant further suspended the Third Respondent pending the outcome of this review application.

<u>The award</u>

[26] The First Respondent made certain key findings, namely:

26.1 there was no good reason to seek the Third Respondent's transfer where he was not a poor performer;

26.2 there was no evidence that his transfer to Region B was a similar job to that which the Third Respondent had carried out in respect of the ARP project;

26.3 the Third Respondent should have been commended for taking strong action to root out corruption;

26.4 the handwritten notes of the meetings of 11 November 2011, kept by Ehlers, should have been made available to the Third Respondent , so that he could understand the rationale for his proposed transfer;

26.5 the municipal manager was not called to testify why he had ordered Ehlers to pursue the redeployment of the Third Respondent;

26.6 the decision to redeploy the Third Respondent was based purely on "political issues", unrelated to the Third Respondent's performance,

and hence could not be a fair basis to effect the Third Respondent's transfer;

26.7 an honest employee should not be redeployed "to fuel the fraudulent activities of those elected to serve the community";

26.8 that the allegations of threats on the life of the Third Respondent were not relevant, SAPS intervened and an ANCYL member who was misbehaving was "subsequently brought to book". The First Respondent found that the threats made in 2009 were of a less serious nature and accepted the Third Respondent's version that anonymous threats should be treated with "disdain".

26.9 I now turn to analyse the test for review as seen against these findings.

Grounds for review

[27] Section 145 of the Labour Relations Act[19] ("LRA") provides as follows -

> '145 Review of arbitration awards:
>
> (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award:
>
> …..
>
> (2) A defect referred to in subsection (1), means:
>
> (a) that the Commissioner;
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers.'

[28] The general principle is that a gross irregularity should concern the conduct of the proceedings rather than the merits of the decision.[20] A qualification to that

[19] Act 66 of 1995

[20] *Herholdt v Nedbank Limited (COSATU as Amicus Curiae)* 2013 (6) SA 224 (SCA) at para 10.

principle is that a gross irregularity is committed when a decision-maker misconceives his/her mandate or his/her duties in conducting the enquiry.[21]

[29] When a commissioner fails to have regard to material facts, this may constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner may have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having his/her case fully and fairly determined.[22] A review of 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 in section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The 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.[23] Material areas of fact, as well the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, and are only of any consequence if their effect is to render the outcome unreasonable.[24]

Analysis of the findings

[30] The Applicant and Third Respondent concluded a contract of employment which regulated the Applicant's right to give effect to a transfer. Clause 9.4 thereof provides that:

> 'The employee's normal place of work shall be the Pentaid House, 55 Andries Street, Wynberg. The City may, however, require the employee to work at such other places within the City's boundary / jurisdiction and within the Republic of South Africa, whether on a temporary or permanent basis, as the City may from time to time require, and may require the employee to travel internationally in performance of his duties when necessary.'[25]

[21] *Herholdt (supra)*; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).
[22] *Herholdt* at para 16.
[23] *Herholdt* (*supra*) at para 25.
[24] Herholdt (*supra*).
[25] Bundle at page 18.

[31] It is so that in seeking to give effect to clause 9.4 of the contract of employment, the Applicant sought to do so in a fair and justifiable manner by considering the complexities of the developments in the community. It was community members who were dissatisfied with the progress of the ARP project, there were serious levels of tension that had arisen and which needed to be investigated and addressed. Ultimately, what weighed on the mind of the Applicant was the need to ensure the safety of the Third Respondent and that of his family in so far as it was reasonably practicable to do so.

[32] There was no ulterior motive for the proposed transfer of the Third Respondent. It was acknowledged by Ehlers that the Third Respondent was a good performer. Ehlers likewise testified that there were no issues of incompatibility. He conceded though that the Third Respondent's obstinacy in refusing to take up a redeployment to Region B caused tension as it left the Applicant in an invidious position.

[33] The merit in the transfer lay in the Applicant's legal duty of care that it owed to its employees and, in this instance, the Third Respondent. The duty to provide a safe working environment rests upon the employer under both common law and statute. It is the working environment that must be safe and not just the actual place where work is rendered. Where the working environment is unsafe the employer would be in breach of its obligations in that regard. See: *NUM & others v Chrober Slate (Pty) Ltd*[26] and *Oosthuizen v Homegas*.[27] It is common cause that there had been ongoing disruption in the Alexandra community. There was dissatisfaction in the inordinately slow progress made in delivering on the objectives of the ARP. There was disgruntlement about the work and the role of the Third Respondent. There were divisions within the community about whether the Third Respondent was a hindrance or an advantage to the ARP project. When death threats emerged and there was a reasonable apprehension of harm to the Third Respondent, which could have eventuated, the Applicant was duty bound to take all reasonable steps to eradicate or mitigate the potential for such harm. A lateral move of the Third

[26] (2008) 3 BLLR 287 (LC).
[27] (1992) 3 SA 463 (O).

Respondent was indeed a reasonable alternative. Importantly, as Ehlers testified, the community needed to see progress on the project, the Applicant needed to deliver, it needed to identify and address the root causes of the dissatisfaction and antagonism in some quarters of the community that sought the Third Respondent's removal. A workshop was mooted as a tool to identify and address such causes. This could not be readily achieved with the Third Respondent *in situ* and hence the proposed transfer.

[34] The gravity of the harm that could have befallen the Third Respondent was not appreciated by the First Respondent. The fact that, at a later stage, one errant ANCYL member was arrested by the SA Police Services for alleged unlawful behaviour is commendable but not a reason for the Applicant to recline in a supine state and take no reasonable steps to safeguard the safety of the Third Respondent in the meantime.

[35] The Third Respondent conceded in cross-examination that the Applicant had a statutory duty to take those steps and could not be expected to "fold its arms" and do nothing.[28] The origins of that duty of care reside in the OHS Act which was not disputed by the Third Respondent other than to state that the Applicant should not "bend to political pressure".

[36] The Third Respondent conceded that the Star publication in question recorded him saying that he had received death threats. However, during his cross-examination, the Third Respondent was not convincing when he testified that the issue of safety was contrived and conveniently used by the Applicant against him. Clearly that line of argument was devoid of truth. Whether the Applicant had not taken proper steps to manage the Third Respondent's safety in 2009 did not mean it could adopt the same attitude to the threats in 2012. The First Respondent made much of this issue but it was clearly not relevant to the then recent threats of 2012, which the Applicant chose to manage differently and more responsibly.

[28] Transcript page 146 at lines 15-20.

[37] It is apparent from the award that the First Respondent paid scant attention to the Applicant's statutory duty of care and, in so doing, committed an irregularity by misconstruing the nature of the enquiry. In so doing, the First Respondent arrived at a decision that no reasonable decision make would have reached.

[38] It is also evident from the Third Respondent's testimony that he held the view that it was within his prerogative to decide whether to transfer to Region B. It was not up to him to decide this when in terms of clause 9.4 of his contract of employment, he had voluntarily consented to a transfer if determined necessary by his employer. This required the Third Respondent to adhere to his employer's instructions and transfer to Region B.

[39] If a transfer to Region B turned out to be unreasonable and unfair, the Third Respondent would have had other options such as the lodging of an internal grievance or pursuit of his Constitutional right not to be subjected to an unfair labour practice. It is so that the LRA provides no express remedy for employees who are unfairly transferred. However, the Labour Appeal Court has brought such actions within the bounds of the LRA. An example is to be found in *Nxele v Deputy Chief Commissioner, Corporate Services, Department of Correctional Services and Others*.[29]

[40] Employers are required to ensure that any transfer must accord with the provisions of sections 186(1)(e) and (2)(a) of the LRA – the transfer must not render the employment relationship intolerable; it must not constitute a demotion. In this particular case, the transfer served a public interest given the very sensitive and unique dynamics that were interwoven with the Third Respondent's duties and functions.

[41] There was no evidence to suggest that such transfer was meant to be an absolutely permanent one. What was apparent is that the Applicant wanted to reduce the temperature in its relationship with the community, conduct

[29] (2008) 29 *ILJ* 2708 (LAC).

workshops, address the issues and take matters from there. In fact, there was no evidence before the First Respondent that the Third Respondent could not be returned to Region B in the near future. The Third Respondent endeavoured to claim that he heard for the first time on 22 July 2012 that the move may be temporary. This was a disingenuous attempt on his part to distance himself from such a possibility.

[42] The Third Respondent was ambiguous about the issue of a transfer. He kept emphasising that he was entitled to access what transpired at the meetings in order for him to make a decision whether to agree to the transfer; this was despite what I have indicated regarding his contractual obligations on that score, although he was not disciplined for a breach thereof.

[43] The Third Respondent was aware of the reasons for the transfer. Ehlers testified that the discussions with the Third Respondent commenced in December 2011. The aim of which was to explain why a move to Region B was necessary. At one stage, the Third Respondent was prepared to move to Region B provided he was given certain assurances that he was "starting from a clean slate". These were guarantees that the Applicant could not furnish. It would have needed all the facts from its investigations into the community dissatisfaction before making any such commitment. The Third Respondent later contended that he could not move to Region B because he did not know what the job entailed; yet the Applicant was putting in place a transfer to a comparable position on the same or similar terms and conditions of employment. It was disingenuous for the Third Respondent to contend that he needed all the information from the meetings of 11 November 2011 before deciding what he wanted to do. He was informed of what was discussed. He knew there were no formal minutes taken but this did not stop the Applicant informing him of the issues. The Third Respondent was the author of a detailed memorandum to the Applicant, dated 3 November 2011, where he articulated the possible reasons for the friction in the relationship between the Applicant and the community.[30]

[30] Bundle at pages 70-75.

[44] At the heart of this matter is that the Third Respondent was not prepared to transfer to Region B and then endeavoured to seek an agreed settlement as an exit strategy. It is common cause that no agreement on that score was concluded but the Third Respondent never took positive steps to move to Region B. He claimed not to know where to tender his services even though he had been informed to report to Ehlers' office for the arrangements to be made and that a Ms Gina Sonte of the Applicant was on hand to take him to the venue. In this regard, the inescapable conclusion was that in the absence of a transfer on the Third Respondent's terms, he was not prepared to go there and tender his services. This evidence was lost on the First Respondent. This is an inescapable conclusion given that even the City Manager met with the Third Respondent for a lengthy period and explained why he should move to Region B but the Third Respondent again refused.

The First Respondent was critical about why the City Manager was not called by the parties to testify to corroborate the evidence of Ehlers. The redeployment issue was not in dispute between the parties more particularly given the terms of the Third Respondent's contract of employment. There was also no factual dispute that City Manager had met at length with the Third Respondent.

<u>The findings on the reasonableness of the instruction</u>

[45] The instruction was reasonable in that it was based on the following irrefutable evidence:

45.1 There were death threats against the Third Respondent because of his role in the project.

45.2 There were threats against the employer and its other employees.

45.3 The programme was being destabilised as a result of disaffection by certain members of the community who challenged the role played by the Third Respondent.

[46] The First Respondent made the following finding:

> '[127] I do understand the delicate situation Ehlers found himself in – after all, he was a paid city employee and I can imagine the amount of undue influence the politician would be able to exhort on him.'

[47] There was no evidence presented to suggest that Ehlers was unduly influenced by any politician. Ehlers testified that he was the acting executive director in charge of the project at that time. He took a decision that it was in the best interest of the Third Respondent, his co-employees and the safety of the property of the Applicant to transfer the Third Respondent. This was in order to defuse the volatile political situation in Alexandra and to enable the Applicant to investigate the matter further.

[48] The First Respondent dealt with the evidence and concluded that the instruction to the Third Respondent did not meet the requirement of it being a fair and just instruction based on the performance of his designated duties,[31] yet poor performance was not an issue in this matter.

[49] Her conclusion is not one that a reasonable maker could have reached in the light of the evidence and the issue she was called upon to decide.

Gross insubordination

[50] The Labour Court has distinguished between insolence (repudiation by an employee of his duty to show respect) and insubordination (refusal to obey an employer's instructions).[32] Both forms of misconduct are properly embraced by the terms of 'insubordination' as used in Schedule 8 Code of practice: dismissal in the Labour Relations Act of 1995 ("the Code of good practice").

[51] Insubordination is possibly a more serious offence because it presupposes an intentional breach by the employee of the duty to obey the employer's instructions. The Code requires that defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent

[31] Award paragraph 137.
[32] J Grogan Workplace: Juta (11th edition) at pages 251-255.

and deliberate, and that the employer should adduce proof that the employee was guilty of defying an instruction. This the Applicant succeeded in proving.

[52] Grogan, in Employment Law, states the following:[33]

> 'The best measure of the gravity of insubordination and/or 'insolence' is the effect it has on the employment relationship. Other things being equal, an isolated refusal to carry out an instruction is less likely to destroy the relationship between the employer and the employee than sustained and deliberate defiance of authority. The latter form of insubordination is well illustrated by *Theewaterskloof Municipality v SALGBC* (Western Cape Division). The Labour Court held that a senior manager who accepted payment of an allowance well knowing that he was not entitled to it, then offered to repay the amounts in derisory instalments, had deliberately breached the trust relationship. Given the destruction of the employment relationship and his total lack of remorse, the employee could not reply on either the general right to progressive discipline or on his long and previously unblemished service record. The court upheld the employee's dismissal.'

[53] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,*[34] the Labour Appeal Court held that '[t]he offence of insubordination in the workplace has, in this regard, been described by the 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 an employers' authority' and in that regard, the Labour Appeal Court referred to the decision of *Commercial Catering and Allied Workers' Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*.[35]

[54] The Third Respondent was insubordinate in a serious manner. He was asked since December 2011 to transfer to Region B but repeatedly and defiantly refused. Even when he was given a last opportunity to make representations why he should not be suspended for such repeated refusal to carry out his employer's instructions, he failed to do so. He could have relented and

[33] Grogan page 253.
[34] (2015) 5 BLLR 484 (LAC) at para 19.
[35] (1989) 10 ILJ 311 (IC) at 314H-J.

followed the instructions of the Applicant and moved to Region B. The Third Respondent refused to transfer.

[55] The Third Respondent made excuses, including that he did not know where Region B was. Others were prepared to assist him in that regard, yet he ignored this opportunity.

[56] The redeployment did not alter the Third Respondent's terms and conditions of employment in so far as benefits and salary were concerned and it was at the same level with the same status because it was a director position. He was not being prejudiced in that regard either.

[57] The First Respondent's award cannot stand. She arrived at a decision that a reasonable decision maker could not have reached.

[58] Further, the impact of the Third Respondent's misconduct prevented the Applicant from being able to carry out and comply with its statutory duty of care.

Condonation

[59] The replying affidavit was filed late and condonation was sought. It is so that condonation is not for the asking, however, this Court can have regard to the fact that the progress of the dispute was far advanced at that stage when the delay happened and it occurred in part over the festive season. If one has regard to the content of the replying affidavit, much of it deals with argument. In the interests of this matter reaching finality, there is no prejudice to the parties in these circumstances.

Order

[60] In the premises, I make the following order:

1. Condonation for the late filing of the replying affidavit is granted.
2. The Award is reviewed and set aside and substituted with:

   "The dismissal of the Third Respondent is substantively fair"

3. There is no order as to costs.

Leppan, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	F J Nalane (Advocate)
Instructed by:	Nozuko Nxusani Inc
For Third Respondent:	F A Darby (Advocate)
Instructed by:	D and K Attorneys Inc