REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2459/09

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SA

on behalf of S KHAN **Applicant**

and

M J TSABADI **First Respondent**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **Second Respondent**

GAUTENG PROVINCIAL DEPARTMENT OF

HEALTH **Third Respondent**

MEC FOR HEALTH, GAUTENG PROVINCIAL

GOVERNMENT **Fourth Respondent**

Heard: **13 October 2011**

Delivered: **25 January 2012**

Summary: Review application – insubordination that warrants dismissal depends on the nature and circumstances of the insubordination – applicant's refusal to obey a lawful instruction – employment relationship intolerable. Dismissal appropriate sanction – review application dismissed.

JUDGMENT

HULLEY AJ

Introduction

[1] This is an application to review and correct, alternatively to set aside an arbitration award issued by the first respondent.

[2] The applicant seeks to have the award corrected to provide that the dismissal of Dr Khan was substantively unfair and for her reinstatement and related relief.

[3] The applicant is recorded as the Public Servants Association acting on behalf of S Khan, but for the sake of convenience I shall refer to Dr Khan as the applicant herein.

[4] The third and fourth respondents failed to file any opposing papers. They simply filed a notice of intention to oppose and then adopted the attitude that they would simply oppose the application on the papers filed by the applicant

without further ado.

[5] I did not understand Mr Van der Merwe who appeared on behalf of the applicant to contest the continued involvement of the second and third respondents too vigorously and I am accordingly inclined to allow them to do so.

[6] I should note however that in terms of Rule 7A (9) of the Labour Court Rules, a party ‘wishing to oppose’ the granting of an order ‘must’, within a period of 10 days from receipt of the amended notice of motion and supplementary affidavit or a notice that the applicant intends to stand by its original notice of motion and affidavit ‘deliver an affidavit in answer to the allegations made by the applicant’. There is nothing in the rule which permits a party to simply file a notice of opposition. Indeed, there is nothing in the rule which requires the filing of a notice of opposition; the intention to do so is, presumably, inferred from the filing of the answering affidavit and its content.

[7] Although the rule suggests that the filing of the answering affidavit is peremptory (“must”), I do not think it is in the interests of justice to adopt a fastidious approach in cases such as these and my inclination would be to condone non-compliance unless there is evidence of prejudice or at the very least a risk of prejudice to the other party.

[8] In any event, we would do well to remind ourselves that the rules exist for the courts and not the courts for the rules.[1] This is not to say that this Court should encourage a lax attitude by practitioners to the rules, but rather that it should bear in mind that the purpose of the rules is to ensure the inexpensive and expeditious completion of litigation and that it should insofar as it is permitted and within the ambit of its inherent powers interpret and apply the rules in such a manner as to ensure rather than stymie this result and the achievement of justice.[2]

1 *Republiekeinse Publikasies (Edms.) Bpk v. Afrikaanse Pers Publikasies (Edms.) Bpk* 1972 (1) SA 773 (A), at 783A.
2 *Khunou & Others v. M Fihrer & Son (Pty) Ltd & Others* 1982 (3) SA 353 (W), at 355E – 356C.

[9] The approach adopted by the third and fourth respondents is not one which is to be encouraged, but the filing of the notice of opposition alerted the applicant to the fact that they intended opposing the relief sought although it did not indicate on what grounds they intended to do so. In the circumstances, however, as previously noted, no prejudice has resulted (at least none has been suggested) and I am inclined to condone non-compliance.

[10] That having been said, I do believe that the third and fourth respondents were slack in their observance of the rules and in the manner in which they opposed these proceedings. Indeed, the third and fourth respondents, having failed to file an answering affidavit, then missed the date for the filing of heads of argument. In these circumstances, I am of the view that an appropriate mechanism with which to censure their laxity is by way of an appropriate costs order. I will return to this aspect later.

Procedure for the review of arbitration proceedings

[11] Sadly, as so frequently happens in review applications to this Court, the proceedings before the first respondent were not properly recorded and this necessitated a reconstruction process.

[12] It is necessary for me to deal with the rules regarding reconstruction at the outset.

[13] Rule 7A sets out the procedure to be followed when a party seeks to review a decision or proceedings of a body or person performing a reviewable function. This includes the review of arbitration awards such as in the present case.

[14] Rule 7A, it has been held, like its close relative, Rule 53 of the Uniform Rules of Court,[3] is not peremptory and has been devised largely for the benefit of the applicant.[4] An applicant is accordingly not obliged to follow that procedure and can elect, instead, to follow the procedure contemplated by Rule 7.[5] A party who elects to proceed without the benefit of a complete record runs the risk that she will be unable to discharge the *onus* which is upon her.[6] Moreover, disputes of fact will be decided according to the *Plascon-Evans* rule[7] which could be obviated to some extent where there is a complete record of the proceedings (assuming, that is, that the ground of review is based upon an issue which appears from the record).

[15] Rule 7A(2) provides that the notice of motion must call upon the person or body whose decision is sought to be reviewed to despatch "the record" of the proceedings sought to be corrected or set aside.

[16] Generally a record may be kept either in the form of handwritten notes or in the form of a tape or electronic recording. (See, for instance, the provisions of Rule 36(2) of the Rules of the Commission for Conciliation, Mediation & Arbitration.)

[17] The practice appears to be for the bargaining council or CCMA, as the case may be, to make available to the Registrar of this Court the tape recordings of the arbitration proceedings. The applicant is then notified by the Registrar and he, she or it must then endeavour to have the record transcribed.

[18] Once the transcription is complete, the applicant's representative must consider the transcription to ensure that it is in order. In this regard, Rule 7A (5) requires the applicant to make copies of such portions of the record as she considers to be necessary for the review and to 'certify each copy as true and correct'. In so far as the transcription of oral evidence is concerned, the

3 *Jockey Club of South Africa v. Forbes* 1993 (1) SA 649 (A), at 661E – F
4 *Moloi v. Euijen NO & Another* (1997) 18 *ILJ* 1372 (LC), at 1374G – 1375 082-785-6354
5 *Simela & others v MEC for Education, Province of the Eastern Cape & Another* (2001) 22 *ILJ* 1688 (LC)
6 *Liberty Life Association of Africa v Kachelhoffer NO & Others* (2001) 22 *ILJ* 2243 (C), at
7 *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634 – 635

transcriber generally certifies the truth and correctness of the transcript based on what she has heard. Where the "record", however, consists of additional evidence, such as documents, maps or models, the applicant's representative cannot content herself with the transcriber's certificate, but must herself so certify.

[19] It often happens that the transcript is littered with words such as "*inaudible*", "*indistinct*", "*mechanical interruption*" or words to that effect.

[20] Should this happen, the appropriate action to be taken is for the applicant's attorney to endeavour to listen to the tape recordings with a view to filing in the gaps in the transcript. The attorney represented the applicant at the arbitration proceedings she should be in a good position to make sense of what the witness was referring to in the portions where the gaps appear.

[21] If this process fails to yield a satisfactory outcome and the applicant is thus unable to certify the truth and correctness of the record, the applicant must approach the arbitrator and the CCMA or bargaining council, point out that the transcript is incomplete and request the arbitrator to supplement the record with her handwritten notes. If the arbitrator is satisfied that her notes are a sufficient record of the oral testimony, he or she should file these and they will then (properly transcribed) stand as a record of the proceedings. The arbitrator should file an appropriate notice together with the handwritten notes certifying the correctness and accuracy of those notes.

[22] If, however, the arbitrator is not satisfied that her notes constitute an accurate or sufficient record she must file a report stating this fact. A process for the reconstruction of the record must then be embarked upon.

[23] The first step in the reconstruction process is to arrange a meeting between

the employer, employee and the arbitrator in order to "compare notes" as it were and to fill in any gaps in the record. Each of these parties plays an important part in this reconstruction process and each has an obligation to attend those proceedings and contribute positively towards the process. The arbitrator and bargaining council or CCMA whose obligation was to ensure that a proper record was kept must, however, arrange the meeting/s and ensure that they are properly co-ordinated. Neither party can, however, remain supine and where there is a failure on the part of the bargaining council or CCMA to arrange a reconstruction meeting, both the employer and employee are obliged to take measures to ensure that this is done.

[24] The procedure to be followed in a reconstruction meeting was fully explained by Comrie AJA in *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v. Commission for Conciliation, Mediation and Arbitration and Others*[8]:

> 'A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness.'[9]

[25] It seems to my mind that since it is for the arbitrator and the CCMA or bargaining council to produce "the record", if the arbitrator is satisfied that the process of reconstruction has enabled him or her to produce such record and to certify it as correct she must do so. She must, of course, record any reservations or objections noted by either the employer or employee. They

8 (2003) 24 ILJ 931 (LAC).
9 *Lifecare Special Health Services* at 936 E – H para 17.

should then file affidavits setting out the respects in which they contest the correctness of the record, what they claim is the correct evidence and the reasons for holding those views.

[26] An affidavit should be prepared by the arbitrator to explain the reasons for the lack of a proper recording in the first place and, if certain tape recordings were unavailable, the reasons or possible reasons for their absence. If the tape recordings went missing, the arbitrator's affidavit must be accompanied by an explanation from the case manager of the CCMA or bargaining council or any other person who can swear positively to such facts, as to the record keeping system of the CCMA or bargaining council and what is likely to have happened to the missing tape recordings.[10]

[27] Should it, after the aforesaid processes have been engaged in, transpire that the record or substantial portions thereof are indisputably lost and the parties are unable to reconstruct those portions, the arbitrator must submit an affidavit to this effect to the Court. The Court is then confronted with a choice 'either to let the judgment in the respondent's favour stand, or to set it aside and to refer the matter for hearing *de novo*.'[11] Either election results in some form of prejudice to one of the parties and should be embarked upon only as a last resort.

[28] I should point out that in the context of appeals in criminal proceedings, the courts have pointed out that where the official recordings have been lost or are not retrievable, the best secondary evidence has to be obtained.[12] This would include, where the tape or electronic recordings have not been properly transcribed, for instance, receiving the bench notes kept by the judicial officer of the court below.

10 See *Papane v Van Aarde NO and Others* (2007) 28 *ILJ* 2561 (LAC), at 2574 G – H.
11 *Department of Justice v Hartzenberg* (2001) 22 *ILJ* 1806 (LAC), at 1811 C.
12 *S v Whitney and Another* 1975 (3) SA 453 (N).

[29] In the context of criminal appeals, the route which appears to be adopted is, where the record cannot be constructed with the best available evidence, to set aside the conviction and sentence. Since the decision to institute criminal proceedings rests with the Director of Public Prosecutions, the criminal courts have no power to refer the matter back for a hearing *de novo*.[13] The latter constraint does not apply, of course, in the context of labour proceedings.

[30] Subject to the latter observation, it appears to my mind that the approach adopted in the context of criminal appeals is a useful guideline for this Court to follow.

<u>Status of the transcribed record in the present case</u>

[31] In the present case, the applicant instituted review proceedings on 23 September 2009. In compliance with Rule 7A (2), the notice of motion called upon the first and second respondents (the arbitrator and the bargaining council, respectively) to despatch the record of the arbitration proceedings.

[32] It is not clear when the tape recordings in the present case were filed with the Registrar by the second respondent, but it appears from the transcriber's certificate attached to the transcript of the oral evidence that the transcription was completed on 6 December 2009.

[33] On 30 July 2010, a person identified as D Z Adonis, the General Manager of the applicant's trade union, filed a document styled "Filing Sheet: Transcript / Record & Bundles of Documents". In the document, Adonis indicated that the "record" consisting of the arbitration award, pre-arbitration minute, closing arguments before the arbitrator, the transcript / record of the arbitration proceedings and the bundle of documents used as evidence during the proceedings (Bundles A to E) were filed therewith and that such documents were certified to be 'a true copy of the transcript provided by the transcribers and of the bundles of documents and other documents used by the parties at the proceedings'.

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13 *S v Joubert* 1991 (1) SA 119 (A); *S v Quali* 1989 (2) SA 581 (E).

[34] On 31 August 2010, the applicant filed its supplementary affidavit and amended notice of motion in apparent compliance with Rule 7A (8) (a). The documents were not filed within the 10-day period prescribed in that rule, but the third and fourth respondents made no issue of this and I am not inclined to do so either.

[35] The transcribers, who are identified as N. Lotter and S. Laas, provided a certificate in which they confirmed that –

> 'I the undersigned, hereby certify that insofar as it is audible, the a foregoing (*sic*) is a true and correct transcription of the proceedings recorded by means of a mechanical recorder …'

[36] The transcribers further noted that the recording was 'very bad at some points and parties are extremely inaudible'. Presumably the reference to "parties" was intended to be to the witnesses. The transcribers also noted that it appeared that the 'applicant's evidence [was] missing from the record as tapes [were] not supplied'.

[37] The applicant supplemented this gap in the record by the inclusion of a further twelve pages which were transcribed from the handwritten notes of the applicant's representative at the arbitration proceedings. This transcription was accompanied by a note by the transcriber, a Mrs M James, who certified that 'this transcription is a fair reflection of the handwritten notes of advocate F J Van der Merwe taken during the arbitration proceedings in this matter'. (It appears that Mr Van der Merwe who appeared in these proceedings on behalf of the applicant, also represented her in the arbitration proceedings.)

[38] There is no indication by Mrs James as to when she completed the transcription, but on 10 October 2011, an affidavit was filed on behalf of the

applicant in which she set out the measures taken to reconstruct the record. This affidavit was filed in response to a complaint regarding the status of the record raised in the heads of argument filed on behalf of the third and fourth respondents.

[39] The following can be gleaned from that affidavit and the addenda thereto:

39.1 After receipt of the transcript of the arbitration proceedings (it is not indicated when the transcription was received) the applicant's representative addressed a letter dated 8 February 2010 to the bargaining council. In this letter, he stated that the evidence of three witnesses, More, Msimango and Khan, who gave evidence on 23 and 24 March 2009 was not contained in the transcript. He requested the assistance of the second respondent in establishing the whereabouts of the missing tape recordings.

39.2 The second respondent apparently forwarded the request to the first respondent.

39.3 On 17 February 2010, the first respondent replied by way of an e-mail in which he indicated that he did not have the tape recordings. He suggested two options: for him to depose to an affidavit confirming that his award contained 'sufficient details of what transpired during the arbitration proceedings' or to engage in a reconstruction process.

39.4 The applicant adopted the view that a reconstruction process should be engaged in.

39.5 A meeting for the reconstruction of the missing portions of the oral evidence was arranged for on 3

May 2010, but this meeting was subsequently cancelled (on the day) due to the unavailability of the first respondent.

39.6 Despite various further attempts, mostly from the applicant's side, the parties were unable to arrange a further meeting.

39.7 On 19 August 2010, the applicant's representative addressed an email to the second respondent expressing the view that little purpose would be served in continuing with a reconstruction if the first respondent did not have his notes. He noted that the third and fourth respondents' representative, Mr Makka, had apparently lost his notes and that his own notes had been made available to Makka. He noted that in light of these facts 'the record is now sufficiently reconstructed' in his view.

[40] It is unclear from the affidavit and addenda whether Makka ever agreed with the view that everything had been done to complete the reconstruction of the record, but it is apparent from the correspondence of Makka that he implicitly accepted that further engagement in the process was futile. At any rate, at the hearing of this matter counsel for the third and fourth respondents acknowledged that everything had been done.

[41] That having been said, I am not satisfied that everything had indeed been done to ensure the reconstruction of the record. For instance, the first respondent expressed the view at an early stage that his award adequately captured the evidence. This issue was not pursued, at the very least as a

starting point for the reconstruction of the record.

[42] Whatever the case may be, however, I am not prepared to go behind the apparent agreement of the parties' representatives and, as I have previously indicated, the rules to ensure the availability of the record are for the benefit of the applicant who is entitled to waive his or her right thereto. I should emphasise that the cases referred to above regarding the application of this principle apply to an election by an applicant between the procedure contemplated by Rule 7 and that contemplated by Rule 7A. They have not been applied in the context of an election by an applicant to proceed in circumstances where, having requested the record, an insufficient or incomplete record is presented, thus compelling him or her to make an election on how to proceed.

[43] On the facts of this case, however, the process of reconstruction had not, as pointed out above, been properly dealt with. Moreover, the applicant's counsel, Mr Van der Merwe, insisted in argument before me that the record was sufficient. This is thus not a case in which the applicant maintained its stance that the record was incomplete and that she was not in a position to properly review the award.

[44] Mr Lennox, who appeared on behalf of the third and fourth respondents, urged me to have regard to the facts as set out in the arbitration award. I did not understand Mr Van der Merwe to contest this suggestion *per se*. I am of the view that this is a useful manner in which to deal with the problem and accordingly intend to have regard to the arbitration award where necessary. There is in any event no suggestion by the applicant that the record of evidence contained in the award was incorrect. I accept, however, that it may not be complete.

[45] Whilst I do have regard to the transcribed notes which the applicant's representatives took at the arbitration proceedings, those notes are not only terse, but are cryptic as well. They do not, for instance, contain any lengthy notes on the line of cross-examination conducted by the applicant's

representative. It would have been surprising if it were otherwise.

[46] In the circumstances, and in light of Mr Van der Merwe's insistence, I proceed hereunder to consider the review application on the limited record before me.

<u>The evidence led at the arbitration proceedings</u>

[47] The applicant, it appears, took up employment with the third respondent (to whom I shall hereinafter to as the Department) at some stage during 1992 or 1993. At the time she was employed as the Superintendent of the Department's Lenasia South Hospital.

[48] At some stage (it is unclear precisely when this occurred), the applicant suffered an injury to her right arm. It appears that she suffered severe nerve damage requiring some 18 to 19 operations. The applicant's use of this arm was severely compromised as a result.

[49] The public service underwent a restructuring process which resulted in a "person-to-post matching" process in terms of Resolutions 7 and 8 of the PSCBC.

[50] There was some suggestion in the documentation that was filed of record that the applicant had declined to participate in that process.[14] The applicant's own account was that she had in fact accepted that post "with gratitude" but had requested a job description relating thereto.[15]

[51] At any rate, it appears that the applicant was absorbed into the post of Medical Advisor at the level of Deputy Director. This was the post which she occupied at the time of her dismissal although she was also described as the

14 See Bundle D: p. 40.
15 See letter from Applicant dated 28 October 2004: Bundle D: p. 37.

Deputy Director for Tenders and Contract Management.

[52] It was common cause that the applicant, in such capacity, reported to Mr Valdis Ramaano, the Director Supply Chain Management.

[53] Ramaano testified that in December 2003, he was transferred to the Department from Johannesburg Hospital (where he had been employed as the Director of Finance and Procurement). He was appointed at level 13 as Acting Director, Administration and Logistics. He identified and referred to the applicable job description for the post of Medical Advisor: Tenders and Contracts.[16]

[54] According to Ramaano, his relationship with the applicant suffered severe strain as a result of her refusal or failure to do any work under him. She did hardly any of the work for which she was responsible and as a result he was compelled to distribute this work among various other people, including her juniors in an effort to ensure that proper service delivery was maintained.

[55] Ramaano was referred to a file (Bundle C) containing documentation which the applicant claimed consisted of work which she had performed. He testified that none of the work referred to in that file was within his province and was not work which the applicant was employed to perform.

[56] The final straw for Ramaano came when he requested the applicant to participate in the development of a tender process involving the Pretoria Academic Hospital. Information needed to be requested from various companies in order to assess the requirements and the budget allocation for a particular product. Ramaano testified that the applicant's response was that she required authority from her union or her lawyer first to perform the work as she had been appointed as the Acting Director to a Director who was still on suspension and the documentation relating thereto was a matter to be utilised in the disciplinary proceedings.

16 Bundle D: pp. 86 – 87.

[57] It is unclear from the evidence precisely what happened next, but the parties concluded an agreement at the bargaining council on 8 June 2004. It appears that this agreement arose out of an unfair labour practice dispute regarding some alleged assault perpetrated by Ramaano upon the applicant. Whatever may have led to the referral to the bargaining council, it appears from the agreement that the parties agreed that the applicant would meet with Ramaano under the chairmanship of a person identified as Mr E Butshingi and that they would do so before the end of June 2004 in order to finalise a job description, organogram and her functional role within the department.

[58] It was put to Ramaano during cross-examination that the applicant in an attempt to resolve the ongoing dispute regarding her job description prepared a document setting out her job description.[17] If regard be had to the content of this document, it appears that, at least by June 2004, the applicant was aware that her tasks included tender and procurement administration. Included in the document is a reference, in addition to tender and procurement responsibilities, to clinical trial and inter-departmental collaboration.

[59] According to Ramaano, the latter aspects never formed part of the applicant's job description. For present purposes that, however, is irrelevant.

[60] On 23 July 2004, the Head of Department addressed a letter to the applicant. The letter read as follows:

> 'Dear Dr Khan
>
> **TRANSFER TO A POST OF MEDICAL SUPERINTENDENT AT SOUTH RAND HOSPITAL**
>
> 1. Our communication regarding the optimal utilisation of your skills and

17 Bundle A: pp. 79 – 87.

expertise refers.

2. In view of the foregoing I have pleasure in informing you, that subsequent to our communication and having duly considered our service needs, approval has been granted for your placement in the capacity of Medical Superintendent at South Rand Hospital, with effect from the 1st of August 2004.

3. I trust that you will accept your placement as expounded above favourably and that you will be happy and successful in your new work environment.

4. We request that you should sign the attached form to indicate acceptance / non-acceptance of this offer, within five (5) working days from date of receipt of your letter.'

[61] The letter was signed on behalf of the Head of the Department.

[62] It is not clear what document was attached thereto.

[63] I pause, once again, to note that there does not appear to have been any dispute between the parties as to whether the Department was entitled to insist on an employee being transferred without his or her permission. Having regard to the provisions of section 14 of the Public Service Act, [18] it may well not be open to an employee within the public service to challenge his or her transfer provided it is within the "public interest" and the transfer has been effected on the authority of a person having the power to take such decision.

[64] There was no challenge, it appears, either in the arbitration proceedings or in the proceedings before this Court as to the entitlement or power of the Department to insist on the applicant being transferred. I will accordingly, for the purposes of this matter, proceed on the assumption that the Department was entitled to insist upon the transfer of the applicant in terms of the applicable legislation. (At this stage I say nothing, yet, as to whether the

18 103 of 1994.

Department in fact so insisted. As it so transpired, there is a dispute as to whether the Department had in fact provided an instruction or whether it was merely a request. I will deal with that issue *anon*).

[65] It will be noted from the arbitration award that the first respondent considered the aforesaid issue on the basis of Ramaano's managerial prerogative. Whether this is legally tenable is not a matter which I need consider as there was no challenge to this aspect.

[66] According to the applicant, she was initially presented with the offer set out in the letter of 23 July 2004 in a verbal form and shortly thereafter in the form of the letter. She claimed that she had rejected the offer at that stage and did not, when subsequently presented with the letter, consider that she was required to formally reject the offer in writing.

[67] An *impasse* developed which led ultimately charges being proffered against the applicant. The nature and terms of this *impasse* were recorded in a series of correspondence exchanged between the parties. I will deal with that correspondence under a different heading below.

[68] In a charge sheet dated 8 April 2005, the Department proffered the following charges against the applicant.

> 'It is alleged that you:
>
> Charge 1
>
> Are guilty of misconduct in that you failed to carry out lawful order or routine instructions in that on the 23rd July 2004 you were instructed by letter to assume duties at South Rand Hospital but you failed to follow the instructions, a follow-up letter dated 4th October 2004 was presented to you but you were

still defiant.

Alternative to charge 2

Guilty of insubordination in that you failed to report to South Rand Hospital as instructed by letter dated 23rd July 2004 and a subsequent letter dated 4th October 2004.

Charge 2

Are guilty of misconduct in that you failed to comply with your contract of employment whereby you promised to let your services to the Department of Health for a salary, but you report to work every day, sit in your office without performing any duty.

Charge 3

Guilty of misconduct in that you prejudice the administration and discipline of the department in that you occupy the office of the Department on daily basis without rendering any services.

Charge 4

Guilty of misconduct in that you failed and still failing to take reasonable instruction from your Supervisor, which amounts to insubordination.'

[69] Disciplinary proceedings ensued. These were interspersed by lengthy delays (and I will deal with those below).

[70] In a document dated 4 December 2006, the chairman delivered his findings. He concluded that the applicant was guilty as charged, but noted that charges 2 and 3 "flows from one charge" and made "a combined finding of guilt as one charge".

[71] After evidence in mitigation and aggravation was received the applicant was informed that her services had been terminated and affording her the right of

appeal.

[72] The applicant, through her union, lodged an appeal on 16 February 2007. The appeal failed.

[73] The applicant then referred a dispute concerning an unfair dismissal to the second respondent.

The arbitration award

[74] The first respondent analysed the evidence and concluded that the dismissal of the applicant was fair both substantively and procedurally. He dismissed the application.

[75] In arriving at his conclusion, the first respondent reasoned as follows:

75.1 With regard to the first charge, the uncontested evidence before him was that a meeting was held with the applicant and her representative when she was requested to indicate the duties that she was performing. It was established in that meeting that some of the activities that the applicant indicated were her core functions were performed elsewhere and that the applicant was unable to account for what she was doing in the Supply Chain Management Unit.

75.2 Pursuant to that meeting, the Department made a business decision to transfer the applicant to South Rand Hospital as a hospital superintendent as that hospital required one. The applicant and her representative were called to a further meeting where this decision was communicated to them and the applicant requested to respond in writing within five days. She failed to do so. Mr. Henry Hall, the applicant's representative, in that meeting, testified that it was unnecessary to respond in writing as they had verbally rejected the transfer. The applicant, on the other hand, testified under cross-examination that she would under no circumstances accept the transfer, no matter what the exigencies of the Department dictated as she had been absorbed into a different post.

75.3 The applicant's claims that that her clinical skills were no longer as sharp as they used to be were to be rejected as the Department's witnesses established that this had been taken into account when the she was to be transferred and the compromise was that she was to be utilised in a managerial as opposed to a clinical position and would only in extreme circumstances be required to perform clinical functions.

75.4 The applicant was a medical doctor by profession and she was not being gainfully employed in the Supply Chain Management unit. In an attempt to utilise her skills, the Department sought to transfer her to South Rand Hospital but she rejected the transfer verbally.

75.5 The transfer of an employee in accordance with the exigencies of the business remained a managerial prerogative and whether this was an order or a request was immaterial.

75.6 'It remains a fact that the Applicant was advised in writing that she would be transfer[red] to South Rand Hospital and she refused without offering any excusable reasons'.

75.7 A refusal to obey a lawful and reasonable instruction carries with it the highest penalty in labour law, i.e. dismissal.

75.8 The dismissal of the applicant on this basis was accordingly fair.

75.9 In so far as the second charge was concerned, the applicant's evidence that she had performed the work set out in Bundle C had to be rejected based on Romaano's evidence that those tasks had nothing to do with Supply Chain Management.

75.10 Moreover, since her salary was paid from the budget of Supply Chain Management, it made sense that her work would be related to the work performed by the Department which paid her salary.

75.11 The irresistible inference to be drawn from the aforesaid was that the applicant did not render any services to the Supply Chain Management directorate. This was corroborated by Ramaano's unchallenged testimony that he had to re-allocate work that the applicant refused to do to some other individuals in the Department to avoid compromising service level agreements with other departments / institutions.

The grounds of review

[76] The applicant attacks the award on several bases.

I summarise these below.

[77] First, the applicant argued that the finding by the first respondent that it was "immaterial" whether the terms of the letter of 23 July 2004 and the verbal discussion which preceded it constituted an "instruction" or not was legally untenable.

[78] In this context, the applicant contended that it was impermissible and contradictory for the first respondent to hold the aforesaid view and, at the same time, find the applicant guilty on a charge of failure to carry out a lawful

and reasonable instruction.

[79] Second, the applicant argued that assuming she was correctly found guilty of a failure to obey the instruction the first respondent “ignored” certain crucial evidence, primarily her testimony that she had rejected the offer both verbally and in writing and the Department should have advised her whether it accepted her rejection before charging her. (To be fair to the applicant the substance of this ground of review is that the applicant was wrongly found guilty of the first charge in the first place.)

[80] Third, in so far as the second charge was concerned, the applicant argued that the first respondent failed to have due regard to the fact that the parties had concluded a settlement agreement regarding the finalisation of her job description. This, she argued, was an indication that she was uncertain of what her job description entailed and the first respondent paid insufficient regard to this.

[81] Fourth, the applicant contended that the first respondent’s finding that she had betrayed her position of trust was unsupported by the evidence, both because she was not guilty of the charges in the first place and because no evidence was led of a breakdown in the relationship of trust. The latter point, she contended, is underpinned by the fact that the Department had in fact invited her to an interview for a promotion to a different post.

[82] Fifth, the applicant argued that assuming that she was guilty of the charges there was no evidence that dismissal was the appropriate sanction. *Inter alia*, she had a clean record, there was no evidence that the relationship of trust had broken down and the employer had not followed the principle of progressive discipline.

[83] Sixth, in so far as the procedure was concerned, the applicant argued that the first respondent erred in finding that she was to blame for the various delays in concluding the disciplinary proceedings over a period of 1 ½ years.

The merits of the review application

[84] I turn now to consider the merits of this application.

[85] The primary focus of Mr Van der Merwe's argument before this Court related to the absence of an instruction in the letter of 23 July 2004. Mr Van der Merwe contended that the manner in which the first respondent dealt with this aspect in his award was inexplicable and irrational.

[86] It will be recalled that the arbitrator found that –

> '[T]ransfer of an employee in accordance with the exigencies of the business remains a managerial prerogative. Whether or not this was not and order but a request subject to rejection by the Applicant is immaterial. It remains a fact that the Applicant was advised in writing that she would be transfer[red] to South Rand Hospital and she refused without offering any excusable reasons'.

[87] Mr Van der Merwe contended that the first respondent's finding that it was "immaterial" whether "this" was an instruction or not was in conflict with his subsequent finding that the applicant was guilty of insubordination for failing to comply with an instruction.

[88] At first blush there appears to be much merit in Mr Van der Merwe's criticism of the award on this aspect. Unless there was a lawful and reasonable instruction given to the applicant she was under no obligation to follow that instruction, much less where no instruction was given in the first place. Thus, it would be irrational for the first respondent to find, on the one hand, that it was irrelevant whether an instruction was given and, on the other, that the dismissal of the applicant for failure to comply with the instruction was fair. These conclusions are mutually exclusive. Indeed, I must confess that I was

initially persuaded by this argument.

[89] However, upon consideration of all the evidence in the record it seems to my mind that the first respondent's award, though not a model of clarity in this regard, must be understood in a different sense to that for which Mr Van der Merwe contended.

[90] There is a series of correspondence exchanged between the applicant and the Department (to which I promised to return and now do) which, it appears, was what the first respondent had in mind. The reference to "this" in the sentence 'whether or not this was not an order' refers, it appears, to the letter of 23 July 2004. In the subsequent statement 'the Applicant was advised in writing that she would [be] transfer[red] to South Rand Hospital and she refused …' the words "in writing" do not refer (as Mr Van der Merwe contended) to the letter of 23 July 2004. It refers, to my mind, to the series of subsequent correspondence.

[91] To understand the first respondent's reasoning on this score, I will commence with a consideration of the letter of 23 July 2004. Mr Van der Merwe's argument was that the letter did not contain an instruction. This was based upon a reading of the provisions of paragraph 4 of the letter which required the applicant to indicate her 'acceptance / non-acceptance of this <u>offer</u>' (my emphasis).

[92] Mr Van der Merwe acknowledged that that interpretation was at odds with what was contained in paragraphs 2 and 3 of the letter in which it was suggested that the placement was a forgone conclusion.

[93] There was thus a conflict in the letter and were it not for subsequent events the argument of Mr Van Der Merwe would have held sway.

[94] However, what in fact happened next was captured in a series of correspondence between Mr Greg Higgins of Bowman Gilfillan Attorneys, the applicant's erstwhile attorneys, and Ms J More, the Department's Director,

Labour Management.

[95] On 1 September 2004, Higgins addressed a letter to More in which he complained about the failure of the Department to comply with the terms of the settlement agreement. Higgins indicated that unless the terms of the agreement were complied with by 11 September 2004 application would be made to the Labour Court to have the settlement agreement made an order of court.

[96] In response to that letter, More addressed a letter dated 22 September 2004 to Higgins of Bowman Gilfillan Attorneys.[19] (Although the letter indicates that it was sent in response to a letter from Bowman Gilfillan Attorneys' letter of 21 September 2004, on the face of it, it is in fact a response to the letter dated 1 September 2004).

[97] In her letter, More complained that there were a number of inconsistencies in Higgins' letter (it appears that what she actually meant was that a number of statements of fact which were incorrect). She continued:

> 'Your client has not informed you that in our last meeting, the Department gave her a letter informing her to move to South Rand Hospital. She is going to be a Medical Superintendent at that institution. The meeting agreed that PSA and Dr S Khan will respond in writing, within five days to the letter. It is almost two months [but] we have not received[d] a response.
>
> Dr Khan is currently not do[i]ng anything. She is just sitting in her office. Your client is a Manager and understands the responsibilities of her level. Should your client not report for duty at South Rand Hospital by the 30/09/2004 the Department will charge her in terms of our Disciplinary Code and Procedure….'

19 Bundle A, page 110.

[98] In her letter of 22 September 2004, More called for a copy of the settlement agreement, the existence of which she was at that stage still disputing.

[99] On 27 September 2004, Higgins addressed a letter to More in response to her letter of 22 September 2004. He attached a copy of the agreement and then stated:

> '4. Despite the aforementioned settlement agreement not being complied with by the Department, our client was *unilaterally* advised that she was *being moved* to South Rand Hospital to *take up* the position as a medical superintendent. Apart from this being *unilaterally implemented* without first complying with the terms of the agreement, it is well-known by the department that our client's health is not up to the demands of the position of superintendent. In the circumstances our client is simply not in a position to take up the offer.
>
> 5. Our client denies that she is currently not doing anything. Our client finds such an allegation startling and supports our client's contention that the department is ill-informed as to the nature of our client's daily activities. Our client's instructions are that she is kept busy at work doing a variety of research.'[20] (Emphasis added.)

[100] It is apparent from the letter of Higgins dated 27 September 2004 that he was of the view that the Department had taken a "unilateral" decision to move the applicant to South Rand Hospital to take up the position as a medical superintendent. Higgins expressed the view that the applicant could not take up "the offer" because the agreement had not been complied with and she was precluded due to her state of health from doing so. Notwithstanding his reference to this as "an offer", it is apparent that he was of the view that the Department had adopted a firm stance. In other words, it is apparent that he was of the view that the applicant was under an instruction.

[101] On 29 September 2004 More responded with a letter to the following effect:

20 Bundle A: pages 111 – 2.

> ‘We refer to your letter dated 27/09/2004.
>
> The document you faxed to us is not [a] settlement agreement of any dispute between Dr Khan and Gauteng Department of Health. The Agreement was a commitment between Dr Khan and Gauteng Health Department to hold a meeting. A meeting was held between Dr Khan represented by PSA and the Department of Health. The Department of Health was represented by Mr Butshingi, Ms J. More and Mr V. Ramaano.
>
> During that meeting your client, Dr Khan, could not tell the meeting what her actual work is on a daily basis, weekly or monthly. Dr Khan was then given a letter informing her about her transfer to South Rand Hospital. Dr Khan and her representative indicated that they will respond within (5) days to the letter. We have not received anything from Dr Khan or her representative.
>
> The only response, we got was from yourselves threatening the Department about referring Dr Khan’s matter to [the] Labour Court. The decision to move Dr Khan is not a unilateral action by the Department. *The Head of Department has the right to move or transfer staff based on operation requirements.*
>
> We are also not aware of any health condition that Dr Khan has that would inhibit her from performing Superintendent’s functions. We would like to reiterate that *should Dr Khan not report at South Rand Hospital by the 30th of September 2004, we will proceed to charge her in terms of Disciplinary Code and Procedure*.’[21] (Emphasis added.)

[102] One can hardly imagine a more strongly worded instruction. Indeed, More goes so far as to point out that disciplinary proceedings would follow for non-compliance.

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21 Bundle D, p. 50.

[103] Thus, whatever ambivalence may have been expressed in the letter of 23 July 2004 and whatever doubt might have existed in the mind of the applicant upon receipt of that letter, such was removed by the series of letters sent by More.

[104] On 30 September 2004, Higgins responded to the aforesaid letter. He wrote:

> ‘Dear Madam,
>
> **GAUTENG DEPARTMENT OF HEALTH / DR S KHAN**
>
> We refer to your letter dated 29 September 2004.
>
> Our client’s instructions are as follows:-
>
> 1. Our client begs to differ with your interpretation of the agreement. The agreement itself states quite clearly that the parties were to meet before the end of June 2004 in order to finalise the following:-
>
> 1.1 job description;
>
> 1.2 Organogram;
>
> 1.3 Her functional role in the Department
>
> 2. The fact of the matter is to date the aforementioned issues have not been finalised. Our client’s instructions in this regard are that a number of meetings which were arranged by our client were postponed. In short, none of the issues referred to in the agreement were ever finalised.
>
> 3. Whenever our client referred to the agreement, the Department’s stance was that our client’s position was redundant. On several occasions the Department requested our client to furnish the Department with information about what our client did within the Department. This is indicative of the fact that the Department does not know what our client’s job description is and what her functional role is within the Department.

4. Despite non-compliance by the Department with the terms of the agreement, our client was unilaterally advised that she was to transfer to the South Rand Hospital in order to take up the position as a medical superintendent. Despite being advised that our client was not medically capable of assuming this position and that this was well-known within the Department this information was challenged and our client was instead threatened with disciplinary action. One would have assumed, at the very least, that the Department would have been prepared to have investigated the issue of our client's medical condition before threatening her with disciplinary action.

5. In any event, and in order to ensure that our client's interests are protected, you are called upon to provide us with the following information:-

5.1 When was the *decision* made *to move* Dr Khan to South Rand Hospital?

5.2 Who made the *decision*? To the extent that the decision was made at a meeting of the Department, we require a copy of the minutes of such meeting.

5.3 Precisely what are the reasons for the Department's *decision to unilaterally transfer our client to South Rand Hospital*?

5.4 When was it first raised as a possibility that our client would be transferred to South Rand Hospital?

5.5 Precisely what are the operational requirements which have *resulted in our client's unilateral transfer*?

5.6 In terms of what authority is it alleged that the Head of Department has *the right to transfer our client to South Rand Hospital*, especially given the fact that no process of consultation has been complied with?

6. Our client has explained to the Department the nature of her work. However, it would appear that since our client's disciplinary hearing, there has been an orchestrated campaign to try and reduce the extent of our client's work within the Department. This is an issue which our client intends dealing with in the appropriate forum in due course.

Until such time as the aforementioned questions have been answered, we do not believe that there is any legal basis for you to institute disciplinary proceedings against our client.

In the interim, all our client's rights are strictly reserved.' (Emphasis added.)

[105] This letter and the emphasised portions in particular make it clear that Higgins considered that a "decision" had been taken to transfer the applicant. Although Higgins appears to have been in the nascent stages of challenging the lawfulness of that decision (for which he required further information) there was no indication that he or the applicant considered it to be anything other than an instruction.

[106] On 25 October 2004, the HOD addressed a further letter to the applicant in which it was noted that she had in fact not assumed the post "offered to you" as Medical Superintendent at South Rand Hospital and did not indicated any reasons for not doing so. The letter proceeded to state that she was afforded the opportunity within three working days from date of receipt of the letter to inform More of her reasons for non-compliance.

[107] The applicant responded in terms of a letter dated 28 October 2004. The letter is headed 'PLACEMENT / REDEPLOYMENT OF STAFF DURING THE TRANSFORMATION AND RESTRUCTURING PROCESS OF THE PUBLIC SERVICE IN ACCORDANCE WITH THE DIRECTIVES OF PSCBC RESOLUTION 7 OF 2002'.

[108] In that letter the applicant pointed out that she had been summoned to a

meeting in August 2004 with More where she was presented with a letter which dealt with her transfer to South Rand Hospital as a Superintendent. She went on to state that –

> 'both Henry [Hall, the applicant's representative at that meeting] and I declined indicating that I had <u>already</u> accepted the post offered to me after Resolution 7 of 2002, in October 2003'. (Emphasis in the original)

[109] The applicant proceeded to complain that she was already in a post in the central office and that she had been 'assured that the conditions of service were to remain the same as per the October 2003 letter from the Human Resources Directorate, and signed by Ms More'.

[110] Despite her use of the word "offer" or variations thereof it is apparent that the applicant knew that she had been instructed to proceed to South Rand Hospital. The thrust of her letter is an argument as to why she should not be transferred, pointing out that she had been given a previous assurance that her conditions of service would remain the same and, further, that was precluded because of the injury to her left hand from transferring.

[111] In the circumstances, I am satisfied on the documentation which was before the arbitrator, that his conclusion that what was set out in the letter of 23 July 2004 was "immaterial" when one had regard to the correspondence which followed.

[112] This line of attack on the award must accordingly fail.

[113] In his heads of argument Mr Van der Merwe referred to a passage in Le Roux and Van Niekerk, *The SA Law of Unfair Dismissal*, where the learned authors expressed the view that it would be unfair to dismiss an employee where her

refusal to obey an instruction was not unreasonable. Mr Van der Merwe pointed out that the applicant had a reasonable basis to refuse to transfer given her medical condition and the requirements of the post of Superintendent at South Rand Hospital.

[114] I have not been able to locate this text book and cannot comment on the context in which the learned authors assert the aforesaid principle. However, the scope for the application of this principle must, if at all possible, be very narrow. In the first place, I fail to see how an employer can reasonably give an instruction which the employee can reasonably decline to follow. Logically, and leaving aside semantics, both stances cannot be reasonable. If an employer provides a reasonable instruction ignorant of certain facts which affect the employees ability to comply with such an instruction and the employee subsequently declines to follow the instruction, then the original instruction would not be unreasonable, but the employer's subsequent insistence on the employee complying therewith (after those facts are brought to the employer's attention) would be. On the other hand, if an employee is given a reasonable instruction and she refuses (by which I mean she does so through some expressed or overt act) to comply therewith due to certain facts which are known only to her, she would be guilty of insubordination, although those facts (if disclosed at the disciplinary enquiry, of course) would amount to mitigation. I hazard to suggest that no employer would, depending on the circumstances, persist with charging an employee once the reason for the refusal is disclosed, but that is a different issue.

[115] Whatever the merits in the principle expressed by Le Roux and Van Niekerk, it can have no application to the facts of the present case. The first respondent accepted that it had been made clear to the applicant that she was not going to be required to perform any clinical work except in emergency situations and that she would be employed largely in a managerial / administrative capacity. There is no suggestion that this finding by the first respondent was irrational or unjustifiable. In the circumstances, the applicant could not continue to refuse to obey the instruction to transfer. The fact that she at no stage revised her stance after a lengthy period during which

correspondence was exchanged, demonstrates that she had no intention of complying with the instruction. The first respondent noted that even at the arbitration proceedings the applicant made it clear that she would 'under no circumstances accept the transfer'.

[116] 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 an harmonious relationship and to co-operate with her employer. Brassey notes that the employee's obligation to ensure an harmonious relationship with the employer and other staff requires that she should do nothing to undermine it.[22] The learned author points out that employers 'and the managers through whom they enforce their will, are likewise entitled to respect' and that failure to demonstrate this amounts to insubordination which suggests, he says, that the offence 'consists in a failure to submit to the employer's authority'.[23]

[117] In *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*[24] the Industrial Court held that:

> 'the offence of insubordination is constituted by the following: When the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilful disobedience), or when the employee's conduct poses a deliberate (wilful) and serious challenge to the employer's authority.'[25]

[118] This view has been endorsed by Grogan who, citing the above authorities, noted that 'employees are obliged to respect and obey their employers because lack of respect renders the employment relationship intolerable and

22 Brassey, *Employment and Labour Law* (Juta vol. 1, 1999): §D2: 31.
23 Brassey, *supra*, §D2: 33 – 34.
24 (1989) 10 *ILJ* 311 (IC).
25 *Commercial Catering & Allied Workers Union* at 314H – I.

disobedience undermines the employer's authority'.[26]

[119] In *Transport & General Workers Union and Another v Interstate Bus Lines (Pty) Ltd,*[27] an employee tore up the notes of the chairman at a disciplinary enquiry into alleged misconduct. The Court held that his behaviour amounted to 'gross insubordination' and although the court could not find that it was calculated to challenge the respondent's authority, it nevertheless had 'the effect of disregarding the respondent's authority and of making a mockery of the respondent's disciplinary procedure'. The Court accordingly found the dismissal to have been substantively fair.

[120] In *Commercial Catering & Allied Workers Union of SA and Another v Wooltru*, *supra*, the Court defined insubordination in the following manner.

> 'It is also of extreme importance to note that insubordination is not the same as insolence - as clearly appears from the above quoted dictum in the *Moonian v Balmoral Hotel* case. *The Shorter Oxford English Dictionary* (1973) refers to insubordinate as: 'not obedient to the orders of superiors' and to insubordination as: 'resistance to or defiance of authority; disobedience'. On the other hand 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. On the other hand, insubordinate is defined as: 'not submissive to authority; disobedient or rebellious'. Disobedient is defined 'as not obedient; neglecting or refusing to obey'.
>
> It is clear that (even though he can be both at the same time) an employee can be insolent (impudent, cheeky, disrespectful or rude) without necessarily

26 Grogan, *Workplace Law* (Juta, 2009) p. 51.
27 (1988) 9 ILJ 877 (IC).

> being insubordinate (disobedient or challenging authority). Mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot by itself constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. As has been fully explained above, insubordination 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 English Dictionary* above) the authority of the employer. It is, of course, required that the insubordination must be deliberate (wilful) and serious (above). This is not to say that contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground for 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.'[28]

[121] The employment relationship entails a *quid pro quo*. In exchange for a salary and other benefits the employee agrees *inter alia* to place her services at the disposal of the employer and to obey the lawful and reasonable instructions of the employer on how those services are utilised. The employee cannot refuse to obey the lawful instructions of the employer whilst at the same time drawing a salary.

[122] I am satisfied that there was sufficient evidence before the first respondent to find the applicant guilty of a failure to obey a lawful instruction.

[123] The question remains, however, whether the sanction of dismissal was appropriate in the circumstances. This is the fifth ground of review as outlined above. It is appropriate to deal with it at this stage.

[124] The first respondent dealt with this aspect fairly tersely. He noted only that a

28 *Commercial Catering & Allied Workers Union* at 315A – G.

'Refusal to obey a lawful and reasonable instruction carries with it the highest penalty in labour law, i.e. dismissal.'

[125] I do not think that this is a fair reflection of the law. Much depends upon the circumstances, the nature of the insubordination and the circumstances surrounding the employees conduct, the manner in which the refusal was conveyed, the length of service of the employee and any and all other factors relevant to aggravation and mitigation.

[126] On the facts of the present case, however, the length of the applicant's employ, her clean record and other mitigating factors were all offset by the fact that the applicant's refusal endured for a substantial period of time and that she continued in the interim effectively to do none of the work for which she was employed. Her conduct was accordingly sufficient to warrant her dismissal. I cannot fault the first respondent's conclusion in this regard.

[127] The fact that the applicant did perform other work cannot alter this conclusion. The point is that she was required to work in the Supply Chain Management department. The fact that she was unable to point to a single task which she had performed relating to the functions of that department is very disturbing. The applicant cannot choose which tasks she enjoys and perform those and which she does not and refuse to do those.

[128] This effectively takes care of the first two and the fifth grounds of review as set out above.

[129] In so far as the third ground of review is concerned, I cannot agree with the argument that the first respondent had insufficient regard to the evidence surrounding the settlement agreement. The first respondent set out in detail the argument advanced by the applicant in this regard.[29] The first respondent accepted the evidence of More and Ramaano on this aspect, however.

[130] More testified that a meeting had been arranged with the applicant and her

29 See the third bullet point in paragraph 109 of the award.

union representative during which the applicant was required to explain what functions she performed but was unable to provide a satisfactory explanation. In terms of this evidence most of what the applicant described to More as her core functions were not performed within the Supply Chain Management department or had been allocated to other personnel.

[131] Ramaano, on the other hand, testified that all the work which the applicant claimed she performed (which was captured in Bundle C) did not relate to his department.

[132] I have already made the observation above that the applicant clearly knew by June 2004 that some of her functions entailed tender and procurement administration. Yet this is precisely the work which she refused to do.

[133] In the circumstances, I cannot find that the arbitrator's award is reviewable on this ground.

[134] In the fourth ground of review as outlined above, the applicant complains that the first respondent had no evidence before him upon which he could come to the conclusion that she had betrayed her employer's trust.

[135] In his award, the first respondent described the applicant as occupying a position of trust and breaching that trust in the manner in which she behaved (a) by refusing to obey a lawful instruction and (b) by not attending to her duties. As I understand the reasoning of the first respondent, he was of the view that the applicant occupied a senior position both within the employer's structures and within the trade union. She appreciated the nature of her responsibilities and the consequences of her conduct. By persisting with her conduct 'over a long period of time',[30] she breached the trust that had been

30 See paragraph 118 of the award.

reposed in her.

[136] Whilst there is undoubtedly an element of trust which an employer reposes in an employee to perform his or her work, it seems to my mind that the authorities on the subject when talking about a breakdown of trust are concerned more with the integrity of an employee and not with her refusal to obey instructions *per se*. The first respondent does not say as much when dealing with this subject, but it is apparent from the evidence of both More and Ramaan (which the first respondent accepted) that the manner in which the applicant avoided performing her work had implications on her integrity.

[137] I cannot say that no arbitrator could reasonably come to this conclusion.

[138] I turn now to consider the sixth ground of review and the attack on procedural fairness. Under this rubric the applicant complained that the first respondent wrongly apportioned the blame to her for the delay in finalising the disciplinary proceedings.

[139] To consider this submission, I must deal with what transpired after the charges were proffered against the applicant. It will be recalled that the charges were proffered against her in terms of a notice dated 8 April 2005

[140] On 4 May 2005, Higgins addressed a letter to More in which he pointed out that the charge sheet had only been served on his client on 3 May 2005 and the hearing was scheduled for 11 May 2005. He indicated that his client would not be sufficiently prepared for a hearing by that date and requested that it be postponed to the week of 18 May 2005.

[141] Higgins indicated in his letter that his client was the Vice President of the Public Service Association and that there was a ‘long and involved history concerning our client’s employment’. As a result, he contended that his client should be allowed legal representation at her disciplinary enquiry.

[142] The applicant’s request for legal representation created a great deal of

consternation and conflict between the parties at the disciplinary enquiry and in the arbitration proceedings. It has reared its head in these proceedings yet again albeit in a slightly different guise. It is perhaps appropriate that I should, at this stage, deal with the question of legal representation before returning to the chronology of events relevant to the present ground of review.

[143] The entitlement to legal representation is dealt with in terms of Clause 7.3.f of Resolution 1 of 2003. I was advised in argument that the resolution outlined the terms of a collective agreement which was binding upon the parties.

[144] Clause 7.3.f is fairly specific. It reads as follows:

> 'In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless –
>
> i) The employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct; or
>
> ii) The disciplinary hearing is conducted in terms of paragraph 7.3.c;
>
> iii) For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practice as an advocate or an attorney in South Africa.'

[145] In my view, the meaning to be afforded to the provisions of clause 7.3.f are fairly clear: unless the circumstances contemplated in sub-paragraphs (i) and (ii) apply, neither the employer nor the employee may be represented by a legal practitioner. On the face of it, it appears that the intention of the parties was to prohibit the use of legal practitioners representing either the employer or employee in disciplinary enquiries save in the circumstances contemplated

therein.

[146] *En passant,* I should mention that Clause 7.3.c deals with a form of pre-dismissal arbitration.

[147] Mr Van der Merwe sought to contend that the arbitrator somehow retained some form of discretion to allow legal representation notwithstanding his acknowledgement that on the express wording of the provision legal representation was not permitted. For the reasons set out below, I disagree with Mr Van der Merwe's argument.

[148] A person has no right to legal representation before a disciplinary tribunal.[31]

[149] The position is that the chairperson of a disciplinary tribunal retains a discretion whether to permit legal representation in given circumstances. Whether the employee should be afforded legal representation is a function of his right to fair treatment.[32]

[150] The question which arises in the present case however, is different. In the present case, the unions have concluded a binding collective agreement. The question thus is not whether the chairperson in these circumstances retains any residual right to afford a party legal representation. The question is whether, on a proper construction of the agreement, the parties thereto intended to provide the chairperson with such a discretion.

[151] A similar situation arose in the case of *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani*[33] (hereinafter referred to as *Mahumani*). In that case the Court was called upon to determine the issue in the context of Resolution 2 of Public Service Resolution 2 of 1999. It appears that that resolution was the predecessor to the present Resolution 1 of 2003. In this regard reference is made to the first

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31 *Cuppan v Cape Display Supply Chain Services* (1995) 16 *ILJ* 846 (D); *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2002) 23 *ILJ* 1531 (SCA).
32 *Hamata*, *supra.*
33 (2004) 25 *ILJ* 2311 (SCA).

page of the Resolution 1 of 2003.

[152] At any rate, clause 7.3.e of Resolution 2, which, as in the present case, was encapsulated into a collective agreement, provided that:

> 'In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless the employee is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practice as an advocate or an attorney in South Africa.'

[153] Clause 7.3.e of the defunct Resolution 2 of 1999 was in substantial terms almost identical to clause 7.3.f(i).

[154] In *Mahumani's* case the Code contained a Clause 2.8 which provided that the terms of the Code were 'guidelines and may be departed from inappropriate circumstances'. Relying upon that Clause Patel AJA stated:

> 'The parties, who agreed on the code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the code to the contrary. There is, therefore, no justification for interpreting 'appropriate circumstances' in clause 2.8 so as not to include circumstances which would render it unfair not to allow legal representation at a disciplinary enquiry.'[34]

[155] The learned judge then concluded that:

34 *Mahumani* at 2315 F – H para 12.

> '…if, on a conspectus of all the circumstances, it would be unfair not to allow legal representation the provisions of clause 7.3(e) may in terms of clause 2.8 be departed from. The presiding officer erred in holding that he had no discretion to allow such a departure.'[35]

[156] I have searched in vain for a similar clause in the present agreement to that in the defunct clause 2.8. It is simply not there.

[157] Two observations spring from the absence of a similar provision to the old clause 2.8.

157.1 The first is that the parties, by excluding it from operation under the new Disciplinary Code and Procedure, intended to remove any discretion which may have been infused by the old clause 2.8.

157.2 Secondly, in the absence of a similar provision to Clause 2.8, it would appear that the judgment in *Mahumani*, is of persuasive value only. In fact, it appears that the decision in *Mahumani* would have been different if clause 2.8 did not exist.

[158] It seems to me that Mr Van der Merwe must be correct when he argues that the concept of fairness would ordinarily require the chairperson of a disciplinary enquiry to retain some discretion to allow legal representation in appropriate circumstances. That does not, however, apply here. The provisions of sub-clause (ii) seem to have been drafted with the intention of alleviating any hardship, real or perceived, which stemmed from not allowing legal representation in appropriate circumstances. In other words, the parties intended that if the circumstances required legal representation a party would be at liberty to ask for legal representation provided he or she agreed that the

35 *Mahumani* at 2315 H – I at para 13.

matter be referred to pre-arbitration dismissal proceedings.

[159] Furthermore, there appears to my mind to be an insurmountable problem to the argument advanced by Mr Van der Merwe. It is apparent from the record, and I did not understand Mr Van der Merwe to contend otherwise, that the Department at all stages maintained the stance that the applicant was not entitled to legal representation. Thus, unless the parties agreed that on a proper construction of the collective agreement the chairman of the disciplinary enquiry retained a discretion to permit legal representation, there was a dispute as to the proper interpretation to be given to the collective agreement. In that event, unless either party yielded to the interpretation of the other, the applicant's only recourse would have been to refer the dispute for arbitration concerning the proper interpretation be given to the collective agreement. Indeed, this is what the parties contemplated in terms of clause 4 of the agreement and it is what was contemplated by the legislature in terms of section. 24 of the Labour Relations Act. A dispute concerning the proper interpretation of the collective agreement was not referred to arbitration. It appears, to my mind, that that must be the end of the issue.

[160] It appears that at one stage Higgins had acceded to this interpretation and in fact requested that the matter be referred to pre-arbitration dismissal proceedings in accordance with the provisions of clause 7.3.c. This approach was however reversed subsequently by the applicant who withdrew the consent given by Higgins and, instead, terminated his services.

[161] As an aside, I should mention that there appears to have been some confusion during the arbitration proceedings as to whether the Department had given an undertaking to withdraw the charges and whether the applicant had been afforded legal representation by an earlier Chairman. I am in agreement with the contentions of Mr Lennox, who appeared for the third and

fourth respondents, that not only were the applicant's contentions in this regard not supported by the record, but it is apparent that when she appealed against her sanction and dismissal, she did not raise these issues and in fact appeared to have taken the contrary stance.

[162] I return to the chronology in order to deal with the question of the delays in proceeding with the disciplinary enquiry.

[163] It appears from the evidence of Ms Kedibone Maphunye, the Department's Assistant Director Labour Relations, who represented the Department at the disciplinary enquiry, that the applicant appeared at the hearing on 11 May 2005 and was assisted by a legal representative. Maphunye testified that because the applicant was not entitled to be assisted by a legal representative the matter was postponed to 18 May 2005 in order to afford her the opportunity to appear on the later date with a fellow employee or a representative from the union.

[164] I pause at this point to note that according to the line of cross-examination adopted by the applicant's representative, it appears that the evidence of Maphunye that the matter was to continue on 18 May 2005 would be challenged. I do not believe that anything turns on this issue, but it is to be noted that in the letter from Higgins to More dated 9 May 2005 a postponement was requested until 18 May 2005 in order to enable the applicant to prepare adequately for that hearing. It thus appears that this was the more likely reason for the postponement until 18 May 2005. At any rate, I do not believe that anything turns upon this issue.

[165] According to Maphunye, the hearing was, on 18 May 2005, again postponed, this time until 20 July 2005 in order to allow the applicant a further opportunity to obtain a representative who was not an attorney.

[166] Included in the bundle of documents presented to this Court (and which apparently served before the arbitrator) was a document styled "Recusal As Presiding Officer" dated 21 September 2005. In that document the Chairman,

Mr Levi Mashabela set out his version of what occurred. He indicated that at the commencement of the hearing the employer's representative objected to Higgins representing the applicant at the proceedings and after hearing argument on the issue he (Mashabela), recommended that the parties deal with the issue by agreement. The matter was postponed in order to enable the parties to discuss and attempt to reach consensus. He indicated that he had been informed that the matter had been scheduled to continue 'on or before the 22nd September 2005' but that the parties had not reached agreement on the question of legal representation. Mashabela pointed out that due to his 'tight calendar schedule' he was compelled to recuse himself from the matter.

[167] This does not accord entirely with the evidence of Maphunye or, for that matter, Higgins' letter of 9 May 2005.

[168] At any rate, what is clear is that between the time period when the matter was first called and 21 September 2005 there was no question of any delay on the part of the Department (I exclude the delay between the time when the charge sheet was drawn up and the time when it was served on the applicant).

[169] Maphunye testified that the matter was subsequently scheduled for 11 November 2005 and when the matter was called at 09h00 on that day the applicant appeared in person and indicated that her union representative would be available at 15h00. As it so happened the matter did not proceed on that day and the next date upon which the matter was set down was for 31 July 2006, some eight months later. It is not clear precisely what the reason for this delay was but according to Maphunye she indicated that the Department was having some difficulty in obtaining another presiding officer to chair the enquiry.

[170] When the matter was called on 31 July 2006, the applicant appeared in

person as she could only secure, it appears, the services of a person who was a junior to herself (within the structures of the union) and she declined to be represented by a junior person.

[171] A further delay ensued and the matter eventually proceeded on 12 October 2006 until its conclusion. On those occasions, the applicant was represented by an official of the Public Servants Association, her union in the present proceedings.

[172] It appears to my mind that, having regard to the account set out above, that although there were delays which must properly be attributed to the employer, there are other delays which ought equally to be attributed to the applicant.

[173] In these circumstances, little purpose is served in apportioning blame for the delay. I should state however, that I am not satisfied that the applicant was in any way prejudiced as a result of any default on the part of the employer.

[174] In the circumstances, this ground of review must fail.

Costs

[175] Costs are to be awarded according to the requirements of the law and fairness.[36]

[176] My inclination is that unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this Court, whether as applicant, in launching proceedings or as respondent opposing proceedings.

[177] The third and fourth respondents have achieved success in opposing this application. They have, however, been rather slack in their opposition; their

36 Section 162(1) of the LRA.

contribution has been minimal. They failed to file an answering affidavit and even although they filed heads of argument, they did so at a late stage. This is a practice that should be deprecated.

[178] I intend expressing my disapproval by disallowing the third and fourth respondents of their claim for costs as the successful party.

Conclusion

[179] In all the circumstances, I make the following order:

179.1The application is dismissed.

179.2There is no order as to costs.

G. I. HULLEY

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

FOR THE APPLICANT: ADV. F. J. VAN DER MERWE

ON INSTRUCTIONS FROM: BOUWERS INC.

FOR THIRD AND FOURTH RESPONDENT: ADV. M. A. LENNOX

ON INSTRUCTIONS FROM: AJAY MAKKA INC.