**REPUBLIC OF SOUTH AFRICA**

Reportable

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Case no: CA 21/13

In the matter between:

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| **PALLUCI HOME DEPOT (PTY) LTD** | **Appellant** |
| and | |
| **JOANNE DEENA HERSKOWITZ** | **First Respondent** |
| **COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA)** | **Second Respondent** |
| **JJ KITSHOFF *N.O*** | **Third Respondent** |

**Heard:** **02 September 2014**

**Delivered:** **12 December 2014**

**Summary: Review of arbitration award – employee dismissed for gross insubordination for shouting at employer and for poor work performance - commissioner upholding employee's dismissal- Labour Court reviewing and setting aside award; finding that employee's guilty of gross insolence and not gross insubordination – Labour Court substituting award and awarding compensation to employee. Appeal Distinction between insolence and gross insubordination restated – employee not insolent and not wilfully defying employer's authority - evidence showing that employee provoked by the deduction of her salary in contravention of the BCEA and employer condescending towards employee – commissioner failing to apply his mind to**

**material evidence – Poor work performance – employee dismissed without any corrective measures taken by employer – commissioner failing to apply his mind to guidelines of the Code of Good Practice- commissioner deciding on issues not relied on by employer - arbitration award unreasonable- Labour Court's judgment upheld – appeal dismissed with costs.**

**CORAM: MUSI JA, MURPHY *ET* SETILOANE AJJA**

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**JUDGMENT**

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KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment of the Labour Court (Visagie AJ) in which it set aside, on review, the arbitration award of the third respondent ("the Commissioner") and substituted it with an order that the dismissal of the first respondent by the appellant was substantively unfair and that the first respondent be awarded compensation in the sum of 10 months' remuneration.

[2] On 4 January 2012, the appellant, Palucci Home Depot (Pty) Ltd, which conducts business in the retail sector selling household furniture and televisions, dismissed the first respondent, whom it employed as Company Manager, on the grounds of *inter alia* insubordination and incapacity or poor work performance. On 1 March 2011, the Tafelberg Furniture Stores (Pty) Ltd ("the Tafelberg Group") purchased the appellant, which was previously owned by the first respondent's family. The new management team took over on 1 March 2011. The first respondent was employed to work for the appellant as Company Manager on a fixed term contract effective from 1 March 2011.

[3] Shortly after the purchase of the appellant, the new management received complaints from members of staff working under the first respondent that she was inclined to scream and shout at them. In early March 2011, Gareth Baker ("Baker"), Head of Group Human Resources, called the first respondent to a meeting where he pointed out to her that her conduct towards members of staff was unacceptable, and that she was required to refrain from such conduct in the future. On 26 April, the first respondent received a letter from

Riaan Lambrecht ("Lambrecht"), Managing Director of the appellant, advising her that management had received further complaints from staff in relation to the manner in which she spoke to them, and warning her that a repeat of such conduct could land her in serious trouble.

[4] On 28 September 2011, Ster Furnishers was purchased by the Tafelberg Group, and since it had only one branch in Montague Gardens, it was absorbed into the appellant. A staff member, at the Montague Gardens branch, complained to Lambrecht who was on a branch visit in Somerset West, about the abrasive manner in which the first respondent had spoken to her on the phone. Lambrecht testified, at the arbitration hearing, that on receiving the complaint, he immediately sent the first respondent a text message from his cell phone asking her what had happened between herself and the Montague Garden's staff member. She called him telephonically within a few minutes, and became very abusive, screaming and shouting at him. After receiving a complaint from Lambrecht, Baker called for an investigation into the complaints against the first respondent, pertaining to her repeated "unprofessional behaviour towards both employees and management". Subsequent to the investigation, Baker held a counselling session with the first respondent on 28 September 2011. He then sent her a letter, dated 24 October 2011, where the following was recorded relating to her behaviour:

> 'One of the issues we have addressed is the fact that there are complaints pertaining to your "screaming and shouting" at the junior staff members.
>
> This issue was addressed with you at our very first meeting with you where we indicated to you that…you should ensure that nobody would ever accuse you of screaming and shouting again.
>
> The staff reports that you continue to scream and shout at them….
>
> In a recent interaction which you had with the Managing Director of Home Depot you raised your voice and lost control of your emotions on a relatively minor issue. He made repeated attempts to moderate your behaviour. These efforts proved fruitless.

> If this is how you behave towards senior management when you have been upset by an issue then clearly you do not have the ability to control yourself.
>
> Your staff members have all reported that they are extremely nervous/scared of you. They fear your volatility and irrationality."

[5] The letter then records that although management had decided at that point to pursue the path of corrective action instead of taking formal disciplinary steps, the first respondent is cautioned that "we will institute a disciplinary enquiry should there be a repeat of this kind of behaviour. Your continued employment will then accordingly be at risk".

[6] Baker testified, at the arbitration hearing, that problems continued to manifest and on Sunday 4 December 2011, Mr Heil (Heil), (Group - Chief Executive Officer), visited the Home Depot (appellant's) section of the Epping warehouse ("the warehouse") and was unhappy with the disorganised state in which he found it. Having spoken to Baker telephonically, he called a meeting the next morning with the management team including the first respondent who was responsible for the warehouse. Although no action was taken against the first respondent, a rescue plan to get the warehouse in order was put in place. In the ensuing weeks, members of senior management made regular visits to the warehouse in order to monitor progress with the rescue plan. On one of such visit, on 20 December 2011, the first respondent and two of her members of staff requested a meeting with Baker at which the first respondent raised several operational concerns with Baker. Baker requested the first respondent to put her concerns in writing, which she then e-mailed to him. Baker tabled the e-mail for discussion at a management meeting the next morning (21 December 2011). Lambrecht, who was present at the management meeting and planned to visit the warehouse later that morning, indicated that he would discuss some of the operational concerns raised by the first respondent in her e-mail to Baker, when he met with her at the warehouse.

[7] Lambrecht met with the first respondent at the warehouse on the morning of 21 December 2011, but the meeting was disrupted by an altercation between the two of them. The events leading up to this altercation relate to the

purported abuse of a company cell phone by members of staff under the control of the first respondent at the warehouse. As there were no fixed telephone lines in the warehouse, three cell phones were given to certain members of staff in the warehouse to use for work related purposes. However, sometime in March 2011, the first respondent was instructed that the cell phones were not to be used by the warehouse staff and that they had to be returned to her, and be kept at all times under her control in her office. This notwithstanding, one of the cell phones was removed from the first respondent's office, and used by members of staff at the warehouse to make calls. On 26 September 2011, the first respondent wrote to Lambrecht informing him that there was a communication problem in the warehouse, and that warehouse staff were now using one of the cell phones. Lamprecht testified that he called the first respondent telephonically reminding her of the instruction issued earlier that the cell phones were not to be used.

[8] Thereafter, during October 2011, the appellant received a cell phone account for calls made from this particular cell phone in the amount of R3000.00. Baker advised the first respondent that this was unacceptable, and instructed her to analyse the account and identify the person/s responsible for making personal calls from the phone, as they had to be held liable for all such calls. A month later, the appellant received another account for calls emanating from the same cell phone in the amount of just over R3000.00. Baker had another discussion with the first respondent about analysing the accounts and identifying the culprits. He also presented her with a list of telephone numbers to go through, which according to the first respondent later turned out to relate to a different cell phone account. This was not disputed by the appellant.

[9] When the first respondent failed to identify the culprits, Baker advised her in an e-mail, dated 25 November 2011, that unless she advised management, by 30 November 2011, which staff member abused the phone, so that the amount of R6 297.80 (total of two accounts) can be deducted from his or her salary, she would be held responsible for the outstanding account. On 30 November 2011, the first respondent responded to Baker, by e-mail, stating that the phone, which was kept in her office each night and collected by

Vernon each morning to be used for work related calls in the warehouse, was used by Vernon and Dieter. She went on to state that if the phone was used illegally in that time, it was out of her control, and she could therefore not be held financially responsible. On the same day Baker responded by e-mail stating:

> 'If you confirm that the blame is shared between Vernon and Diether then I accept this. Please advise them that an amount of R3 148. 90 will be deducted from their pay in December 2011.'

Baker concluded the e-mail by asking the first respondent to let him know once she had let Vernon and Diether know. The first respondent had not reverted to Baker as requested in his letter of 25 November 2011.

[10] Seemingly, the deduction was made from the first respondent's December salary, and the first respondent, who was clearly aggrieved by the deduction, raised it privately with Baker (after his meeting with her and other staff members, on 20 December 2011 at which she raised a number of operational concerns with him). According to Baker, he advised her that if she was able to carry out the analysis of the cell phone accounts in question, and identify the culprits, then he would arrange to reverse the deduction from her salary.

[11] Still aggrieved, the first respondent attempted to raise the issue of the deduction with Lambrecht the next morning at the warehouse, where he met with her to discuss some of the operational concerns which she had raised, in her e-mail to Baker, the day before. Lambrecht testified at the arbitration hearing that, he indicated to the first respondent that he was not prepared to entertain any discussion on the issue of the deduction, because it was part of an investigation that Baker was attending to. The first respondent became upset and screamed at him within earshot of members of staff in the warehouse, accusing him of being unprofessional and not an "MD". Lambrecht repeatedly asked her to lower her voice or else he would leave the meeting. She persisted, and Lambrecht terminated the meeting and walked out of her office. She followed him and confronted him in the corridor, again taking issue with his refusal to discuss the deduction from her salary. She

angrily shouted out to him not to turn his back on her again, and that he was unprofessional and not a MD. When he went into the administration office, she passed him and went into the office of Helderburg International Importers, which her husband Ayton occupied. When he passed that office on his way back to the warehouse, she came out and asked him for the copy of the e-mail, which he had in his possession. On advising her that his copy was for his records, and that she had a copy of the e-mail since she had e-mailed it to Baker, she hurled similar insults at him as earlier that day, and demanded that he gives her the copy of the e-mail. He repeatedly asked her to lower her voice as the staff could hear, and when she failed to do so, he gave her the copy of the e-mail and left. Soon thereafter, Lambrecht asked for the incident to be investigated and on 23 December 2011, she was charged and given notification of the disciplinary hearing. The charges against the first respondent were as follows:

'**A) GROSS INSUBORDINATION IN THAT YOU**;

1. Again screamed and shouted at the MD of the Company and shouted at the warehouse manager on the 21st December 2011, (refer to counselling discussion of 28th September 2011).

**B) POOR WORK PERFORMANCE /CAPACITY TO PERFORM AT THE REQUIRED STANDARD OF THE NEW OWNERS OF THE COMPANY WITH REFERENCE TO BUT NOT LIMITED TO YOUR JOB DESCRIPTION, POINT 13 AND ATTACHMENT "A" OF YOUR EMPLOYMENT CONTRACT:**

1. Duplication of IBT's

2. Control and management of leave forms and feedback to Company

3. Sub-standard stock management and control (stock counts/stock levels/stock management). And failure to report findings to Managing Director as instructed.

4. Management and control of supplier invoices to H/O for processing and payment.

5. Gross neglect in the management of the warehouse and the stock resulting in a loss to the Company of an estimated R250 000.00.

6. Failing to phone customers back and/or failing to identify the problem and resolving the problem. (ref to Hellopeter – customer Anastacia and a complaint from customer Campbell.

7. Prior to dispatching stock to the branches you failed to ensure that the pricing was on the computer.

8. Failure to execute your duties to the required standard of the new owners within the current framework and the current resources available to you. The Directors are of the opinion that a competent manager could successfully run the Company with the current resources and within the current framework.

**C) REFUSALTO CARRY OUT REASONABLE INSTRUCTIONS GIVEN BY A SUPERIOR OR AUTHORISED PERSON IN A SENIOR CAPACITY IN THAT YOU:**

1. Allowed “small” items to be stored in the warehouse.

2. Allowed the cell phone to be removed from the control of the office.

3. Failed to distribute HR posters and point of sale material to the branches timeously.

4. Failed to obey the instruction of the MD with regard to the scheduling of shifts at the Canal Walk Branch.

5. Failed to control and forward the TV licence register to H/O as instructed as this is a legal requirement.’

[12] The disciplinary hearing was held on 29 December 2011, and in early January 2012, the chairperson handed his finding to the appellant, in which he recommended that the first respondent be dismissed on the grounds of insubordination and incapacity to perform her job function in accordance with the standards and requirement of the appellant. The first respondent was dismissed by the appellant in terms of a written termination notice dated 4 January 2012. Dissatisfied with her dismissal, she referred an unfair dismissal

dispute to the CCMA for conciliation and thereafter arbitration. The Commissioner found the first respondent guilty of insubordination, failure to carry out instructions and failure to perform at an acceptable standard.

[13] The first respondent took the matter on review to the Labour Court. The Labour Court upheld the review application and set aside the arbitrator's finding on the bases that: (i) the first respondent could not, on the evidence, have been found guilty of the charge of insubordination but should instead have been found guilty of gross insolence; (ii) the arbitrator exceeded his powers in finding the first respondent guilty of the charge of failing to carry out instructions because the chairperson of the disciplinary hearing had not dealt with that charge; and (iii) even if the charge relating to poor work performance (Charge B) was "found to be proved" by the appellant in either the disciplinary hearing or the arbitration proceedings, the sanction of dismissal was too harsh as a progressive approach, by the appellant, to the "perceived shortcomings" of the first respondent "would have been called for". In the circumstances, the Labour Court found that the sanction of dismissal was too harsh, and that the appellant should instead have given the first respondent a final written warning. The Labour Court accordingly held that had the first respondent sought reinstatement, she would have been entitled to it, but as she sought compensation only, she was entitled to 10 months' salary as compensation for her unfair dismissal. It is this decision which the appellant now appeals against.

Application of the incorrect test on review

[14] The principal contention of the appellant is that the Labour Court applied the wrong test on review as it was unmindful of the decision in *Herholdt,*[1] which requires a reviewing court to go beyond identifying process related errors, and find that such errors had as their consequence an unreasonable result. To the contrary, I am of the view that the Labour Court in reviewing and setting aside the award of the Commissioner, and substituting it with a finding that the first respondent's dismissal was substantively unfair, was not oblivious to the test

[1] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA).

enunciated in *Sidumo*[2] by the Constitutional Court. However, since the Labour Court's judgment pre-dated *Herholdt* by just under a month,[3] it would be unreasonable to expect the Labour Court to have been mindful of the decision of the SCA in *Herholdt* or of this Court in *Goldfields*[4] both of which endorsed and, admirably, refined and clarified the operation of the *Sidumo* test.

[15] Additionally, the Labour Court's omission to echo the *Sidumo* refrain in concluding its review judgment cannot, to my mind, render a patently unreasonable award such as the one we have here – where the Commissioner's findings are not supported by the evidence, and crucially point to the failure to apply his mind to considerations that were material to the outcome of the dispute – reasonable. It is apparent from the reasoning of the Labour Court that it found by implication that the decision of the Commissioner is one that could not reasonably be reached. Thus, as will be demonstrated further in the course of this judgment, the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.

[16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in *Head of the Department of Education v Jonas Mohale Mofokeng and Others,*[5] "for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result". Thus, as recognised in *Mofokeng*, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator "must not misconceive the inquiry or undertake the

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.
[3] The Labour Court delivered its review judgment on 8 August 2013, and the SCA delivered *Herholdt* on 5 September 2013.
[4] *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).
[5] *Head of Department of Education v Jonas Mohale Mofokeng and Others*, Case No: JA 14/2014, 1 October 2014, Labour Appeal Court, paras 30-33

inquiry in a misconceived manner", as this would not lead to a fair trial of the issues.[6] In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

> 'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'[7] [Footnote omitted]

<u>Insubordination v Insolence</u>

[17] Turning then to the charge of insubordination (Charge A), the Commissioner found the first respondent guilty of gross insubordination for having screamed and shouted at Lambrecht in a passage way within earshot of staff after he had instructed her in her office not to address him in that way. In the review application, the first respondent raised as a ground of review that the Commissioner failed to apply his mind to the facts and the law relating to the charge of insubordination in the workplace. The Labour Court found, in this regard, that the arbitrator misconstrued the nature of the enquiry by failing to distinguish between insubordination and insolence. Its reasons for doing so are these:

> 'In the face of clear authority mentioned above, our law has consistently distinguished between insubordination and insolence. …
>
> In my view, there could not have been any insubordination charge levelled against the applicant arising out of her conduct on 21 December 2011. It is common cause that she had an altercation with Lambrecht and although she disputed whether she shouted or whether she was loud, I accept that her

[6] *Mofokeng* at paras 30-33.
[7] *Mofokeng* at para 32.

conduct was abrasive, that she was confrontational and that she probably shouted at Lambrecht as he and other witnesses testified. However, there was no instruction given to the applicant by Lambrecht prior to her shouting at him in a loud fashion. The conduct of the applicant, in my view, was consistent with what the Commercial Catering and Allied Workers Union of South Africa case referred to as insolence. It was clear that the applicant showed disrespect to Lambrecht in the manner she dealt with him on the day in question. It is clear that the applicant had no regard for her colleagues who witnessed the incident. However, an important factor to take into account, which the [arbitrator] dealt with, but placed little weight on, is the fact that the third respondent unilaterally made deductions from the applicant's salary in contravention of section 34 of the Basic Conditions of Employment Act. In my view, the second respondent should have placed more weight on the conduct of the employer, which clearly provoked the incident and the response from the applicant when she confronted Lambrecht.

… [I]n my view, the incident with Lambrecht which was clearly provoked by the company making the unlawful deductions from the applicant's salary, together with whatever discussions the company may have had with the applicant concerning the manner in which she dealt with colleagues, would in any event not have been sufficient to warrant a dismissal on the charge of insolence or gross insolence alone.

The second respondent failed to apply his mind to the difference between insubordination and insolence as required by the stated authorities. As I have indicated, based on the clear evidence provided at the arbitration hearing, there was no question of any insubordinate conduct, let alone gross insubordinate conduct, concerning the incident of 21 December 2011. On this basis alone, the second respondent's award is not one which a reasonable arbitrator could have reached.'

[18] The Commissioner seemingly found the first respondent guilty of gross insubordination in relation to Charge A on two bases: first for screaming at Lambrecht (Managing Director) within earshot of staff, and (b) for failing to heed his instruction not to address him in that way. The purported failure of the first respondent to obey the instruction of Lambrecht as referred to above, did not form part of the allegations relied upon by the appellant to found the

gross insubordination charge (Charge A). This charge was limited to “again screamed and shouted at the MD of the company and shouted at the warehouse manager on 21 December 2011…”[8] It is common cause, in this regard, that Charge A did not relate to the first respondent’s purported refusal to carry out or obey an instruction from Lambrecht prior to or during the altercation, or to any other instruction from the appellant for that matter. In fact, the Commissioner recorded specifically in the award that “Lambrecht conceded that [the first respondent] had never refused to carry out an instruction”. This notwithstanding, the Commissioner found that the first respondent was grossly insubordinate for screaming “at Lambrecht in a passage way within earshot of staff after he had instructed her in her office not to address him in that way”, prompting the Labour Court to find *inter alia* that although the conduct of the first respondent was abrasive and confrontational, and that she probably shouted at Lambrecht, there was no instruction given to her by Lambrecht prior to her shouting at him.

[19] It is clear from this finding that the Labour Court failed to appreciate that the refusal to carry out an instruction is not the only basis upon which to found a charge of insubordination. The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer’s authority.[9] Whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer’s authority, even where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer’s authority.

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[8] Apparently, the latter aspect of Charge A, namely that the first respondent shouted at the warehouse manager, was not persisted with at the arbitration hearing because as Company Manager, the first respondent would have been senior to the warehouse manager.

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

[20] The refusal by an employee to carry out an employer's instruction is, therefore, not always required for a finding of insubordination. However, the failure of the Labour Court to recognise this did not, in my view, influence its characterisation of the conduct of the first respondent, on the evidence led at the arbitration hearing in relation to charge A, as constituting "insolence" as opposed to "insubordination". In characterising the first respondent's conduct as "insolence", the Labour Court relied upon the decision of *Wooltru,*[10] which emphasises the importance of distinguishing insubordination from insolence simply because they are different offences. *Wooltru* equates the offence of insolence with conduct which is offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous, and insubordination with "resistance to or defiance of authority; disobedience, and refusal to obey an order of a superior".[11] *Wooltru* makes it clear that although an employee can be both insolent and insubordinate at the same time, he or she can be insolent without necessarily being insubordinate.[12] Notably, the Court in *Wooltru* held that a mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot, on its own, constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. Insubordination it observed:

> 'can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of (see especially *The Shorter Oxford Dictionary above)* the authority of the employer. It is of course required that insubordination must be deliberate (wilful) and serious (above). This is not to say contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground of dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are definitely not the same kind of offence.'[13]

[21] Applying these principles, the Labour Court found that the first respondent's conduct did not constitute insubordination but rather gross insolence "as it is

[10] *Wooltru* at 314-315 A-B.
[11] *Wooltru* at 314-315 A-B.
[12] *Wooltru* at 315 D-E.
[13] *Wooltru* at 315 E-G.

clear that the applicant showed disrespect to Lambrecht in the manner she dealt with him on the day in question". To the contrary, the appellant contends that this is not a case about a low to middle level cheeky employee who gives backchat showing impudence or insolence, but rather one that concerns the daughter of the previous owner of the business, and the expression of her defiance to the attempts by the new owner (the appellant) to exert its authority. The contention thus advanced is that the Labour Court erred in failing to find that the breach of the duty to show respect (insolence) becomes insubordination where the disrespectful conduct constitutes a deliberate challenge to the employer's authority. The appellant, therefore, contends that even if the first respondent's conduct was to be classified as insolence, and a lack of respect, the conduct was grossly disrespectful and justified the imposition of the sanction of dismissal.

[22] As demonstrated, there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. However 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.[14] Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.[15]

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[14] *Mqhayi v Van Leer SA (Pty) Ltd* 1984 (5) ILJ 179 (IC) at 182A-D, citing *London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287F and 288A.
[15] *Wooltru* at 315 H.

[23] In the current matter, the first respondent was dismissed by the appellant for being grossly insubordinate to Lambrecht. It is common cause that she was upset over the deduction of an amount of R 6 298 from her salary and this led to the altercation with Lambrecht on 21 December 2011 because he refused to entertain any discussion on the issue. Lambrecht testified, at the arbitration hearing, that when, on 21 December 2011, he refused to entertain any discussion on the issue of the deduction because it was part of an investigation that Baker (the Human Resources Manager) was attending to, the first respondent became upset and "screamed and shouted" at him within earshot of members of staff working in the warehouse, repeatedly accusing him of, turning his back on her, being "unprofessional", and "not an MD.[16] The first respondent denied in her testimony, at the arbitration hearing, that she screamed and shouted at Lambrecht or that she accused him of being "unprofessional" and "not an MD". Her testimony at the arbitration hearing, on this aspect, is this:

> 'I have a naturally loud voice and acknowledge it was raised during the unfortunate incident in question. I was upset and frustrated and under extreme provocation. I was not shouting at Riaan [Lambrecht] and had no intention of being disrespectful. I believe I am entitled to stand up for dignity in the face of unfairness. I was neither defiant nor disobedient. I did not swear or abuse him and I did not challenge his authority. I was tremendously frustrated and provoked because he refused to discuss with me my very valid complaint that R6297 was deducted from my salary unlawfully and for no good reason. Nobody else heard what was being said and it therefore affected no other person and was between Riaan [Lambrecht] and myself. If he had listened to my complaint without turning his back and showing contempt for me, the incident would never have happened. I believe my problem should be discussed with mutual respect between employer and employee.
>
> Riaan [Lambrecht] came to my office on the 21st of December… [He] said that he would not discuss my salary deduction, using the feeble excuse that my email of complaint was not addressed to him….He also said at this Arbitration that he was waiting for the outcome of an investigation but this is not so. The deduction had already been made….

[16] "MD" refers to Managing Director.

> When I asked him to address the issue, he stood up, turned his back on me and said sarcastically, without looking at me "geniet jou dag", which I took as an arrogant way of saying "get lost". I followed him out into the corridor and said something like "I would like to discuss it because it is important to me. He carried on walking with his back to me and I followed saying "it is not right to turn your back in the middle of a discussion.'

[24] Members of staff present in the warehouse at the time of the altercation between Lambrecht and the first respondent were Fathima Gerbier ("Gerbier"), Ikraam Bailey ("Bailey"), Barney Bolton ("Bolton"), Riaan Swanepoel ("Swanepoel"), and Tertia Botha ("Botha"). Only Gerbier, Bailey and Bolton were called to testify on the appellant's behalf at the arbitration hearing. At the arbitration hearing, Gerbier who was approximately 11 metres away from the first respondent and Lambrecht during the altercation testified that she and Botha, with whom she shared an office, were on the telephone when they heard the first respondent "screaming". She stopped talking and put her head out of the window to see what was happening. She saw the first respondent and Lambrecht near the fire extinguisher then went back to the telephone and continued with her conversation. Bailey, on the other hand, who was the furthest from Lambrecht and the first respondent during the altercation testified, at the arbitration hearing, that he was about 30 metres away when heard the first respondent screaming at Lambrecht in the passage "about the email". He said that he heard her say that she wanted to make a copy of the email.

[25] Bolton who was the closest (three metres away), and outside whose office the altercation between the first respondent and Lambrecht took place, testified at the arbitration hearing that he heard the first respondent say to Lambrecht, in a "raised" voice, "don't turn your back to me". He also said that she was visibly upset and spoke in a raised voice, but that "sy het nie geskree nie soos'n besepe". Bolton's testimony, at the arbitration hearing, was consistent with that of Riaan Swanepoel's, at the disciplinary hearing, which was that he heard "loud voices" outside his office and went to see what was happening. On doing so, he saw the first respondent and Lambrecht arguing approximately three metres away from the office he shared with Bolton. He

heard the first respondent say to Lambrecht in a raised voice “don’t walk away from me” and Lambrecht responded by asking the first respondent “to speak softly as people were listening”. When asked in cross-examination, at the disciplinary hearing, if he “heard a raised voice or was it shouting”, he responded: “I would say her voice was fairly raised but I wouldn’t classify it as shouting”. Swanepoel also pointed out in his testimony, at the disciplinary hearing, that those who know the first respondent well, would know that when she is eager and excited her voice becomes raised naturally. Needless to say, Swanepoel was called by the appellant to testify at the disciplinary hearing, but not at the arbitration hearing.

[26] Botha, who occupied the same office as Gerbier, at the time of the altercation between the first respondent and Lambrecht, also testified at the disciplinary hearing that “we just heard loud voices”, but couldn’t make out what was said. She was, predictably, also not called by the appellant to testify at the arbitration hearing. Gerbier, who shared an office with Botha, corroborated her testimony by stating, at the disciplinary hearing, that she heard “loud voices” but was unable to hear what was being discussed, yet surprisingly at the arbitration hearing, she testified that the first respondent was “like screaming”. When the first respondent put the inconsistency of the two versions to her in cross-examination, at the arbitration hearing, Gerbier’s nondescript answer “[t]hat, it’s the same here”, made it apparent that she was unable to provide a plausible explanation for the inconsistency. The Commissioner ought, for this reason, to have rejected the evidence of Gerbier that the first respondent “screamed” at Lambrecht.

[27] By the same token, he ought to have drawn a negative inference from the failure of the appellant to call Swanepoel and Botha to testify at the arbitration hearing, because their testimony at the disciplinary hearing verified that the first respondent spoke to Lambrecht with a “raised voice” during the altercation in the warehouse, but that she did not “scream and shout” at him. Consistent with their testimony was that of Bolton’s, at both the disciplinary and arbitration hearings, that he heard the first respondent say to Lambrecht in a raised voice “don’t turn your back on me”. He too was adamant that the

first respondent did not “scream and shout” at Lambrecht during the altercation. Bailey, on the other hand, who was the furthest (30 metres away) from the first respondent and Lambrecht during the altercation testified, at the arbitration hearing, that he heard the first respondent screaming at Lambrecht in the passage “about the email” which she wanted to copy. However, at the disciplinary hearing, he testified that the first respondent screamed at Lambrecht saying “give me the paper, I want to take it further with you”. Bailey made no mention of the latter utterance in his testimony at the arbitration hearing. Coupled with this inconsistency is the improbability that Bailey, who was the furthest away from the first respondent and Lambrecht during the altercation, would not have heard her “screaming” at Lambrecht, when Swanepoel, Bolton, Botha (and Gerbier), who were substantially closer, heard her arguing with Lambrecht in a “loud” or “raised” voice. For this reason as well, the Commissioner ought to have rejected the testimony of Bailey.

[28] In addition, other than Lambrecht’s testimony that the first respondent repeatedly accused him of being “unprofessional” and “not an MD”, there is simply no evidence, on the record, that supports the allegation that the first respondent told Lambrecht that he was “not an MD” or that he was “unprofessional”. The first respondent in fact denied saying this to Lambrecht in her testimony at the arbitration hearing. I also find it highly improbable that if, as testified by Lambrecht, the first respondent had repeatedly accused him of being “unprofessional and not an “MD”, both inside her office and in the passageway, why none of the members of staff, who were in the immediate vicinity of the altercation, heard the first respondent utter those words − particularly if, as testified by him − she “screamed and shouted” at him in the presence of members of staff. Thus on the evidence and the probabilities, I find that although the first respondent probably spoke to Lambrecht in a brash and argumentative manner, and insisted that he should not turn his back to her while she was discussing the issue of the deduction from her salary with him, she did not “scream and shout” at him, and nor did she accuse him of being “unprofessional” and “not an MD”. Accordingly, I find that the Commissioner erred in failing to reject the testimony of Lambrecht on this aspect.

[29] Although the respondent's conduct can be described as insolent, impudent, disrespectful, and rude, it certainly does not constitute insubordination which in law requires a persistent, wilful and serious challenge to, or defiance of the employer's authority.[17] Nor, in my view can the first respondent's conduct towards Lambrecht be described, on the evidence, as a "calculated challenge" to the employer's authority,[18] since it was neither deliberate nor intentional. The first respondent had been provoked by Lambrecht in two respects: firstly by the unlawful deduction of monies from her salary which, it is common cause was the basis of the impasse, and secondly by the condescending manner in which Lambrecht had turned his back to her whilst she attempted to discuss the issue of the deduction with him. 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, on which to found a charge of insubordination or gross insubordination.

[30] In addition, the argument advanced by the appellant that the altercation on 21 December 2011 was an expression of the first respondent's defiance − as the daughter of the previous owner − to the attempts of the new owner (the appellant) to exert its authority, is also not supported by any evidence and is at best conjecture. This appears to stem from the misplaced conclusion arrived at by the Commissioner in the arbitration award that "the [first respondent] was not able to accept the new work environment probably because she was her own boss in the past". It is important, in this respect, to

[17] *National Union of Public Service & Allied Workers and Others v National Lotteries Board* 2014 (3) SA 544 (CC) at para 213, minority judgment per Dambuza AJ; *Lynx Geosystems SA v CCMA and Others* (2010) JOL 26424 (LC).
[18] *Transport and General Worker Union and Another v Interstate Bus Lines (Pty) Ltd* (1988) 9 ILJ 877 (IC) at 880-1.

recognise that the first respondent was charged with gross insubordination because of the manner in which she addressed the Managing Director on 21 December 2011; an isolated incident in the context of being angry and provoked by the unlawful deduction from her salary of the amount of R6298, 00 coupled with the condescending manner in which he turned his back to her in refusing to discuss the issue. She was not charged with continued defiance of the appellant's authority due to some familial allegiance and comparison of business practices, nor for a failure to carry out a lawful and reasonable instruction from her new employer as a basis for the charge of insubordination. The evidence did not support that. In any event, first respondent's various written communications to the appellant clearly demonstrate that she had earnestly attempted to conform to their requirements, and attempted to assist with the running of the business. Thus, on a proper consideration of the evidence led at the arbitration hearing, there is no support for the conclusion reached by the Commissioner that the first respondent's conduct constituted insubordination let alone gross insubordination.

[31] The appellant's submission that insolence can only relate to "a cheeky low to middle level" employee is not supported by any authority, and is unsustainable. The Labour Court found in line with *Wooltru* that the first respondent's conduct in this matter did not constitute insubordination as it was not a serious, persistent and deliberate challenge to the authority of the appellant. It, however, found her conduct to constitute gross insolence, which should have been sanctioned with a final warning. I am unable, on a proper analysis of the evidence, to endorse this finding. The conduct complained of, in my view, was simply insolence as it was neither serious nor wilful and ought, in the circumstances, to have been sanctioned with a warning.

[32] The purported warning that the appellant gave the first respondent in October 2011 has little relevance to the conduct of the first respondent whether viewed as insolence or insubordination, as it was not issued after a proper enquiry during which the first respondent was given the opportunity to defend herself by stating her case, cross-examining the complainants and adducing evidence

in defence of the charge levelled against her. The Commissioner in fact recognised this during the arbitration when he said this:

> 'The fact is you were counselled about it, it is not a disciplinary hearing, it is not a procedure…it is not, it is not a warning, it cannot be used as a warning.'

He even went further to assert: "I just want to satisfy the [first respondent] that it was not a warning", but concluded inexplicably that it was made clear to the first respondent in September 2011 that she "had to correct her manner or disciplinary action would be instituted should there be a repeat of 'this kind of behaviour'" − an oblique reference, I believe, to her "unprofessional behaviour towards both employees and management"[19] – a wholly unrelated transgression to my mind, which fails to justify the first respondent's dismissal for the commission of conduct, on the evidence, which points to insolence and not insubordination. Insolence, as pointed out, would only justify dismissal if it is serious and wilful, which the first respondent's conduct was not, making it quite clear that the appellant's primary objective was to "get rid" of the first respondent. The fundamental point being that the Commissioner failed to apply his mind to the difference in principle between the two forms of misconduct when he assessed the facts of the matter, concluding there was insubordination, when the facts supported only one reasonable conclusion − that the first respondent's conduct amounted to no more than insolence, which should have been acted upon by the appellant with a written warning − and not dismissal.

[33] Whether misconduct amounts to insubordination depends on a number of factors including the wilfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer prior to the purported act of insubordination.[20] Provocation by an employer prior to the act of insubordination by an employee, is thus an important factor that must be considered in assessing its gravity. The same principle in my view would apply to the act of insolence or gross insolence. If the employee

[19] As per the 24 October 2011 letter.
[20] John Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2nd edition (Juta) 2007 at 309, cited in *National Union of Public Service & Allied Workers and Others v National Lotteries Board* 2014 (3) SA 544 (CC) at para 214, minority judgment per Dambuza AJ.

was provoked into insolence or insubordination, it may have a considerable mitigating effect on the seriousness of the offence and may render the dismissal inappropriate.

[34] Monies were unilaterally deducted from the first respondent's salary in contravention of s 34 of the Basic Conditions of Employment Act,[21] ("BCEA), more particularly sections 34(2)(b) and (c) thereof. An employer is prohibited, in terms of s 34(1)(a) of the BCEA from making any deductions from an employee's remuneration unless, subject to s 34(2) of the BCEA, the employee in writing agrees to the deduction in respect of a debt specified in the agreement. Section 34(2) of the BCEA, in turn, provides that a deduction in terms of s 34(1)(a) of the BCEA may be made to reimburse an employer for loss or damage only if –

> '(a) the loss of damage occurred in the course of employment and was due to the fault of the employee;
>
> (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deduction should not be made;
>
> (c) the total amount of the debt does not exceed the actual amount of the loss and damage; and
>
> (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.'

[35] The deduction of monies from the first respondent's salary was, in my view, made in contravention of sections 34(2)(b) and (c) of the BCEA as the appellant had not followed a fair procedure, and had not given the first respondent a reasonable opportunity to show why the deduction should not be made. Moreover, the amount deducted exceeded the actual amount of the purported loss incurred by the appellant. The monies deducted from the first respondent's salary constituted a significant percentage of the first respondent's monthly salary, and the unfairness associated therewith

[21] 75 of 1977.

aggrieved her. The unfairness is not only manifested in the deduction itself, but also in the arbitrary manner in which the deduction was made.

[36] The appellant attempted to justify the deduction on the basis that the announcement that a deduction would be made from the first respondent's salary, unless she identified the true culprits, was communicated to her on 25 November 2011, but she engaged in "open confrontational behaviour" with Lambrecht only on 21 December 2011, in circumstances where she had already had an opportunity to "ventilate her objections" in interaction with Baker, the Human Resources Manager. This reaction, in my view, was not unexpected of the first respondent because by the date of impasse (21 December 2011) she had seen that the deduction had physically come off her salary whereas in November, she was merely advised that the appellant may take this action. However, even if it is accepted that the first respondent had an opportunity to ventilate her objections in interactions with Baker in November 2011, the deduction from the first respondent's salary, in any event, remains arbitrary and in contravention of s 34 of the BCEA by virtue of the fact that the total quantum of the cell phone bill was deducted, in circumstances where it is common cause that only a portion of the calls were said to be unauthorised. In addition, the appellant is a VAT vendor and would therefore recoup the VAT paid on the accounts. No provision was made for this eventuality when the appellant deducted the monies from the first respondent's salary.

[37] The impasse between Lambrecht and the first respondent arose as a result of this unlawful deduction, which she wished to discuss with him and was fully entitled to do, but which he simply refused to entertain on the basis that it was being investigated by Baker. This begs the question: what, in circumstances where the monies had already been deducted, required investigation? It furthermore turns out that the first respondent had not been provided with the correct statement of account in order to enable her to investigate which members of staff, in particular, were responsible for making unauthorised personal calls from the cell phone. This, as the evidence reveals, was only made available to her approximately seven months later on 28 June 2012,

during the arbitration hearing. I am of the view that it could not, in the absence of so essential a document, have been expected of the first respondent to investigate who the “real culprits” responsible for making the so called unauthorised calls were or, for that matter, show why the deduction (equivalent to the costs of the unauthorised calls) should not have been made from her salary?

[38] The appellant contended that in the workplace a defence of provocation does not depend on the wrongfulness of the employer’s conduct (as the employee will always say that he or she was grievously wronged) but on whether there were other means, not amounting to misconduct, open to an employee to express his or her displeasure, such as a grievance procedure. As contended for by the first respondent, the appellant’s reliance on a grievance process is merely an attempt to obscure the real issue, as a grievance procedure has no relevance in the context of this matter pertaining, as it does, to an unlawful action by the employer which the employee herself sought to resolve by attempting to raise the issue which aggrieved her with the employer directly, but which the employer was simply not prepared to entertain. In the circumstances, I find that the appellant had failed to prove on a balance of probabilities that the unauthorised personal calls were made from the third cell phone, that it incurred a loss, and that the first respondent was liable for such loss. Accordingly, I consider that the Labour Court was correct in considering the illegal deduction to be a mitigating factor in assessment of the seriousness of the offence of insolence, which the Commissioner had simply failed to apply his mind to.

[39] The sanction of dismissal was, regardless of whether the conduct constituted insubordination or insolence, manifestly incongruent and unfair. The appellant’s own code of conduct recommends a written warning for the first offence of impertinence/insolence, and a final written warning for the second. Dismissal is only recommended for the third offence of insolence. Similarly, item 3(4) of the Code of Good Practice for Dismissals in Schedule 8 to the LRA (“the Code of Good Practice”) deems it inappropriate for an employer to dismiss an employee for a first offence, except if the misconduct is serious

and of such gravity that it makes a continued employment relationship intolerable. Gross dishonesty or wilful damage to the employer's property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination are listed as examples of serious misconduct, subject to the rule that each case must be judged on its own merits. This, the Commissioner, similarly failed to apply his mind to.

[40] Also, as alluded to earlier, the Commissioner failed to apply his mind to the fact that the charge of screaming and shouting at Lambrecht could not on the facts (evidence) and the law be interpreted as insubordination in light of established authority, which requires the presence of a wilful and serious challenge to, or defiance of, the authority of the employer to found a charge of insubordination or gross insubordination.[22] The distinct difference between insubordination and insolence is that of disobedience (in intentionally refusing to carry out an instruction or an intentional and serious challenge to, or defiance of the employer's authority) and a failure to respect the employer. The Commissioner did not appreciate the difference, nor did he apply the relevant legal principles, resulting in him misconstruing the whole nature of the enquiry, and his duties in connection therewith. Similarly, the Commissioner made errors of fact by failing to appreciate the weight and relevance to be attached to particular facts, such as that the first respondent was provoked into being insolent and disrespectful to Lambrecht, first by the illegal and arbitrary deduction of monies from her salary, and thereafter by condescendingly turning his back to her when she raised the issue of the deduction with him.

[41] However, as held by this Court in *Mofokeng*, mere irregularities or errors in relation to the facts or the law are not sufficient to vitiate the award as they may not produce an unreasonable outcome or lead to the conclusion that the arbitrator misconceived the whole nature of the enquiry. Ultimately, it will

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[22]; *Wasteman Group v South African Municipal Workers Union* [2012] 8 BLLR 778 (LAC); *SACWU obo Mokoena v Afrox Ltd (Newcastle)* [2007] JOL 19354 (NBCCI); *Enviroserv Waste Management (Pty) Ltd v Mosime NO and Others* [2010] JOL 25671 (LC). See also *LAWSA* Vol.13 (1) Paras 203-204.

depend on the materiality of the error or irregularity and its relation to the result. Materiality of the error, it held, must be assessed and determined:

> 'with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry so as to lead to no fair trial of the issues with the result that the award maybe set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'[23] [Footnote omitted]

[42] The Commissioner, in the current matter, made material errors in fact and law by failing to apply his mind to the distinction on the facts and the law between insubordination, and insolence in determining whether the first respondent had committed the offence of gross insubordination upon which the appellant based its decision to dismiss her. Then in determining the fairness of the dismissal he failed to appreciate the distinction between gross insubordination and insolence, and that an employee can only be dismissed for gross insolence and not mere insolence. Furthermore, in assessing the fairness and appropriateness of the dismissal, he failed to assess the gravity of the misconduct with reference to the fact that it was neither wilful nor serious, and that the first respondent was provoked into conducting herself in an insolent manner by the employer in two important respects, first by the unlawful deduction of monies from her salary, which was the basis of the impasse, and

[23] At para 33.

second by the condescending manner in which Lambrecht had turned his back to her while she tried to raise the issue with him. It is a key principle of the Code that employers and employees must treat each other with respect. Both Lambrecht and the first respondent were members of senior management. That he was her immediate superior did not give him *carte blanche* to treat her with disrespect. The Commissioner's failure to properly apply his mind to these material considerations led him to misconceive the nature of the enquiry by failing to address the question for determination as revealed by the evidence, namely whether the dismissal of the first respondent for a first transgression of insolence, where she was provoked by the appellant, was fair.

<u>Going beyond the findings of the disciplinary chair</u>

[43] The Commissioner furthermore, in my view, misconstrued the true nature of the enquiry and his mandate in connection therewith by making a determination on aspects of the charges, which neither the chairman of the disciplinary hearing nor the appellant relied upon, at the time of the first respondent's dismissal, in concluding that her dismissal was unfair. The Commissioner dealt in his award with sub-charges A1 (gross insubordination), B5 (gross neglect in the management of the warehouse and the stock resulting in the loss to the company of an estimated R250 000 00,00, C2 (allowed the cell phone to be removed from the control of the office), C3 (failed to distribute HR posters and point of sale material to the branches timeously) and C5 (failed to control and forward the TV licence register to the H/Q as instructed as this is a legal requirement).

[44] However, the chairman of the disciplinary hearing, in his recommendation, dealt only with sub-charges A1 (insubordination), B1 (duplication of IBT's), B3 (sub-standard stock management and control − stock counts/stock levels/stock management and failure to report findings to managing director as instructed), C2 (allowed the cell phone to be removed from the control office and C4 (failed to obey the instructions of the MD with regard to the scheduling of the shifts at the Canal Walk Branch). The chairman did not deal with the remainder of the charges, but went on to recommend the dismissal of

the first respondent on the basis of his findings that she was guilty of insubordination and poor work performance only.

[45] The chairperson of the disciplinary hearing, accordingly, refrained from enquiring into, and finding the first respondent guilty of the sub-charges relating to her purported refusal to carry out instructions as described in Charge C. He furthermore did not recommend to the appellant that she be dismissed on the basis of a guilty finding on this charge, and nor did the employer rely upon a finding on this charge as a basis for dismissing the first respondent. Although the chairperson of the disciplinary hearing touched briefly upon sub-charge C2 relating to the removal of a cell phone from the control of the first respondent's office, he did not find the first respondent guilty of this charge. What he did find, however, is that the first respondent failed to carry out the instruction "to determine which calls made from the phone were personal in nature in order to ensure that the responsible person was held accountable for incurring these costs". It must be pointed out, however, that the appellant had never charged the first respondent with failing to carry out any such instruction.

[46] This finding by the chairperson was, in any event, made in the context of the poor work performance/incapacity charge (Charge B), and not the failure to carry out reasonable instructions (Charge C). This notwithstanding, the Commissioner in his award went beyond the findings of the chairperson in his recommendation, and dealt with all the sub-charges under Charge C and arrived at a finding that the first respondent had failed to carry out instructions as described in that charge. In *Fidelity Cash Management Services v CCMA and Others,*[24] this Court held that:

> 'It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer gave a particular reason as the reason for the dismissal in order to

[24] [2008] 3 BLLR 197 (LAC).

hide the true reason such as union membership. In such a case, the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that an employer gave for the dismissal but on the basis of the true reason for the dismissal.'[25]

Accordingly, the Commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent's dismissal on the basis of reasons for the dismissal, which the appellant did not rely upon at the time of dismissing the first respondent. But for this error, I believe that the Commissioner would have arrived at a different result in the award.

Poor Work Performance

[47] The Commissioner found the respondent guilty of poor work performance as set out in Charge B on the basis of: (a) the state of the warehouse which the first respondent was responsible for; (b) damage to stock in the warehouse which was packed incorrectly and left unprotected; (c) her failure to deal with the processing of creditors invoices which led to the loss of discounts; (d) failure to control television licensing; (e) failure to distribute the BCEA, Employment Equity Act and health and safety posters to two shops under her control.

[48] The Code of Good Practice on Dismissals provides that person's determining whether a reason for dismissal related to poor work performance is fair should consider whether the employee failed to meet a performance standard, and if so, whether (a) the employee was aware, or could reasonably be expected to have been aware of the required standard; (b) the employee was given a fair opportunity to meet the required standard; and (c) dismissal was an appropriate sanction for meeting the required standard.[26]

[49] However, the Commissioner found the first respondent guilty of poor work performance as described in Charge B without giving consideration to any of the factors outlined in the Code. There is no indication from the evidence on the record that the appellant had put in place certain performance standards,

[25] At para 32.
[26] Item 9 of the Code of Good Practice: Dismissals, Schedule 8 to LRA.

and that the first respondent was aware of them. As much was conceded by Lambrecht in his testimony at the arbitration hearing, but he then went on to glibly state with reference to performance standards that "everybody knew what it means". There is, furthermore, no indication on the record that the appellant had followed an adequate evaluation procedure to determine whether the first respondent failed to meet the required standards. This notwithstanding, the Commissioner found as follows:

> 'The respondent has discharged the *onus* of proof that the appellant …did not perform her duties at the acceptable standard… The sanction to dismiss the applicant was appropriate.
>
> The applicant was aware of what was expected of her. She was paid a salary of R35000 per month and she purported that she had managed the business prior to the buy-out. A manager has to control the work the staff do and the manager is in the end responsible for errors and omissions of the staff….'

[50] Even though the first respondent had managed the business prior to the buy-out by the appellant, and that her responsibilities may have been similar to her previous duties, this did not absolve the appellant from following an evaluation procedure before dismissing the first respondent for poor work performance. To my mind, the failure to do this rendered the decision of the appellant to dismiss the first respondent neither objective nor reasonable.[27] Accordingly, in my view, the Commissioner's failure to apply his mind, to these material considerations, led to his failure to address the question relevant to the enquiry, namely whether the appellant had proved that the first respondent had failed to meet the standards of work performance.

[51] The Commissioner furthermore failed to recognise that it was impermissible for the employer to dismiss the first respondent on grounds of incapacity/poor work performance alone, as it sought to do, without first (a) conducting an investigation to establish the reasons for the unsatisfactory performance, (b) giving the employee the right to be heard; (c) giving the employee appropriate evaluation, instruction, training, guidance and counselling, and (d) after a reasonable period of time for improvement, the employee continues to

[27] *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* (1993) 14 ILJ 171 (IC).

perform unsatisfactorily.[28] The uncontested testimony of the first respondent is that the appellant never once, prior to charging her on 23 December 2011, gave her an indication verbally or in writing that it was of the view that she was lacking in capacity to perform her duties. She also testified that the appellant never once suggested to her that her work performance was substandard and could lead to her dismissal. Nor did the appellant implement a system of progressive or corrective discipline to assist her in improving her performance. When pressed under cross-examination, at the arbitration hearing, to provide evidence of written warnings given, and progressive actions taken to correct what it viewed as first respondent's substandard performance,[29] the only response that Lambrecht could muster was this: "I don't have anything pertaining to that here with me, but we did speak to you".

[52] The appellant not only failed to comply with its obligations to the first respondent in so far as a dismissal for incapacity/poor work performance is concerned, but its Human Resources Manager Baker, who deposed to the appellant's answering affidavit in the review application on its behalf, expressly stated on oath that a dismissal for incapacity does not require any form of progressive discipline. Not only is this statement premised upon an incorrect legal assertion, but it demonstrates a complete lack of understanding on his part of cursory principles of labour law, which in so far as dismissal on the grounds of incapacity is concerned, requires an employer prior to dismissing an employee for incapacity/poor work performance to give the employee an appropriate evaluation, instruction, training, guidance or counselling, and only after a reasonable time for improvement has elapsed resulting in the employee continuing to perform unsatisfactorily, can the employee be dismissed. Significantly, in this regard, the appellant's own disciplinary code required it to give the first respondent a verbal warning for her purported transgressions relating to poor work performance.

[28] Item 8(2) of the Code of Good Practice: Dismissals, Schedule 8, LRA.
[29] The first respondent pertinently asked Lambrecht in cross-examination at the arbitration hearing: "for example did you say to me you were not happy with the way I dealt with customers, ask me if I was having a problem with it, or what do I think was causing the problem or do I require extra training, do I need assistance etc. or how can you help me reach my potential or even suggest the way you would like to be dealt with or anything like that?"

[53] Although in certain circumstances, for instance where the employee is a member of senior management, and her knowledge and experience qualifies her to judge for herself whether she meets the required standard, an employer may not be required to follow a formal procedure or counsel the employee.[30] This expectation would, of course, depend on the existence of acceptable standards of performance which as indicated − do not exist in the context of this matter − despite the appellant's express commitment, in the first respondent's letter of employment, to establish same:

> 'The company will establish acceptable standards of performance for staff. You will be required to achieve this level of performance on a monthly basis. Your failure to do so will be deemed to be substandard sales performance and as such a material breach of the performance standard which we expect of you.'

[54] As indicated, even though the first respondent had managed the business prior to the buy-out by the appellant, and that her responsibilities may have been similar to her previous duties, this did not absolve the appellant from setting performance standards against which to judge the first respondent's performance, before dismissing her for poor work performance, particularly because as a new owner of the business, its new management team was expected to have a different philosophy on how to manage the business. Even if, I am mistaken in this view, and the appellant was entitled, by virtue of the first respondent's seniority, experience and knowledge, not to follow a formal evaluation procedure and counselling, I believe that she was, as a manager, still entitled to a warning that poor performance could lead to her dismissal and to be given a reasonable time to improve. She was, however, given no such warnings or opportunity to improve.[31] These are further material considerations, which the Commissioner simply failed to apply his mind to.

[55] Item 3(4) of the Code of Good Practice provides that "[w]hatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet

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[30] *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC); *Brodie v CCMA* (2013) 34 ILJ 608 (LC).
[31] *Unilong Freight Distributors (Pty) Ltd v Muller* [1997] 11 BLLR 1497 (SCA).

the requirements of s 188".[32] Section 188(2) of the LRA expressly enjoins a person considering whether the reason for dismissal is a fair reason or whether the dismissal was effected in accordance with a fair procedure to take into account the Code of Good Practice. There is scant indication from an analysis of the Commissioner's award that he took the Code of Good Practice into account in considering whether the appellant's reasons for the first respondent's dismissal were substantively fair.

[56] Viewed cumulatively, the Commissioner's failure to apply his mind to issues which, as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry by failing to address the questions raised for determination, namely whether the dismissal of the first respondent was fair for a first transgression of: (a) insolence where she was provoked into such conduct by the employer, (b) poor work performance where no evaluation procedure was followed and no progressive disciplinary measures were taken; and (c) refusing to carry out instructions, which reason the employer did not rely upon at the time of dismissing the first respondent? The failure of the Commissioner to properly apply his mind to the Code of Good Practice, and additionally to the material fact that the first transgressions of insolence and poor work performance are not dismissible offences, reflect not only on the Commissioner's failure to address the questions raised for determination, but also that he made a decision which no reasonable decision-maker could have made, principally because he wholly misconstrued the nature of the enquiry before him and his duties in connection therewith. But for these material irregularities in the award, the Commissioner would have arrived at a different result. It cannot, therefore, be said that the first respondent was given a fair hearing or that the Commissioner's decision was one that a reasonable arbitrator could have reached on the full conspectus of



[32] Section 188 of the LRA provides:

'(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove−

(a) that the reason for *dismissal* is a fair reason−

(i) related to the employer's conduct or capacity; or

(ii) based on the employer's *operational requirements*; and

(b) that the *dismissal* was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of this Act."

the evidence before him. In the circumstances, I consider that the Labour Court was correct in concluding that the first respondent's dismissal by the appellant on the grounds of insolence, poor work performance, and failure to carry out instructions was substantively unfair.

<u>Substitution and quantum of the compensation</u>

[57] Having found that the dismissal of the first respondent to be substantively unfair, the Labour Court substituted the Commissioner's finding with a finding that the first respondent's dismissal was substantively unfair and that she be awarded compensation in the sum of 10 months' remuneration in the form of her salary prior to dismissal. The Labour Court's reason for not remitting the matter to the CCMA for a rehearing is this:

> 'At the hearing of the matter, both representatives of the parties agreed that the facts of the matter are fairly common cause. In addition to comprehensive pleadings that were prepared in this matter, there is a full record of the proceedings of the CCMA, which included the record of the disciplinary proceedings. In those circumstances, it is my view that all the facts required to make a determination by the court have been placed before this court and the court is in as good a position to make the decision.'

[58] Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court "is in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.[33] Thus, where the issues are largely common cause, the pleadings comprehensive, the full record of both the disciplinary and arbitration proceedings are before the

[33] *Sidumo* at para 98.

court, and there has been a elapse of almost 20 months from the date of dismissal to the date of finalisation of the review application, such as in this case, the consideration of bringing the dispute to a speedy finality would certainly have a bearing on the decision of the reviewing court to decide the dispute, and not remit it to the CCMA, because it is "in as good a position" as the CCMA to do so. The Labour Court's decision not to remit the dispute to the CCMA for determination is accordingly justifiable upon a consideration of the facts of this case.

[59] Turning then to the issue of compensation which was awarded by the Labour Court to the first respondent in its substituted finding, it is important to bear in mind that at the arbitration hearing, the remedy which the first respondent sought, in the event of a finding that her dismissal was unfair, was compensation and not reinstatement because she believed that a continued employment relationship would be intolerable. In granting the first respondent compensation equivalent to 10 months of her salary, the Labour Court reasoned as follows:

> 'The [first respondent] has not asked for reinstatement. In light of my view that the [the first respondent's] dismissal was substantively unfair, had the applicant sought reinstatement she would have been entitled to her salary retrospective to the date of her dismissal. I also take cognisance of the fact that at the time of her dismissal, the [first respondent] was on a 2.5 year contract which commenced 1 March 2011. Effectively therefore, on the date of her dismissal, there were 20 months left on her contract of employment.'

[60] Relying on the decision of this Court in *Tshongweni v Ekurhuleni Metropolitan Municipality*,[34] the appellant contends that the Labour Court erred in finding that the factors relevant to the determination of the quantum of compensation included the amount that the first respondent might have been entitled to in the breach of her fixed-term contract, and the amount that she might have been entitled to by way of back-pay in the event that she had elected to seek reinstatement and not merely compensation. In *Tshongweni*, this Court found that the applicant sought reinstatement in the guise of damages, because

[34] (2012) 33 ILJ 2847 (LAC) at paras 31 to 43.

what he really wanted was his salary for the period he was unemployed between July 2006 and February 2010, equivalent to 43 months' salary (an amount in excess of R2 million), being his positive interest, which would be the actual loss of his salary for the nine months remaining on the unexpired period of his fixed term, as well as consequential losses in respect of the salary he would have earned had his fixed term contract been renewed for at least 34 months. The problem with granting such a remedy, the Court found, was that the LRA does not provide for damages for unfair dismissal, and that where reinstatement is not granted, the court is limited to granting compensation in a maximum amount of 12 months.[35] In relation to the award of compensation equivalent to nine months' salary, the Court found that the Labour Court was evidently guided by the fixed term contract having nine months to run at the date of dismissal, and that in the absence of any misdirection or error, there is no basis for interfering with the award of compensation.

[61] Unlike in *Tshongweni*, where the dismissed employee sought reinstatement under the guise of damages, in the current matter the first respondent, in accordance with the limitation in s 194 of the LRA, sought compensation equivalent to 12 months remuneration, calculated at her rate of remuneration on the day of dismissal. Moreover, although the Labour Court took into consideration that, had the first respondent sought reinstatement she would have been entitled to her salary retrospective to her date of dismissal, and that on her date of dismissal there were 20 months left on her contract of employment, it was at all times alive to the fact that in awarding compensation to the first respondent, in terms of s 194 of the LRA, it was limited to awarding compensation which is not more than the equivalent of 12 month's remuneration calculated at the employee's rate of remuneration on the day of dismissal. The Labour Court accordingly awarded the first respondent compensation equivalent to 10 months remuneration, calculated at the rate of her remuneration on the day of her dismissal.

[35] *Tshongweni* at para 40.

[62] The Labour Court, in my view, cannot be faulted in its quantification of the compensation awarded to the first respondent, nor the principles applied in determining same. The compensation awarded, in my view, was an attempt to offset the financial loss which resulted from a wrongful act of the employer (the appellant), and was not an attempt to punish the appellant. The Labour Court considered the amount of time remaining of the 30 month period, during which the first respondent could not be removed from her employment by the appellant, and tempered the award by reducing the 12 month's compensation to 10 months. This decision, in my view, is in accordance with the Labour Court's discretion under s 194(1) of the LRA, and is accordingly not open to question.

[63] As recently reiterated by this Court in *Kukard v GKD Delkor (Pty) Ltd*,[36] the power of the Labour Appeal Court to interfere with the quantum of compensation awarded by an arbitrator or the Labour Court under s 194(1) of the LRA is circumscribed and can only be interfered with:

> '[O]n the narrow grounds that the arbitrator exercised his or her discretion capriciously, or upon the wrong principle, or with bias or without reason or that she adopted a wrong approach. In the absence of these grounds, this Court has no power to interfere with the quantum of compensation awarded by the Commissioner. An appeal court will, furthermore, not interfere merely because it would come to a different decision. It is therefore for the [employer] to persuade this Court that the quantum of compensation awarded by the Commissioner may be impugned on one of the narrow grounds referred to above. This it has simply failed to do.'[37] [Footnote omitted]

[64] Thus other than the appellant's complaint that the Labour Court gave consideration to the fact that if the first respondent had sought reinstatement, she would have been entitled to her salary retrospective to her date of dismissal, and that on her date of dismissal there were 20 months left on her contract of employment, which as demonstrated above are valid considerations in the context of awarding compensation to an employee who has been unfairly dismissed, the appellant has simply failed to persuade this

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[36] *Ruan Kukard v GKD Delkor (Pty) Ltd*, Case No: JA52/2013, LAC, 7 October 2014.

[37] At para 37.

Court that the Labour Court's award of compensation may be impugned on one of the circumscribed bases referred to above. In the circumstances, I find no basis for this Court to interfere with compensation which the Labour Court awarded to the first respondent.

[65] In the premises, I find that the award was correctly reviewed and set aside by the Labour Court. The appeal, therefore, falls to be dismissed. I see no reason, in law or fairness, why costs should not follow the result.

[68] In the result, I make the following order:

'The appeal is dismissed with costs.'

F Kathree-Setiloane AJA

Musi JA and Murphy AJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

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