THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1993 / 13

In the matter between:

TUMISANI PATRICK MNGUNI **Applicant**

and

COMMISSIONER PEARL MBEKWA N.O. **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

WESTONARIA LOCAL MUNICIPALITY **Third Respondent**

Heard: **20 April 2016**

Delivered: **27 October 2017**

Summary: Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with evidence on record – arbitrator's decision regular and sustainable – award upheld

Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence by arbitrator – assessment and determination of evidence unassailable – findings must stand

Misconduct – intimidation and insolence – principles considered – employee clearly insolent and behaving in intimidatory manner – employee guilty of misconduct – award upheld

Dismissal – consideration of appropriate sanction – misconduct gross – dismissal a fair and appropriate sanction in the circumstances – award upheld

Review application – part of record missing – consequences to review application – in the interest of the parties to decide review on the merits

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is one of those matters that seems to be never-ending. The applicant was dismissed by the third respondent as far back as 3 March 2009, now approaching a decade ago, and has twice turned in the bargaining council and once in this Court. Once again, this unfortunately is an example of the kind of situation that simply does not fit in comfortably with the objective of speedy resolution of employment disputes. Hopefully this matter can now be concluded.

[2] What is now before me to decide is a review application by the applicant to review and set aside an arbitration award made by the first respondent in her capacity as an arbitrator of the South African Local Government Bargaining Council ('the second respondent'). This application has been brought in terms of Section 145, as read with Section 158(1)(g), of the Labour Relations Act[1] ('the LRA').

[1] Act 66 of 1995.

[3] As touched on above, this matter has as its origin the dismissal of the applicant by the third respondent on four charges of misconduct, on 3 March 2009. The applicant challenged his dismissal as an unfair dismissal to the second respondent, and was successful in that challenge. In an arbitration award dated 26 February 2010, arbitrator Khoza appointed by the second respondent to arbitrate the matter found that the applicant's dismissal was substantively unfair, and directed that the applicant be reinstated. The third respondent launched a review application to challenge this arbitration award on 22 April 2010, which application was brought under case number JR 940 / 10.

[4] The third respondent's review application under case number JR 940 / 10 ultimately came before Basson J for determination, on 24 January 2012. On this occasion, the third respondent in turn was mostly successful. Basson J granted an order dismissing the third respondent's review application pertaining to charges 1 and 3 in respect of the misconduct for which the applicant was dismissed. But the learned Judge upheld the third respondent's review application where it came to charges 2 and 4 in respect of the misconduct for which the applicant was dismissed. The learned Judge remitted the matter back to the second respondent for determination *de novo* before another arbitrator, but only in respect of charges 2 and 4.

[5] The dispute then indeed proceeded back to the second respondent, and on this occasion, the first respondent was appointed as arbitrator to decide the matter. The dispute came before the first respondent for arbitration on 10 and 28 August, 17 October, 19 November, and 12 December 2012. The arbitration continued on 28 February, 29 April, and then concluded on 10 and 11 July 2013. Following the conclusion of the arbitration proceedings, and in an arbitration award handed down on 30 August 2013, the first respondent found in favour of the third respondent and decided that the applicant's dismissal by the third respondent was fair. The first respondent then dismissed the applicant's unfair dismissal claim. It is this determination of the first respondent that gave rise to the current review application.

[6] The applicant's review application was filed on 16 September 2013, and was thus brought within the 6(six) weeks' time limit under Section 145[2] of the LRA. The review application is accordingly properly before this Court for determination. It must however be stated, from the outset, that the first respondent found that the applicant had only committed the misconduct in respect of charge 4.2 of the charges levied against him, and upheld his dismissal as being fair on that charge only. It is therefore only necessary to consider the relevant background facts relating to this charge, which I will proceed to summarize next.

The relevant background

[7] The applicant commenced employment with the third respondent on 16 February 2007, and was employed as a VIP protector in the third respondent's mayoral department.

[8] The misconduct for which the applicant was dismissed took place on 18 August 2008. On that day, the applicant attended at the third respondent's testing station, where he conducted himself in an unacceptable manner, which will be elaborated on below.

[9] Prior to these events, there had been a history of the applicant coming to the testing station and misbehaving. Johanna Magrieta Moolman ('Moolman'), a drivers' licence testing officer employed at the testing station, stated that some time before the incident giving rise to the charge against the applicant, she found the applicant in the cash office, where only the cashiers are allowed. When Moolman asked him to leave the cash office, he told her that he was her boss and behaved in a rude and aggressive manner towards her.

[10] Michael Freddie Schoeman ('Schoeman') was the testing station manager at the time. Schoeman had been told by employees (which included Moolman, and two of the cashiers being Mrs Steenkamp and Mrs Molekwe) that a certain individual had come to the testing station, accessed restricted areas, and behaved in a rude and aggressive manner. These employees were referring

[2] Section 145(1)(a) reads: '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 - (a) within six weeks of the date that the award was served on the applicant …'

to the applicant, but Schoeman did not know who he was. Schoeman stated that he told employees that if this person came again, they should call him.

[11] On 18 August 2008, Mrs Steenkamp called Schoeman to tell him that the individual concerned was there again. Schoeman left what he was doing and found the applicant in the cash office where Molekwe sat. Schoeman asked the applicant who he was. The applicant then informed Schoeman that he (the applicant) was their new boss and they all had to listen to him. The applicant behaved rudely and aggressively towards Schoeman. All of this took place in full view of members of the public and other employees.

[12] In order to try and diffuse what was happening, Schoeman asked the applicant to accompany him to his (Schoeman's) office. The applicant initially resisted, but then acceded to the request. Once in Schoeman's office, Schoeman asked the applicant to identify himself. The applicant took out his identity card and threw it at Schoeman. The applicant proceeded to tell Schoeman once again that he, the applicant, was now the boss at the testing station and everyone had to listen to him. The applicant was shouting at Schoeman throughout. Moolman, who had the office next door to Schoeman, heard the entire altercation, and confirmed that the applicant was rude and aggressive towards Schoeman.

[13] Schoeman also stated that the conduct of the applicant disrupted him in fulfilling his normal duties, and he in fact had to leave a member of the public he was attending to in order to deal with the applicant. Also, all of the above took place in the context of the applicant persisting in entering an area of the testing station where he was not allowed.

[14] The aforesaid conduct of the applicant then formed the basis of one of the misconduct charges proffered against the applicant in disciplinary proceedings that followed. For the reasons set out above, the other charges are no longer relevant. The charge, as formulated, had the general label of 'intimidation, verbal abuse and disrupting the operations of the employer'. The specifics of the charge were:

> 'That the employee is guilty of misconduct by contravening paragraph 2(d) of the Code of Conduct, by failing to act in the best interest of the Municipality

> and in such a way that the credibility and integrity of the Municipality is not compromised read with paragraphs 1.2.9 and 1.2.11 of the Disciplinary Procedure by failing to refrain from any ruse, abuse, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee or member of the public or with others in any form of action, which will the effect of disrupting the operations of the employer. … The employee on or about the 18th of August 2008 again arrived at the Testing Station, being the premises of the employer utilized for purposes of a testing station for the obtaining of drivers' licences, and on his arrival acted in rude and aggressive manner towards Mr Beertjie Schoeman. Further on the abovementioned date being the 18th of August the employee's actions disrupted the duties of Mr Schoeman and effectively the operations of the employer.' (sic)

[15] Disciplinary proceedings were then convened before one J A Motepe, in which the applicant was represented by his chosen SAMWU official. In a comprehensive written ruling dated 25 February 2009, the applicant was found guilty of all the charges against him, which included the charge referred to above. It is also clear from the ruling that the chairperson considered the issue of an appropriate sanction. The chairperson recommended that the applicant be dismissed, and this recommendation was then implemented by way of a letter of dismissal by the third respondent to the applicant on 3 March 2009.

[16] The applicant then challenged his dismissal as an unfair dismissal dispute to the second respondent, and as discussed above, successfully so. This was however overturned on review and sent back to the second respondent for determination *de novo* on *inter alia* the above charge. On this occasion, it came before the first respondent who then upheld the dismissal of the applicant on the above charge, finding the applicant's dismissal to be substantively and procedurally fair. Now it is the applicant's turn to challenge this finding of the first respondent on review, and it is this review application that is now before me.

The test for review

[17] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] Navsa AJ held that the

[3] (2007) 28 ILJ 2405 (CC).

standards as contemplated by Section 33 of the Constitution[4] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[5]

[18] Accordingly, in every instance where this constitutionally suffused Section 145(2)(a)(ii) of the LRA is sought to be applied by a review applicant to substantiate a review application, any failure or error of the arbitrator relied on must lead to an unreasonable outcome arrived at by the arbitrator, for this failure or error to be reviewable. Therefore in my view, what the review applicant must show to exist in order to succeed with a review application in this instance is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, then that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then show further that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order 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 and Another*[6] the Court said:

> '… 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.'

[19] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold*

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[4] Constitution of the Republic of South Africa, 1996.
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] (2013) 34 *ILJ* 2795 (SCA) at para 25.

Mine) v Commission for Conciliation, Mediation and Arbitration and Others[7] 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 arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[20] 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.[8] 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, with the view to establish whether this material and issues can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material and issues, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed.[9] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[10] 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.'

[7] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and 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 and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[8] See *Fidelity Cash Management* (*supra*) at para 102.
[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[10] (2015) 36 ILJ 1453 (LAC) at para 12.

[21] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the first respondent.

Grounds of review

[22] The applicant's case for review must be made out in the founding affidavit, and supplementary affidavit.[11] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[12]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[23] In the founding affidavit, the applicant's review grounds consist mostly of the applicant in essence quoting from the first respondent's award, and then disagreeing with what was recorded, and then suggesting that such findings were irregular and unreasonable. No proper motivation is provided as to why these findings are reviewable. This is not a proper manner in which to articulate grounds of review. It must be illustrated in sufficient particularity as to why the findings made by the first respondent were irregular, and then further, an unreasonable outcome.

[24] What I can gather from the founding affidavit is that the applicant's submission is that the first respondent's finding that the applicant had intimidated Schoeman because the applicant had suggested he was Schoeman's boss and an HOD was reviewable, because Schoeman did not specifically testify to this effect and the first respondent made this deduction of her own accord.

[25] The applicant also contends that the first respondent ignored material evidence, to the effect that Schoeman was called to come to the cashier's office, where the applicant was, to confront the applicant about what he was

[11] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27. The applicant did not file a supplementary affidavit.
[12] (2010) 31 ILJ 713 (LC) at para 27.

doing there. According to the applicant, this meant that Schoeman decided to leave his workstation, and it was not the applicant that disrupted Schoeman's work, as the first respondent found to be the case.

[26] The applicant's supplementary affidavit in terms of Rule 7A(8)(a) does not fare much better where it comes to grounds of review. Only one proper ground of review is raised therein, being that the first respondent committed a reviewable irregularity in finding that the trust relationship between the applicant and the third respondent had broken down. The supplementary affidavit does not say why this is so, other than indicating that legal argument in this regard would be submitted.

[27] I will now decide the applicant's review application based on these grounds of review.

Evaluation

[28] This matter can be decided by first having regard to the undisputed facts. It was never disputed that the applicant was at the testing station on 18 August 2008 and that he does not work there. It was also not disputed that he accessed the areas of the testing station that were not normally accessible, and that he was asked what he was doing there. Schoeman indeed had to deal with the applicant, and the applicant did inform Schoeman that he was Schoeman's boss. Finally and on the undisputed facts, the applicant certainly raised his voice, and there was an altercation between him and Schoeman.

[29] In this context, and considering the charge as it was brought against the applicant, the issues the first respondent as arbitrator had to decide was relatively simple. She had to decide whether the applicant in his altercation with Schoeman shouted at him, was rude, aggressive and intimidatory towards him, and further whether his conduct had the effect of interrupting normal work activities at the testing station. If the first respondent accepted that the applicant had so transgressed, then the first respondent had to decide whether the applicant had earned his dismissal as a fair sanction. It is clear from a reading of the first respondent's award and the reasoning contained therein that she indeed appreciated that the matter hinged on deciding these

issues, which she then did. Her approach in deciding the matter is in my view unassailable.

[30] What did the evidence before the first respondent then show where it came to answering these questions? Both Moolman and Schoeman testified in the arbitration. Moolman confirmed all the events relating to the conduct of the applicant discussed above, as well as the fact that he was not allowed in the cash office area. Schoeman also testified about all the events summarized above. Schoeman was adamant that he never shouted back at the applicant. He explained how he was interrupted in his work by the events that took place. It may be stated that at the time of the arbitration, Schoeman had retired and was no longer employed at the third respondent, and thus had no skin in the game, so to speak.

[31] The final relevant witness for the applicant was Thabo Ndlovu ('Ndlovu'). He was the municipal manager of the applicant. He testified that considering the misconduct the applicant had been found guilty of, there was no prospect of a continuing employment relationship between the parties, and this relationship was irretrievably damaged. In particular, Ndlovu was concerned about the intimidation component of the charge. He described the misconduct to be very serious. He also stated that a proper example had to be set throughout the municipality, and if the applicant was not properly dealt with, this could have a negative impact in the organization. Ndlovu mentioned an incident where he met the applicant in a lift (he did not even know the applicant), and the applicant twice asked him why he hated him, despite the fact that he did not even know the applicant. He considered the attitude of the applicant worrying. Under cross examination, Ndlovu said that the misconduct of the applicant was something that resorted under his area of responsibility. He also said that it was not just about intimidation, but all the other issues 'linked to' the case should also be considered.

[32] Where it came to the case of the applicant, most of his evidence is missing from the record (which I will deal with later). According to what the first respondent recorded in her award, the applicant testified that he was entitled to be at the testing station and in the cash office, by virtue of the fact that he considered himself as HOD of VIP protection. He said that it was Schoeman

who accosted him, and demanded to know what the applicant was doing in the cash office where people were working with money. According to the applicant, he said that he expected Schoeman to greet him first, and was not happy with the manner in which Schoeman had asked him what he was doing there. The applicant admitted that Schoeman asked him to come to Schoeman's office where he showed Schoeman his access card. The applicant stated that he was never rude towards Schoeman nor shouted at him, but admitted he told Schoeman he was Schoeman's HOD and his boss. The applicant also said that he never disrupted Schoeman in his work.

[33] The applicant's only other witness was Lesebo Papo ('Papo'), the assistant manager: EAP and OHS. Most of his testimony related to the absence from work charge against the applicant, which is no longer a relevant consideration in these proceedings. Papo testified that the applicant was head of VIP protection, but did add that this was as far as he was concerned not a senior position. Papo testified that the applicant's access card gave him access to all areas at the testing station.

[34] Therefore, and where it came to the conduct of the applicant complained of, the first respondent was confronted with two mutually destructive cases, only one of which could be true. The first respondent has to decide which case to accept. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[13]

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him'.

[35] The first respondent accepted the version of Schoeman. In doing so, the first respondent in fact came to a proper and reasoned conclusion. She specifically considered a number of critical probabilities, one of which was the fact that the applicant had told Schoeman that he (the applicant) was Schoeman's HOD and his 'boss'. As touched on above, one of the applicant's grounds of review was that because Schoeman did not specifically testify that he was intimidated because the applicant told Schoeman he was Schoeman's HOD / 'boss', the first respondent was not permitted to draw such an inference. But nothing can be further from the truth. In deciding which of the mutually destructive cases to

[13] (2011) 32 ILJ 723 (LC) at para 9.

accept, the first respondent must have regard to probabilities.[14] Probabilities mean, as said in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[15] that the inference must be drawn from the evidence which would be the 'the most natural or acceptable inference'. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[16] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

[36] It was thus permissible for the first respondent to infer from the testimony presented (which included testimony by the applicant himself) that the statements to Schoeman to the effect that the applicant was Schoeman's HOD and boss was intended to intimidate Schoeman. In my view, it would actually be difficult to think of any other reason why the applicant would say this to Schoeman in the circumstances. These statements by the applicant to Schoeman must also be considered in the context of it being made in a rude and aggressive manner, and the applicant being confronted about being in a restricted area. In *National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others*[17] the Court dealt with comparable situation to the matter *in casu*, and said:

> '… Mr Motloba shouted at Ms Bezuidenhout; he was aggressive and enraged on account of the accusation made by the group of employees that he had agreed with Johnson Controls' interpretation of the collective agreement without their mandate. It is also probable that, in a fit of anger, Mr Motloba pointed and poked Ms Bezuidenhout with his finger as a display of his aggression. His level of aggression was such that Ms January thought that he

[14] In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5 the Court said: '…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...'.
[15] (2000) 21 *ILJ* 2585 (SCA) at para 9. See also *SA Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at para 35.
[16] 1985 (3) SA 916 (A) at 939I-J. See also *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E; *National Union of Mineworkers and another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at paras 36 – 37.
[17] (2017) 38 ILJ 1626 (LAC) at para 42

> would strike at Ms Bezuidenhout. He had the intention to act as he did. Mr Motloba's downright denial that he did not point at Ms Bezuidenhout or poked her with his finger must be rejected.'

The Court concluded as follows based on these facts:[18]

> '… there was sufficient evidence which showed that Mr Motloba threatened and intimidated Ms Bezuidenhout. As already highlighted, he invaded Ms Bezuidenhout's personal space and shouted at her at a relatively short distance …'

The applicant behaved similarly towards Schoeman, save only for the fact that the applicant at least did not touch Schoeman. The first respondent's conclusions in this regard is justified, and cannot be seen to be unreasonable. There is thus no merit in this ground of review.

[37] The evidence of Schoeman and Moolman emerged unscathed from cross examination. I am satisfied from a reading of the record that their evidence was cogent, and without any material contradiction. They also corroborated one another in all the relevant respects. There was no reason for the first respondent to not have preferred, and then rely, upon their evidence. As to the applicant witness Papo, he was argumentative and at times evasive under cross examination. He did not want to make pertinent concessions that were called for. His testimony in any event did not seek to contradict what had been testified to by Schoeman and Moolman in any way, as to the events on 18 August 2008.

[38] The entire evidence in chief and part of the cross examination of the applicant has not been transcribed. It is the duty of the applicant to place such transcript before the Court in order to support his review application, and if the transcript is lost, or incapable of being transcribed, the applicant should attempt a reconstruction.[19] In the supplementary affidavit, the applicant has set out the

[18] Id at para 46.
[19] See *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 931 (LAC) at para 13; *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at para 43.

particulars of his efforts in obtaining what was initially a missing part of the recording of the arbitration, containing the applicant's evidence, which was later obtained. This recording later obtained then constituted the supplementary record filed by the applicant. But still, there is no explanation of any kind about the missing part of the evidence in this supplementary record and what was done to reconstruct that missing part. The applicant has elected to proceed with the review application despite this missing part of the record, and the third respondent has taken no issue with this course of action proposed. Considering the past history of this matter, it is clear to me that both parties want to dispose of this matter, now, and on the merits, once and for all.

[39] I have to say that without the bulk of the applicant's evidence, it is difficult for me to evaluate the applicant's evidence and determine whether the first respondent may have committed a reviewable irregularity in considering, and then determining, such evidence.[20] As the court said in *Uee-Dantex Explosives (Pty) Ltd v Maseko and Others:*[21]

> 'When this court exercises its powers of review under s 145 of the Act, the point of departure for any debate concerning challenges made to the conduct or decisions of a commissioner is what was before the commissioner during the proceedings. What was before the commissioner, is constituted by the record of the proceedings. …'

[40] The applicant has pertinently stated that he is still prepared to proceed with the review application with the record as it stands, which the applicant submitted would be sufficient to substantiate his review application. The applicant is of course free to decide to do so.[22] In *Doornpoort Kwik Spar CC v Odendaal and Others*[23] it was held:

[20] Compare *Francis Baard District Municipality v Rex NO and Others* (2016) 37 ILJ 2560 (LAC) at para 25.
[21] (2001) 22 *ILJ* 1905 (LC) at para 22; See also *Ndlovu v Mullins NO and Another* (1999) 20 *ILJ* 177 (LC) at paras 13-14.
[22] See *Papane v Van Aarde No and Others* (2007) 28 ILJ 2561 (LAC) at para 28.
[23] (2008) 29 ILJ 1019 (LC) at para 7.

> '… In such circumstances the court will decide whether or not the award is reviewable by looking at all the evidence available, the documentary evidence and the record as incomplete as it may be.'

[41] The applicant was the only one who testified in support of his case about the events on 18 August 2008, other than Moolman and Schoeman, whose evidence I was able to consider. There is thus nothing by way of external testimony to the contrary against which to test their evidence. As such, this review application can only be decided on the basis of the testimony of Moolman and Schoeman as to the events on the day, and that of Ndlovu where it comes to the issue of sanction, and if this turns out to be fatal to the applicant's application on the merits, then so be it. In *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others*[24] the Court said:

> '…. In the present circumstances, then, the court must look at the award of the commissioner together with all the documentary and other evidence before him … as well as the available transcript of proceedings, and then decide whether the award passes muster….
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> …. The applicant in a review has an onus to prove his/her case and must do so on all the evidential material properly placed before the court. If, after consideration of all of that material (defective as it may be), the court is unable to find a reviewable irregularity, then the applicant will obviously fail. A defective record in such circumstances is but one of the vagaries which accompany the litigation process.'

[42] In my view, the final say in these kind of circumstances has been aptly articulated by Sutherland JA in *Intellectual Democratic Workers Union on Behalf of Linda and Others v Super Group and Others*[25] where the learned Judge said:

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[24] (2004) 25 ILJ 1286 (LC) at paras 16 and 18. See also *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others* (2016) 37 ILJ 549 (CC) at para 36; *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* (2005) 26 ILJ 876 (LC).at 881C-E; *Solidarity on behalf of Botha v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 1363 (LC) at para 15.

[25] (2017) 38 ILJ 1292 (LAC) at paras 8 – 9. See also *Francis Baard District Municipality* (*supra*) at paras 21 – 22.

'In my view, once a proper effort to reconstruct a record has been made, the review court should tackle the task, provided the record is adequate to enable the relevant controversy to be decided. At the two extremes there could, on the one hand, be an issue that either does not or hardly turns on the facts, and on the other hand, the issue may be one in respect of which close examination of the content of the ipsissima verba of witnesses is critical. The former may safely be heard, despite a rudimentary record, the latter, perhaps, not at all. Many cases will fall in between these poles. A measure of judgment is called for to assess the feasibility of a proper adjudication in a given case.

In certain cases, the record may be rather poor for the relevant purpose, although not completely useless. The preferable option may be to set aside the whole proceedings and allow the dispute to be adjudicated afresh. However, that option, although from a purely forensic standpoint may be attractive, the implications of a remittal may work undue hardship on one or both parties. Typically, that unhappy predicament results from the long elapse of time since the dispute arose. When a remittal would, after a long elapse of time, trigger prejudice, the appropriate choice may be to hear the matter, warts and all. Generally, in such a case, it is appropriate for a court to weigh heavily the wishes of the parties, who after all, carry the risks of the imperfections of the record; if both prefer to press on to a final resolution of the dispute on an inadequate record, such a choice may tip the judicial judgment call on whether to carry on or to remit.'

Applying the above *dicta*, *in casu*, this is a case falling between the two poles referred to by Sutherland JA. The missing part of the testimony is important, but not critical to deciding the review. Both parties have expressed their clear wish to have this matter concluded. The case also dates back to 2008, and it is in the interest of finality not to send it back to the second respondent again, especially considering that an important witness such as Schoeman has long since retired. I am satisfied that I have enough to decide the matter, warts and all. As said by Sutherland JA:[26]

'… the sensible option is to hear the matter and put the dispute to bed.'

[26] Id at para 11.

[43] Turning then to deciding this matter on the merits, and considering the actual reasoning of the first respondent as contained in her award, I am overall satisfied that she properly evaluated and determined the evidence before her, and in particular, the probabilities. Generally speaking, the award is well reasoned and deals with all the pertinent evidence. It is certainly not lacking in reasoning, which is a criticism often dispensed by this Court where it comes to awards of arbitrators.[27] This being the case, the applicant would always face an uphill battle in seeking to show that the outcome arrived at by the first respondent was unreasonable.

[44] The first respondent considered the evidence of the applicant's own witness, Papo, to the effect that the applicant was not authorized to be in the cash office area. In this regard, the record shows that although Papo testified that the applicant's access card allowed him access to all areas of the testing station, he concedes in cross examination that this was done after the fact and on instruction from the applicant himself, and that the applicant was in principle not allowed in the cash office area. The first respondent accepted that Schoeman's approach to the applicant and the questions he put to the applicant, because of him not being allowed in the cash office area, made sense. Based on these pieces of evidence, the first respondent reasoned that it was likely that the applicant reacted the way that he did because he knew he was not supposed to be there. This reasoning makes sense to me, and is certainly not unreasonable.

[45] The first respondent also considered the applicant's own testimony to the effect that he considered Schoeman's approach to him not to be 'right', and that he expected Schoeman to first greet him. The first respondent held that it could be inferred from this view that it was likely that the applicant refused to identify himself, as Schoeman had testified was the case, and reacted aggressively. The first respondent also considered the applicant's own testimony about only speaking in a loud voice, and after analysing the version, rejected it, concluding that the applicant was unjustifiably shouting at Schoeman. Yet again, I can find little fault with this reasoning and conclusions

[27] See for example *Sasol Mining* (*supra*) at para 7; *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 37; *Kok v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 32888 (LC); *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20.

reached by the first respondent, which is in any event fully supported by the direct testimony of Schoeman and Moolman. It resorts well within the bounds of reasonableness.

[46] As already touched on above, it is undisputed that the applicant indeed told Schoeman that the applicant was an HOD and that he was Schoeman's boss. I have already dealt with the first respondent's finding as to why the applicant would say such things to Schoeman, which finding is unassailable. But the first respondent went even further, and sought to decide whether these contentions of the applicant even had substance. The first respondent held that other than the *ipse dxit* of the applicant and his witness Papo, there was no supporting evidence or documents to the effect that that the applicant held an HOD position. Papo conceded under cross examination that he had nothing to do with the appointment of staff, and in any event could not point to any document appointing the applicant as HOD. Papo also conceded he and the applicant were friends. The applicant similarly conceded in the part of the cross examination that was transcribed that he did not have an appointment letter where it came to this alleged HOD position. I am inclined to agree with the first respondent where she reasons that surely there must have been some kind of letter of appointment or documentary evidence proving the applicant was appointed as an HOD. In light of all the concessions made by Papo and the complete absence of any proper documentary evidence substantiating the applicant's alleged appointment as HOD, it is highly unlikely that what the applicant said to Schoeman was true, and the first respondent's finding to this effect was entirely rational and reasonable. I may add my own view that I have difficulty in accepting that the head of VIP protection would be in charge of the licencing testing station.

[47] This then leads logically to the next consideration, namely that if it is not true that the applicant was an HOD and Schoeman's 'boss', then what was he doing in the cash office area and why did he say this to Schoeman? The first respondent was very much alive as to how this question was to be properly answered. She referred to the fact that the applicant had come to the testing station for his own personal benefit, namely to get a licence (PDP). Obviously be did not want to stand in line with everyone else, but used his position to 'jump the queue', so to speak. When confronted by Schoeman, the applicant

reacted by saying that he was Schoeman's superior and an HOD, which could only serve to 'resist' (as the first respondent calls it), the challenge by Schoeman. This reasoning of the first respondent makes common sense, and is in my view the most natural inference to be drawn from the facts. The first respondent committed no wrong in so concluding, and certainly her conclusion in this regard was reasonable.

[48] All these probabilities considered, the first respondent then prefers the evidence of Schoeman. She accepted that the applicant was rude and aggressive and shouted at Schoeman, and sought to intimidate him. The first respondent's findings on the facts, in this regard, is in my view unassailable on review. Insofar as the first respondent can be seen to have made a credibility finding in preferring the evidence of Schoeman over that of the applicant, there is nothing on the record to indicate that this credibility finding would be completely out of kilter or irreconcilable with the evidence as contained in the record and the applicant has in any event made out no such case in the founding affidavit or supplementary affidavit.[28] There is simply no justified basis on which to interfere with any such a credibility finding made by the first respondent.

[49] This leaves the part of the charge relating to the applicant's conduct disrupting the duties of Schoeman. There can be little doubt that this was indeed the case. As a matter of logic, and whilst attending to the applicant, Schoeman could not do his other work. Schoeman testified that he was busy with other work when it was brought to his attention that the unknown individual (which turned out to be the applicant) was in the cash office area again. The applicant simply had no business being there. Schoeman was compelled to deal with it. The first respondent dealt with all these considerations in her award, and in my view justifiably so. Her conclusions to this effect are properly arrived at, and entirely reasonable.

[50] The applicant has put forward as a ground of review, as identified above, that the first respondent ignored that it was Schoeman that chose to leave his work and come and attend to the applicant, and thus it could not be contended that

[28] See *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 485 (LC) at para 18; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 31.

the applicant had disrupted Schoeman in his work. I consider this reasoning to be ridiculous, and to criticize the first respondent for not considering it, completely undeserving. The fact is that the applicant had no business being in the cash office area. He was not allowed to be there. Schoeman had been briefed by his employees about some unknown person (as said this turned out to be the applicant) coming into the cash office area and misbehaving. When he was told this person was back, he was obliged to deal with the situation. The fact that he chose to deal with the situation cannot detract from the culpability of the applicant and the fact that overall considered, he was the direct cause of the disruption. There is simply no substance in this ground of review.

[51] In conclusion, the first respondent's finding that the applicant was rude and aggressive towards Schoeman and sought to intimidate him is unassailable and properly supported by the evidence. Similarly, the finding of the first respondent that the applicant's conduct interfered with the normal duties of Schoeman is equally unassailable. Considering charge 4.2 against the applicant as set out above, there can be little doubt that the applicant committed this misconduct with which he had been charged. The first respondent's finding to this effect is not in any way irregular, and certainly a reasonable outcome based on the evidence properly considered as a whole. There is no substance to the applicant's review application where it comes to these conclusions of the first respondent.

[52] This the only leaves the issue of an appropriate sanction for this misconduct. The applicant has also raised as a ground of review that his dismissal as a sanction was unfair, and in particular took issue with the first respondent's finding that the trust relationship had broken down.

[53] In deciding whether this ground of review raised by the applicant has any substance, regard must first be had to the nature of the misconduct the applicant had committed. At its core, the applicant's conduct towards Schoeman, as manager of the testing station, was insolent. As was said in *Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*[29]:

[29] (1989) 10 *ILJ* 311 (IC) at 315A-G.

> '… insolence is defined as: "offensive contemptuousness of action or speech due to presumption"; and insolent is defined as: "contemptuous of rightful authority; presumptuously contemptuous; impertinently insulting". Likewise, *Collins English Dictionary* (1983) does not regard insubordination and insolence as synonyms. Insolent is defined as: "offensive; impudent or disrespectful". It is clearly a synonym for cheeky which is defined as: "disrespectful in speech or behaviour; impudent". Disrespectful (the other synonym for both of these words) is defined as: "contempt; rudeness; lack of respect for". It is clear that insolence, disrespect, rudeness and impudence are birds of a feather. …'

[54] In *Environserve Waste Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[30] the Court defined 'insolence' as follows:

> 'The offence of insolence is generally equated with conduct which is offensive, disrespectful, impudent, cheeky, rude, or insulting. Such conduct may be verbal, in writing or through demeanour, and invariably has the consequences of demeaning the person it is directed at or his or her authority. At worst, it has an element of contempt attached to it. Conduct commonly associated with insolence varies in degrees and extremes, and may include talking back; talking over; shouting at; aggressively arguing; talking in a disrespectful, demeaning or contemptuous manner; body language such as eye rolling, direct finger pointing, looking or walking away whilst the superior is talking, or worst, gesturing disrespectfully towards a superior, including showing him/her the proverbial middle finger …'

There can be little doubt that the applicant's conduct towards Schoeman was disrespectful, impudent and contemptuous of this authority as manager of the testing station. The conduct of the applicant was undoubtedly demeaning to Schoeman, considering what was said, and certainly rude as well.

[55] But did this justify dismissal? The above *ratio* in *Wooltru* was applied in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[31], and the Court came to the following conclusion:[32]

[30] [2016] ZALCPE 23 (15 November 2016) at para 14.

> '… acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of 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 a dismissal, provided that 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.'

[56] In *Environserve Waste Management*[33] the Court applied the above *dictum* from the judgment in *Palluci*, and held:

> 'It is accepted that the offence of mere insolence is not in itself sufficient to result in a dismissal. What is defined as 'mere insolence' will obviously depend on the circumstances and the conduct in question, and its effects. However, for insolence to justify a dismissal, it must by all accounts be wilful and serious, with the result that the employment relationship irretrievably breaks down. Examples of gross insolence include some as already indicated above, and may extent to *inter alia*, verbal abuse and/or tirades which may be laced with crass profanities, making personal or crude insults or gestures toward a superior, coupled with violent conduct in some instances, or even making physical or other threats.'

[57] In my view, the following *dictum* from the judgment in *Sylvania Metals (Pty) Ltd v Mello N.O. and Others*[34] aptly summarized the legal position where it comes to insolence as misconduct, as follows:

> 'This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,* discussed the "*fine line"* between insubordination and insolence, with the latter being conduct that is offensive, disrespectful in speech or behaviour,

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[31] (2015) 36 ILJ 1511 (LAC) at para 20.
[32] Id at para 22.
[33] (*supra*) at para 15.
[34] [2016] ZALAC 52 (22 November 2016) at para 18.

> impudent, cheeky, rude, insulting or contemptuous. While the Court noted that insolence may become insubordination where there is an outright challenge to the employer's authority, "*acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful*". The sanction of dismissal is reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer.'

[58] The first respondent paid scant attention in her award to all the elements of the applicant's insolent conduct. What the first respondent focussed on was the intimidation component of the misconduct, which she described as serious misconduct. However, considered together, the other elements of the insolence of the applicant as coupled with the intimidation would certainly make the transgression a gross violation.[35] In *Johnson Controls Automotive*[36] the Court said:

> 'There is no evidence in support of the argument that Johnson Controls regarded the incident as normal. On the contrary, it will be remembered that Ms Scheepers' testimony was to the effect that Johnson Controls viewed the encounter as a personal attack on Ms Bezuidenhout's integrity which could not be countenanced. Mr Motloba's outbursts were completely unacceptable and devoid of any respect. Mr *Partington*, for Johnson Controls, argued that the conduct displayed by Mr Motloba was in truth reminiscent of the kind of belligerence and militancy that has no place in industrial relations. I agree.'

The same can be said about the conduct of the applicant *in casu*. It was devoid of respect, belligerent and entirely unacceptable. It was an attack on Schoeman so as to stop Schoeman taking issue with the fact that the applicant was where he was not allowed to be.

[59] The facts in the judgment of *Palluci* may serve as a comparison, to the contrary so to speak, of the facts *in casu*. I point out that in *Palluci*, the Court accepted that although the employee could be said to be insolent, it could not be considered to be gross, and as such dismissal was not justified.[37] In

[35] Compare *Environserve Waste Management* (*supra*) at para 19.
[36] (*supra*) at para 44.
[37] See *Palluci* (*supra*) at para 29.

Palluci, the allegation against the employee was that she had accused the managing director of being 'not an MD" and of being unprofessional, and also shouted at him in the presence of other staff. The Court in fact rejected this case of the employer and thus held that it did not happen.[38] *In casu*, and to the contrary, the statements made by the applicant to Schoeman no doubt happened, as well as the fact that he shouted at Schoeman in the earshot of others.

[60] Also in *Palluci*, the Court held that what the employee did wrong was complaining to the managing director about a deduction from her salary in a brash and arrogant manner, and she turned her back on him. The Court said that this conduct was 'insolent, impudent, disrespectful, and rude', but held that it was not 'persistent, wilful and a serious challenge to, or defiance of the employer's authority'.[39] The Court also considered, as an important consideration, that the employee had been provoked by the act of the deduction from her salary and by the condescending manner in which the managing director dealt with her query in this regard. The Court concluded, in finding dismissal to be inappropriate:[40]

> '… This resulted in nothing more than, at best, an isolated knee jerk in the heat of the moment by the first respondent, who had been provoked by her employer. It is clear from the evidence that she did not intend to challenge or defy Lambrecht's authority, but in her anger at the deduction coupled with Lambrecht's refusal to discuss the issue with her by inter alia condescendingly turning his back to her, she reacted precipitously by demanding, in a raised voice, that he should not turn his back to her while she was discussing the issue of the deduction with him. Whilst the first respondent's conduct was manifestly insolent, it cannot be said to be a serious, persistent and deliberate challenge to the employer's authority …'

[61] Turning to what is now before me, the evidence showed that the applicant had a penchant for coming to the testing station and throwing his weight around, without any cause or reason for doing so, and when it was simply not his place to do this. In fact, Schoeman had been alerted beforehand to this unknown

[38] Id at para 28.
[39] Id at para 29.
[40] Id at para 29.

person who was behaving in such a manner. And sure enough, the applicant came back and did the same thing, thus leaving Schoeman with no choice but to intervene. There is nothing Schoeman or any of the staff at the testing station did to provoke the applicant. Rather, the applicant wanted to use his employment at the third respondent to his advantage when coming to procure a licence, and behaved as he did when confronted. In sum, he shouted and was rude and aggressive, made statements to Schoeman about the applicant's position which was not true, initially refused to identify himself and then threw his identity card at Schoeman, which conduct was witnessed by others. This places the insolence of the applicant far outside the realm of what was considered in *Palluci* not to be dismissable.

[62] The judgment in *Sylvania Metals*[41] is a far more apposite comparator to the matter *in casu*. In that matter,[42] the Court dealt with a situation where, in a meeting, the employee said he was unwilling to work with his senior, adopted an argumentative and hostile approach to his senior during the meeting, refused to answer questions put to him, and stated that he required his instructions to him to be put in writing in future. The employee also left the meeting before it was concluded and in evidence was unrepentant about his conduct. Based on this, the Court held as follows, in upholding the dismissal of the employee as a fair sanction:[43]

> '… The employee was aggressive, rude and disrespectful in his speech and behaviour towards Mr Malema during the course of the meeting. His refusal to adhere to a reasonable instruction given to him to explain the circumstances of the valve repair was both wilful and serious. His insistence that all future instructions to him to be signed by the plant manager, that he would not work according to Mr Malema's standards and his decision to leave the meeting before it had concluded posed a deliberate and serious challenge to the employer's authority. His conduct indicated a refusal to respect the authority of Mr Malema as his superior. It also indicated an approach which was impractical insofar as it sought to require Mr Malema to place all instructions to him in writing. The employee's chosen course of behaviour constituted serious

[41] (*supra*).
[42] See para 19 of the judgment.
[43] Id at para 20.

misconduct. It was not merely insolent but also insubordinate in the refusal to respect and adhere to the line of authority in the workplace.'

[63] Although not specifically referred to in the first respondent's award, an important consideration *in casu* is a complete absence of remorse by the applicant for what he did. In fact, the applicant persists with an approach that he did nothing wrong. The first respondent does pertinently say in her award that she does not believe that progressive discipline is possible. This indicates to me that the first respondent appreciated that there was a lack of remorse on the part of the applicant. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[44] the Court said:

'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. …'

[64] In any event, and even if the first respondent did not consider the applicant's lack of remorse, it is always about whether the outcome arrived at by the first respondent was reasonable, and this factor would certainly be an important component in rendering the outcome arrived at to be reasonable. In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[45] the Court applied the aforesaid *dictum* in *De Beers*, and said:

'… This passage was endorsed and applied by the LAC in its unanimous decision in *The Foschini Group (Pty) Ltd v Marie Fynn and Others* (unreported case no DA 1/04 31 January 2006). In that case, a sales assistant was found guilty of displaying abusive and threatening language as well as aggressive behaviour towards a customer, for which she was dismissed. The LAC held the dismissal to have been fair, holding at paras 21 and 22 that:

"Throughout the series of events which comprised this dispute, including the hearing before second respondent, first respondent showed no remorse or

[44] (2000) 21 *ILJ* 1051 (LAC) at para 25. See also *Independent Newspapers (Pty) Ltd v Media Workers Union of SA on behalf of McKay and Others* 2013) 34 ILJ 143 (LC) at 146; *Greater Letaba Local Municipality v Mankgabe No and Others* (2008) 29 ILJ 1167 (LC) at para 34.
[45] (2010) 31 ILJ 2475 (LC) at paras 27 – 28.

> regret for the conduct which she had displayed on the day in question. In this regard the... dictum... in *De Beers*... at para 25 is of application to the present dispute.... In the present case first respondent held a responsible position in appellant's organization. It is trite that in the service industry "the customer is king". In the case of a senior employee, albeit under some measure of provocation, who pursues the customer to outside of the premises, then engages in an altercation of the kind which required her to be led back into the premises by the store messenger, and shows no regret or remorse for her conduct, an employer is entitled legitimately to adopt the attitude that the risk of continuing the employment of this person is unacceptably great."'

[65] What the applicant needed to do to mitigate the seriousness of his misconduct was to acknowledge his wrongdoing, express regret for what he had done, and tender an apology to Schoeman. This would have gone a long way in possibly convincing an arbitrator such as the first respondent that dismissal may not have been a fair sanction. The failure to do so must weigh heavily against the applicant. In *Johnson Controls Automotive*[46] it was held as follows:

> 'A simple apology may have resolved the issues. Instead, an obstinate trivialisation of the incident and a denial that the event was inappropriate pervade the record. The misconduct for which Mr Motloba was charged was serious. He showed no contrition. Although he intimated that he learned from his experience as a leader not to permit his constituency to approach matters in the manner that they did, he denied that he made a mistake in approaching Ms Bezuidenhout with the group of approximately 20 employees. I am satisfied that the sanction of dismissal meted out was appropriate in the circumstances of this case.'

[66] What makes matters even worse *in casu* is that the applicant's misconduct took place in the cash office area for all to see. It was witnessed by members of the public and even when Schoeman took the altercation to his office, the applicant shouted at Schoeman to the extent that Moolman in the adjacent office could hear. In *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and Others*[47] the Court held as follows:

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[46] (*supra*) at para 53.
[47] (1991) 12 *ILJ* 1032 (LAC) at 1037F-H.

> '…In our view a disregard by an employee of his employer's authority, especially in the presence of other employees, amounts to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which is the very essence of a master-servant relationship cannot, under these circumstances, continue. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship…'

[67] The conduct of the applicant surely disrupted the harmony in the workplace. This the first respondent clearly properly appreciated. The conduct of the applicant hindered the work of employees, and in particular Schoeman. The applicant caused a state of disharmony to exist, without any provocation, cause or reason. In this regard, the Court in *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[48] said:

> 'By its very nature the employment relationship places certain obligations upon the employee, two aspects of which are the generic duties of the employee to maintain a harmonious relationship and to cooperate with her employer. Brassey notes that the employee's obligation to ensure a harmonious relationship with the employer and other staff requires that she should do nothing to undermine it …'

[68] It is true that that the first respondent did not specifically refer to all the factors that must be considered in deciding whether the sanction of dismissal imposed on the applicant was fair.[49] However, the first respondent did consider the

[48] (2012) 33 ILJ 2117 (LC) at para 116. See also *Environserve Waste Management* (*supra*) at para 16.

[49] In deciding whether the decision to dismiss by the applicant was fair, the 'totality of circumstances' had to have been considered. This 'totality of circumstances' include the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether progressive discipline would be appropriate, the effect of dismissal on the employee, the employee's service record, the issue of the nature of the misconduct, any breakdown of the trust relationship, the existence of dishonesty, the existence of genuine remorse, the job function and the employer's disciplinary code and procedure. See *Sidumo* (*supra*) at paras 116 – 117; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ

important issues such as the gravity of the offence, the absence of remorse, and what the disciplinary code provided for as a sanction. And then, specifically, the first respondent dealt with the issue of the trust relationship. She accepted the testimony presented by Ndlovu that testified for the applicant that the trust relationship had been destroyed. Ndlovu, by virtue of his position, was competent to testify about the trust relationship. There is no basis to interfere with this conclusion of the first respondent, which is properly supported by the evidence on record, and the disciplinary hearing documents. The destruction of the trust relationship also strongly mitigated in favour of a conclusion that the applicant's dismissal was a fair sanction. The following *dictum* in *Miyambo v CCMA and Others*[50] is particularly apposite, where it was held:

> 'It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust...'

[69] The applicant, as touched on above, has raised a complaint that there was no testimony from his own superior about the trust relationship, as Ndlovu was not such a person.[51] I am compelled to point out a certain irony in this complaint, considering what the applicant did. As stated, the applicant referred to himself as Schoeman's boss. That being so, Schoeman's ultimate superior is Ndlovu, and it would follow that he must be the applicant's superior as well. The applicant tried to prove he was Schoeman's 'boss' and failed. But where it comes to sanction, he then tries to distance himself from that part of his case. The applicant wants to have his cake and eat it. And I again refer to the discussion above to the effect that unlike in *Edcon*, Ndlovu as municipal manager was the proper person to testify about the employment relationship, and his evidence that this kind of misconduct resorted within his scope of

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1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38, in this regard.

[50] (2010) 31 ILJ 2031 (LAC) at para 13.

[51] The applicant is relying on the judgment of *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA) at para 19.

responsibility is the testimony that should be accepted. There is accordingly no merit in this ground of review.

[70] Overall considered, the decision of the first respondent in finding that the dismissal of the applicant was a fair sanction can be comfortably reconciled with the following *dictum* from the judgment in *Msunduzi Municipality v Hoskins*[52], where the Court dealt with what it called 'serious insubordination and insolence'[53] by an employee, and held:[54]

> 'In my view, the arbitrator correctly applied his mind to all the material that was placed before him. He took into account the seriousness of the insubordination, the respondent's blatant well-publicised challenge to the authority of the municipal manager, that he showed no remorse when he appeared at the arbitration, and found dismissal to be an appropriate sanction. The fact that the arbitrator did not make specific reference to schedule 8 to the LRA does not detract from the fact that factors relevant to sanction were in this matter taken into account. The arbitrator considered progressive discipline and found that given, inter alia, the seriousness of the transgression, lack of remorse and instead being defensive, the complete breakdown in the employment relationship between the respondent and the municipal manager, as well as the responsibility of the municipality to deliver services, it would not be practicable to restore the employment relationship. …'

[71] To sum up, the first respondent simply cannot be faulted where she found that the applicant has indeed committed the misconduct as contemplated by charge 4.2. And then where it comes to dismissal as a fair sanction, the outcome arrived at by the first respondent is founded on proper and legitimate factual and legal considerations, and overall considered is a finding a reasonable decision maker could come to. The applicant has therefore failed to justify a proper basis on which this Court should interfere with the award of the first respondent.

[52] (2017) 38 ILJ 582 (LAC).
[53] Id at para 26.
[54] Id at para 29.

Conclusion

[72] In *Gold Fields Mining*[55] the Court said:

> '…. The questions to ask are these: … (ii) Did the arbitrator identify the dispute he was required to arbitrate….? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? .. (iv) Did he or she deal with the substantial merits of the dispute? and (v) is the arbitrator's decision one that another decision-maker could reasonable have arrived at based on the evidence?'

In casu, all these questions must clearly be answered in the affirmative, and this can only lead to an ultimate conclusion that the first respondent's award must be upheld

[73] Therefore, and for all the reasons set out above, I conclude that the first respondent's arbitration award is not reviewable. I am satisfied that there is nothing untoward or irregular in the first respondent's evaluation and determination of the evidence. Insofar as the issue of the outcome arrived at by the second respondent may be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application accordingly falls to be dismissed.

[74] This then only leaves the issue of costs. This review application in my view always had little merit, and should never have been pursued. The evidence against the applicant was in reality overwhelming and there was never any valid grounds to challenge the credibility and probability findings of the first respondent. The applicant's grounds of review were scant, and not properly motivated. For these reasons, I was sorely tempted to make a costs award against the applicant. But in its heads of argument, the third respondent has not asked for costs. I also consider that the previous review proceedings in favour of the third respondent also did not carry with it an order of costs.

[55] (*supra*) at para 20 – 21.

Exercising the wide discretion I have under Section 162 of the LRA, I consider it appropriate that no costs order be made against the applicant.

Order

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

1. The applicant's review application is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr N Thaanyane of Thaanyane Attorneys

For the Third Respondent: Adv L Pillay

Instructed by: De Swart Vogel Myambo Attorneys