THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1585 / 14

In the matter between:

MIDAS GROUP KOMATIPOORT	**Applicant**
and	
NUMSA	**First Respondent**
ZODWA MAHLANGU	**Second Respondent**
ESTHER MANGWANA	**Third Respondent**
THOMAS NTIMBANA N.O. (AS ARBITRATOR)	**Fourth Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL	**Fifth Respondent**

Heard: **22 June 2017**

Delivered: **14 February 2018**

Summary: Bargaining council arbitration proceedings – Test for review relating to jurisdiction and merits of award considered – where review concerning issue of jurisdiction the test of rationality and reasonableness does not apply and award considered *de novo* on the basis of being right or wrong –

where merits of award considered the appropriate review test that of the existence of an irregularity and reasonable outcome

Dispute – arbitrator obliged to determine real issue in dispute – consideration of nature of dispute – real issue in dispute considered – assessment and determination of evidence – real issue in dispute based on dismissal for misconduct / poor performance – dismissal has nothing to do with union membership

Dismissal – distinction between misconduct and poor work performance considered – entirely different concepts with different requirements – same facts and circumstances cannot be dismissal for misconduct and poor performance

Dismissal – real basis for dismissal considered – dismissal in essence one for incapacity (poor performance) – dismissal for misconduct improper, incompetent and unfair – employer should have applied provisions in Schedule 8 relating to poor performance

Dismissal – even if merits of misconduct dismissal considered – employees had already been disciplined for misconduct and final written warning issued – cannot dismiss for the same misconduct – no evidence of further misconduct after final written warning

Dismissal – breach of cell phone policy – no proper evidence of misconduct – misconduct not proven

Bargaining council arbitration proceedings – no case for review made out – award upheld – review application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award made by the fourth respondent in his capacity as an arbitrator of the Motor Industry Bargaining Council (the fifth respondent). In terms of this award, the fourth respondent found that the dismissal of the

second and third respondents by the applicant was substantively unfair and determined that they be reinstated with retrospective effect to their date of dismissal with back pay equivalent to 6(six) months' salary. The application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The second and third respondents had been dismissed by the applicant on 27 December 2013. They were members of the first respondent at the time of their dismissal. As a result, the first respondent pursued their dismissal as an unfair dismissal dispute to the fifth respondent as the applicable bargaining council. This dispute then came before the fourth respondent for arbitration on 16 May and 3 July 2014. Following completion of the arbitration proceedings, and in the aforesaid arbitration award, which was dated 3 July 2014, the fourth respondent found in favour of the second and third respondents, leading to the current review application.

[3] The award was handed down by the fourth respondent on 14 July 2014. The applicant served and filed its review application on 8 August 2014, which is thus within the time limit prescribed by Section 145 of the LRA, and the review application is accordingly properly before Court for determination. I will now proceed in deciding the applicant's review application, commencing with first setting out the relevant facts for consideration.

The relevant facts

[4] The second and third respondents were both employed by the applicant as cleaners. The second respondent commenced employment in 2009, and the third respondent in 2010. They were both dismissed on 27 December 2013 on a variety of what purported to be misconduct charges.

[5] The difficulties in this matter appear to have arisen in 2013, when Monica Van Jaarsveld ('Van Jaarsveld') became employed by the applicant as manager. Van Jaarsveld clearly had a problem where it came to the manner in which the second and third respondent discharged their cleaning duties. According to the applicant, the second and third respondent were dismissed as a result of

[1] Act 66 of 1995.

their conduct and failures, over the whole period from September to November 2013.

[6] Van Jaarsveld was dissatisfied with the manner of cleaning of the premises by the second and third respondents. She complained that the premises was dirty and customers complained. According to her, she had several discussions with the second and third respondents on how they should properly clean the premises and actually demonstrated to them how to do it.

[7] Another problem Van Jaarsveld had was that the second and third respondents were continuously talking on their cellular telephones instead of doing their work. According to the applicant, it had a policy prohibiting the use of cellular telephones during working hours that applied in the workplace, which was issued to the second and third respondents, and which they contravened.

[8] On 25 November 2013, the second and third respondents were notified to attend a disciplinary hearing to be held on 27 November 2013 on three charges of misconduct. The first charge was unsatisfactory work performance, in that they did not complete tasks to acceptable standards as from September to November 2013. The second charge was disobedience in failing to carry out lawful work instructions as from September to November 2013. The third charge was disobedience in failing to comply with the cell phone policy from September to November 2013. The disciplinary hearing then took place on 27 November 2013, pursuant to which the second and third respondents were found guilty of all three charges, and were dismissed.

[9] As far as the second and third respondents were concerned, they committed no misconduct. They properly carried out their duties in terms of their job descriptions. There were never given specific instructions in the period from September to November 2013 which they did not comply with. As far as the use of cell phones were concerned, they only used their cell phones during their breaks and lunch, and in any event, they were never given a policy indicating that they were not permitted to use their cell phones at work. They also contended that they also did not receive a fair hearing.

[10] The fourth respondent had to decide between these two conflicting cases. He accepted that the dismissal of the second and third respondents was procedurally fair. In the absence of a cross review, this finding stands, and need not be considered further.

[11] Where it came to deciding substantive fairness, the fourth respondent held that the second and third respondents had been working for the applicant for three and four years respectively, without difficulty, until such time as Van Jaarsveld joined the applicant. The fourth respondent further held that there was no evidence of any specific instructions being given to the second and third respondents during the period between September and November 2013, which they refused to comply with. According to the fourth respondent, there was also no corroborating evidence of the premises being dirty and improperly cleaned, as alleged by the applicant. As to the cell phone policy charge, the fourth respondent held that there was no proper evidence that such policy was issued to the second and third respondents. The fourth respondent concluded that the dismissal of the second and third respondent was therefore without reason, and thus substantively unfair.

[12] A final factual consideration remains. The fourth respondent considered that the second and third respondents had been dismissed for ulterior purposes. In his award, the fourth respondent recorded that he could not 'ignore' that the charges against the second and third respondents were 'influenced' by their union membership, and their problems started when they joined the union.

<u>The grounds of review</u>

[13] The applicant has raised a number of review grounds upon which its challenge of the above conclusions arrived at by the fourth respondent is based.

[14] The applicant contends that the fourth respondent relied on the fact that the second and third respondent's dismissal related to their membership of the first respondent as trade union, and as such, the dismissal would be automatically unfair in terms of Section 187 of the LRA. This meant that the fourth respondent lacked jurisdiction to arbitrate the dispute, and the award is accordingly a nullity.

[15] According to the applicant, the fourth respondent in any event misconstrued the evidence before him and failed to properly consider the same. The basis for this contention is that the fourth respondent did not consider that the incidents giving rise to the dismissal of the second and third respondent took place from September to November 2013, and thus they were dismissed for misconduct and disobedience over a period of time. The second and third respondents knew how to do the work but did not want to do it properly, and failed to comply with work related instructions, but the fourth respondent failed to consider all the testimony presented on behalf of the applicant establishing this.

[16] A further review ground relates to the fourth respondent failing to consider all the evidence relating to the prior progressive discipline applied to the second and third respondents. This included a number of warnings for disobedience and unsatisfactory work performance in July, September and November 2013.

[17] Finally, the applicant takes issue with several of the specific conclusions arrived at by the fourth respondent, contending that these are not the findings of a reasonable decision maker. These findings include the lack of pictures being presented of the unsatisfactory work, that the cell phone policy was not presented to the second and third respondents because they did not sign it whilst another employee (one Dreyer) did, that the applicant did not have cameras at the premises as was the case with other premises, and that the applicant had pre-determined the dismissals of the second and third respondents.

The test for review

[18] The applicant's review application, considering the above grounds of review, is thus based on two main components. The first is a challenge of the jurisdiction of the fifth respondent. The second is a case challenging the finding of substantive unfairness, on the merits thereof. Each of these components have distinct tests of review.

[19] Firstly, and where it comes to the review relating to the jurisdiction of the fifth respondent, and consequently also the fourth respondent, to decide this

matter, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] does not apply. As said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3]:

> '…. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. <u>If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise</u> …. ' (emphasis added)

[20] Where the jurisdiction of a bargaining council such as the fifth respondent is at stake in a review application, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord, by deciding *de novo* whether the determination by the arbitrator on jurisdiction is right or wrong.[4] Specifically, and in *Trio Glass t/a The Glass Group v Molapo NO and Others*[5] the Court said:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[21] Thus, in the case of a wrong decision by a bargaining council arbitrator where it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justiciable grounds.[6] It does not matter what the reasoning of the arbitrator may have been and it is up to the Court to, from an

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[2] (2007) 28 ILJ 2405 (CC).
[3] (2008) 29 ILJ 964 (LAC) at para 101.
[4] See *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21.
[5] (2013) 34 *ILJ* 2662 (LC) at para 22. See also *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12; *Phaka and Others v Bracks NO and Others* (2015) 36 ILJ 1541 (LAC) at para 31.
[6] See *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 *ILJ* 557 (LAC) at para 24; *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC) at para 6.

objective perspective, decide whether the requisite jurisdiction exists. In *Universal Church of the Kingdom of God v Myeni and Others*[7] the Court said:

> '… the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. … If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.'

[22] Turning next to the test for review where it comes to the review challenge in respect of the finding of substantive unfairness of the fourth respondent, in other words a review on the merits, this was dealt with in *Sidumo,*[8] where the Court said that the question to be asked was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'.

[23] This means, in short, that even if it can be said that an arbitrator acted irregularly, erred, or failed in making his or her award, these shortcomings would only lead to a successful review if it can also be said that it resulted in an unreasonable outcome. Thus, the review applicant must first show that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Next, and if this failure or error is shown to exist, the review applicant must then show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[9] the Court said:

> '…. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set

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[7] (2015) 36 ILJ 2832 (LAC) at para 27. See also *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at para 40.

[8] (*supra*) at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service* (*supra*) at para 96.

[9] (2013) 34 *ILJ* 2795 (SCA) at para 25.

aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[24] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[10] said:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[25] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[11] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed.[12] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[13] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence

[10] (2014) 35 ILJ 943 (LAC) at para 14. The *ratio* in *Gold Fields* was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[11] See *Fidelity Cash Management* (*supra*) at para 102.
[12] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[13] (2015) 36 ILJ 1453 (LAC) at para 12.

> viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[26] Against the above principles and tests, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the fourth respondent, in respect of both components of the review application.

Evaluation

[27] The first part of the applicant's review application can be swiftly disposed of. There was no case of a dismissal based on union membership pursued by the first, second and third respondents to the bargaining council at the outset. This is apparent from the conciliation referral document which was contained in the bundle of documents before the fourth respondent. The referral related to an ordinary unfair dismissal, for the want of a better description, and was based on a challenge that the second and third respondents committed no misconduct, that they were not guilty of poor performance, and that the procedures as prescribed by the LRA were not followed. There is no mention of another basis of dismissal in the referral.

[28] But it does not just end there. A consideration of the transcript of the arbitration proceedings makes it apparent that no such case was raised by the first respondent's union representative when conducting the arbitration on behalf of the first, second and third respondents. No such case was put to any of the applicant's witnesses in cross examination. The second respondent, who testified in the arbitration, made no mention of it. It simply was never in issue.

[29] The only reference to dismissal being based on some or other union affiliation occurred during the last closing remarks by the first respondent's union representative in making his closing argument. This reference was in my view nothing more than a gratuitous remark made by the representative to in some way bolster the closing argument, and was not based on any kind of evidence. It was in any event clear from the closing argument presented, as a whole, that the first, second and third respondents were challenging the substantive

and procedural fairness of the dismissal of the second and third respondents, based on poor performance and misconduct.

[30] It is true that the fourth respondent made reference in his award to dismissal of the second and third respondents, based on their union membership, being a possible consideration. But in my view all the fourth respondent was doing was articulating his own speculation. All that was before him to support such a conclusion was the singular remarks in the closing address of the first respondent's union representative. There was however, as said, no evidence to support such a conclusion and no such case was ever actually made out.

[31] In the end, in any event, there is always a duty on the fourth respondent as arbitrator to ascertain the real nature of the issue in dispute. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another,*[14] it was held as follows:

> 'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. …'

[32] In ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No & others[15] The Court applied the above dictum in *Bader Bop* and held:

> 'I accept that an arbitrator has the duty to determine the true nature of the case before the arbitrator. So much is clear. …'

[33] In *CUSA v Tao Ying Metal Industries and Others*[16] the Court gave the following guidance in order to decide what the real dispute between the parties would be in a particular case:

[14] (2003) 24 ILJ 305 (CC) at para.52.
[15] (2013) 34 ILJ 2347 (LC) at para 57

> '… a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration.... The dispute between the parties may only emerge once all the evidence is in.'

[34] Considering all the background circumstances, and the nature of the dispute as it emerged from all the evidence, I have little doubt that the real issue in dispute before the fourth respondent for determination was always that of an unfair dismissal dispute based on misconduct and poor performance. There is accordingly no substance in the applicant's jurisdictional challenge. There was nothing wrong in the fourth respondent entertaining the dispute that was before him, which he was clearly competent to do. Therefore, the applicant's ground of review based on the lack of jurisdiction of the fourth and fifth respondent must fail.

[35] Moving on to the next part of the applicant's review case, the first question is whether the fourth respondent's finding of substantive unfairness is in any way irregular or outside the bounds of a reasonable outcome. For the reasons to follow, the fourth respondent's conclusion that the dismissal of the second and third respondents was substantively unfair is in my view unassailable on review.

[36] The fourth respondent's award contains a cryptic summary of the essential facts. He finds that prior to Van Jaarsveld becoming employed, the only problem there was with the second and third respondents was a written warning for not taking a staggered lunch time dating back to 2011. He further records that the hearing notification given to the second and third respondents on 25 November 2013 applied to 'misconducts' over the period from September to November 2013. These findings are fully supported by the

[16] (2008) 29 *ILJ* 2461 (CC) at para 66. See also *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 9; *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 *ILJ* 925 (LAC) at para 16.

evidence on record, and are in fact in line with the testimony of the applicant's own witnesses.

[37] The fourth respondent then finds that there was no evidence presented where the second and third respondents were given a specific instruction on a specific day that was not complied with. As to the poor performance issue, the fourth respondent finds that there must be proper supporting evidence of this, and not mere allegations. The fourth respondent further doubted the cell phone policy prohibiting the use of cell phones during working hours was ever presented to the second and third respondents. The fourth respondent however specifically referred to the fact that on 22 November 2013 the second and third respondents were issued with final written warnings and then charged two days later for the very same misconduct, covering in essence the same period, as there was no evidence of any further specific misconduct between 22 and 25 November 2013. For all of these reasons, the fourth respondent concluded that 'the allegations against the applicants (referring to the second and third respondents) were unfounded', and the applicant was out to get rid of the second and third respondents.

[38] Before even considering the sustainability of these factual findings of the fourth respondent, I am compelled to point to a fundamental difficulty in the case of the applicant in bringing about the dismissal of the second and third respondents. This difficulty lies in the fact that the applicant has failed to distinguish between misconduct in the form of carrying out instructions (insubordination) and poor work performance. This lack of proper distinction is evident from the charge sheet itself. What the applicant did was to 'charge' the second and third respondents for both misconduct (insubordination) and poor performance based on the exact same circumstances and facts. In short, what the applicant did was to say that because the second and third respondent did not clean as they were instructed and required to do for the period from September to November 2015, they were guilty of both misconduct in the form of insubordination, and poor performance. This is an impermissible approach, and improperly blurs the necessary distinction that must exist between misconduct and incapacity in the form of poor work performance.

[39] The distinction between misconduct and poor work performance was dealt with in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*,[17] where the Court said:

> '… what is then the difference then between negligence (misconduct) and poor work performance? The distinction can be found in the concept of wilfulness or deliberateness. In the case of negligence, it must be present, whilst in the case of poor performance, it must be absent. …'

In casu, the misconduct component of the charge did not relate to negligence, but insubordination. However, and similar to negligence, insubordination has a central component of wilful and deliberate conduct on the part of the employee.[18] In *ZA One*, the Court then added the following:[19]

> 'In my view, the distinction between poor performance and misconduct (negligence) can be established by the asking of two simple questions when it has been established that an employee indeed failed. The first question is 'Did the employee try but could not?' and the second question is 'Could the employee do it, but did not?' If the first question is answered in the affirmative, then it has to be poor performance, because an employee that honestly (for the want of a better word) seeks to achieve what is expected of him or her but is unable to do so is incapacitated and would not behave wilfully or indifferently or fail to apply the necessary care. If the second question is answered in the affirmative, then it has to be misconduct, as this would be a situation where the employee is fully able to do what is required not to fail, and such failure could therefore only be because of indifference or wilfulness or a failure to take care. …'

[40] The Court in *ZA One* also referred with approval[20] to the following extract from the reported CCMA arbitration award in *Thompson v Samaki Beach Lodge*[21]:

> '…. There is an extremely fine line between misconduct and incapacity (or operational requirements) in some instances and that line is not easily drawn

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[17] (2013) 34 ILJ 2347 (LC) at para 75
[18] See *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA and Others* (1995) 16 ILJ 349 (LAC) at 359E-F; *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 60.
[19] Id at para 78
[20] Id at para 76. See also *Transnet Freight Rail v Transnet Bargaining Council and Others* (2011) 32 *ILJ* 1766 (LC) at para 44 – 45
[21] (2009) 30 ILJ 1396 (CCMA) at 1417D – J.

in many instances. As proper categorization of a dispute will determine what course of action will be taken against an employee, there is no doubt that proper categorization is extremely important. A proper distinction should be made between a misconduct enquiry and a poor work performance: incapacity enquiry as the latter does not require any investigation into the issue of culpability. …'

[41] In the end, one can do little better than to refer to the following *ratio* in *Gold Fields Mining*[22]:

'… Poor work performance and misconduct are by definition two distinct and diverse concepts.

In drawing a distinction between poor work performance and misconduct, Professor B Jordaan in his article 'Poor Work Performance (Incapacity) vs Misconduct' stated the following:
'Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards. In this case the problem lies with the employee's "aptitude": although willing to do what is required, s/he is *unable* to because of some factor linked to the employee that s/he has little or no control over.
A dismissal for misconduct is based on the employee's fault i.e. intentional or negligent noncompliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness). The employer is required to give the employee an opportunity to respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.'

The requirements to show that the dismissal for misconduct was fair are different to what has to be shown in the case of dismissal for incapacity.'

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[22] (*supra*) at paras 22 – 24.

[42] It is clear from all that I have set out above that the concepts of a dismissal for misconduct on the one hand, and dismissal for poor work performance (as a species of incapacity) are incompatible. This means, in short, that an employee cannot be 'charged' for poor performance, subjected to disciplinary process, and then dismissed applying misconduct considerations. In the case of poor performance, the process has other objectives, which can broadly be described as being to identify the poor performance, establish what is required to resolve it, providing the employee with assistance to resolve it, and then allowing the employee a reasonable opportunity to achieve what is required. It is simply not the case of an employee being 'guilty' and a sanction imposed.

[43] The applicant's approach in this matter was thus fundamentally flawed. It could not 'charge' the second and third respondents with poor performance, and then also insubordination (misconduct) based on the exact same set of facts and causes of complaint. It is either the one or the other. So, either the second and third respondent received instructions which they in a culpable and blameworthy fashion failed or refused to carry out, or they were not capable or unable to perform the work they were instructed to do. It cannot be both.

[44] When properly considered, what were the second and third respondents dismissed for in the end? Answering this question entails a proper conspectus of the evidence as a whole. Dealing firstly with the testimony of Henry Bosch ('Bosch'), the HR Manager, the reality is that his testimony did not lend much support towards the applicant establishing its case. For the most part, Bosch, who was also the person that presided over the disciplinary hearing of the second and third respondents, could only testify about what he had been told in the disciplinary hearing and did not have any personal knowledge about any of the events that gave rise to the charges against the second and third respondents. He could not testify about whether the second and third respondent indeed failed to discharge their cleaning duties, in what respects they failed, or failed to comply with instructions in this respect. He also did not witness the second and third respondents using their cell phones whilst cleaning.

[45] However, and considering that he presided over the disciplinary hearing, and thus made the finding that the second and third respondents should be dismissed, Bosch was pertinently asked under cross examination what the second and third respondents were dismissed for. He answered:

> 'Disobeying instructions, instructions relating to the standard of work. Disobeying instructions relating to the cell phone. And not doing the work to standard.'

He further testified that the instructions concerned were given by Van Jaarsveld to the second and third respondents, and she was the one that assessed their performance.

[46] Bosch also acted as the representative of the applicant in the arbitration. Having first testified himself, he then called as his first witness the HR administrator, Angel Nhlabhathi ('Nhlabhathi'). I have some difficulty with the evidence of Nhlabhathi, specifically relating to the manner in which it was put on record. Virtually the entire evidence in chief elicited from Nhlabhathi was done by way of leading questions to which only a 'yes' or 'no' answer was required. This persisted to such an extent that the first respondent's representative, who was a lay person, interjected to object to this approach. But Bosch was undeterred. He simply continued soliciting evidence by way blatantly leading questions. Even under re-examination, this approach persisted, to the extent that on one occasion Bosch actually put an answer to Nhlabhathi to just confirm. The testimony of Nhlabhathi thus has very little value. But even if her evidence is considered, and as a general proposition, all Nhlabhathi did was to regurgitate what was contained in documentary evidence, minutes and warning documents, with minimal personal knowledge of the allegations against the second and third respondents relating to the insubordination and poor performance charges. Thus, the testimony of Nhlabhathi also does very little to prove the applicant's case.

[47] Some of what Nhlabhathi said under cross examination does bear mention. She confirmed that as from 2008/2009 to 2013 and until Van Jaarsveld started working for the applicant, there was no problem with the performance of the second and third respondents. In addition, she conceded that she was based

at Malelane and hardly worked with the second and third respondents and could not really comment about the veracity of the charges against them.

[48] The only witness with actual knowledge of the subject matter of the charges in the disciplinary proceedings was Van Jaarsveld. At the onset of her testimony, Bosch asked her: '… can you tell us what was the problem you had with these two ladies … in relation to their offences or their work or their obedience or whatever that led to the hearing on 27 November ...'. She answered: 'Unsatisfactory work performance. They were given written warnings until it came to the final written warning.'

[49] In substantiation of this statement, Van Jaarsveld testified that when she took over in July 2013, she found that 'the place was dirty'. According to her, she then asked the second and third respondents to properly clean the premises. She testified that she demonstrated to the second and third respondents how to clean, and bought new material and equipment for them to use. But as far as Van Jaarsveld is concerned, these interventions did not achieve the required result, and the premises were still not properly cleaned. It was then, as Van Jaarsveld said, that she '… issued them with warnings so that they start doing their jobs...'. Finally, and when these warnings were not successful, Van Jaarsveld testified that she decided to take the matter to a disciplinary hearing.

[50] I am again compelled to be critical about the manner in which Bosch solicited evidence from Van Jaarsveld. Her evidence in chief was permeated with leading questions by Bosch to her. In fact, and on at least two occasions, Bosch conducted what was in essence cross examination of Van Jaarsveld, whilst leading evidence in chief, thus compelling her to give the answers he wanted. This kind of conduct substantially detracts from the value of that evidence.

[51] Turning to the cross examination of Van Jaarsveld, she made a number of important concessions. She conceded that this was in reality not a case of the second and third respondents not carrying out instructions to clean, but rather that they did not obey the instructions because they did not clean properly. In simple terms, this is therefore not a case where the second and third respondents were given instructions to clean and refused to comply or did

nothing in a wilful and deliberate manner. In simple terms, they cleaned, but did not do it to the satisfaction of Van Jaarsveld.

[52] What is clear from the testimony of Van Jaarsveld is that the gravamen of the complaints against the second and third respondents had little to do with misconduct, and was at its core a poor performance issue. This meant it needed to be dealt with on that basis, and Item 9[23] of Schedule 8 to the LRA, as read with Items 8(2) to (4)[24], therefore found application. As said in *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others*[25]:

> ' … When an employee is dismissed for poor work performance, the arbitrator must examine whether the employee was trained to perform the functions that he or she was tasked to do; whether such training was adequate; and whether the employee may benefit from further training or counselling. …'

[53] It then follows that the insurmountable difficulty with any poor performance case sought to be advanced by the applicant, is that the provisions of Items 8 and Item 9 of Schedule 8, as referred to above, were never complied with, for the reasons to follow.

[54] Firstly, and in the applicant presenting its case, there was inadequate evidence of proper evaluation, training, guidance and counselling of the second and third respondents. The high water mark of the evidence was that if the second and third respondent did not perform as required, they were given written warnings. That is not what it envisaged by Items 8 and 9 of Schedule 8. There was no continuous attempt to try and remedy their poor performance, being rationale behind the process in Schedule 8. Comparable

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[23] Item 9 reads: 'Any person determining whether a dismissal for poor work performance is unfair should consider- (a) whether or not the employee failed to meet a performance standard; and (b) if the employee did not meet a required performance standard whether or not- (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard; (ii) the employee was given a fair opportunity to meet the required performance standard; and (iii) dismissal was an appropriate sanction for not meeting the required performance standard'.

[24] Item 8 reads: '(2) … an employee should not be dismissed for unsatisfactory performance unless the employer has- (a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily. (3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter, (4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee'.

[25] (2016) 37 ILJ 2313 (LAC) at para 9. See also *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC) at para 48; *Gold Fields Mining* (*supra*) at para 25.

is the following dictum from the judgment in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[26]:

> '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, and that the first respondent was aware of them. … 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. …'

[55] Secondly, proper evidence as to the manner in which the second and third respondents failed to meet the required performance stands was severely lacking. Details were sparse, and unsubstantiated. The testimony of Van Jaarsveld was vague, and lacking in sufficient specificity. The fourth respondent was very much alive to this problem, making specific reference to it in his award. In short, poor performance was not established on the evidence.

[56] Because the real reason behind the dismissal of the second and third respondents was that of poor performance, the lack of any proper compliance with Items 8 and 9 of Schedule 8 must mean the end of the matter for the applicant. The dismissal of the second and third respondent cannot be justified, and would be substantively unfair. As said in *Palluci*:[27]

> '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 E 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 continued to perform unsatisfactorily. … Nor did the appellant implement a system of progressive or corrective discipline to assist her in improving her performance … '

[26] (2015) 36 ILJ 1511 (LAC) at para 49.
[27] Id at para 51.

[57] However, and even if this matter is decided on the basis of misconduct, then the applicant nonetheless faces yet another difficulty. As said, the misconduct charge was for insubordination. But there was no evidence of any specific instruction that was given, at a specific time, to the second and third respondents and which instruction was disobeyed or deliberately not complied with. Instead, it was a general instruction to clean, spanning the whole period from September to November 2013. And therein lies the conundrum, because on 22 November 2013 the second and third respondents were issued with a final written warning for 'failure to carry out work to the required standard, without reasonable cause', 'inefficiency/unsatisfactory work performance' and 'not following direct orders from management'. This is virtually identical to the two principal charges in the charge sheet dated 25 November 2013. It thus follows that the second and third respondents were already disciplined for the same misconduct up to 22 November 2013, and could therefore not be competently charged for this misconduct again on 25 November 2013. The fourth respondent was equally much alive to this difficulty, also making specific reference to the same in his award.

[58] If the applicant wanted to rely on misconduct to justify the dismissal of the second and third respondents on the insubordination charge referred to, following on the final written warning issued on 22 November 2013, it needed to prove the existence of such kind of further misconduct after 22 November and before 25 November 2013. Simply put, the applicant cannot rely on misconduct for that which the second and third respondents had already been disciplined. The applicant presented no evidence of further misconduct for which the second and third respondents had not been disciplined already.

[59] In any event, and in order to succeed with substantiating an insubordination charge, the applicant was required to show the following, as enunciated in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*[28]:

> 'It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination

[28] (2013) 34 ILJ 1440 (LAC) at para 31.

> was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified. …'

What is patently absent in this case is any evidence of a specific instruction being given to be carried out, and that there was a wilful and deliberate refusal / failure to comply with that instruction given. As Van Jaarsveld, in effect, said herself that it is not that the second and third respondents did not clean, it is that they did not clean properly as she wanted them to. This may be a performance issue, but it cannot be insubordination.

[60] This leaves only the charge of the second and third respondents using their cell phones during working hours. The third misconduct charge in the charge sheet of 25 November 2013 related to this. Much was made in the arbitration proceedings about a policy in this regard being issued to the second and third respondents, with the fourth respondent concluding that there was no proper evidence that such a policy had indeed been issued to them. But in my view very little turns on whether any such policy was issued to the second and third respondents or not. Even accepting that it was, there is simply insufficient evidence to establish a transgression. Other than vague and general statements of the second and third respondents being seen talking on their cell phones whilst cleaning, the necessary particularity to identify actual instances of misconduct is absent. To illustrate – the testimony is that the second respondent was seen talking on her cell phone whilst cleaning, but there is no reference as to when this allegedly happened with the required specifics to prove a charge.

[61] Overall considered, the applicant failed to prove that the second and third respondents committed misconduct. The fourth respondent's conclusion to the effect that the applicant failed to establish that the second and third respondents committed misconduct is properly supported by the evidence, and is certainly a reasonable outcome based on such evidence. This outcome must thus be sustained on review, and applicant's review application must fail on this basis as well.

[62] In sum, the applicant dismissed the second and third respondent for poor performance, but in doing so, failed to properly establish the existence of

same in evidence and did not comply with Items 8 and 9 of Schedule 8. It follows that their dismissal cannot be justified, and would be substantively unfair. Even if the misconduct the second and third respondents had been charged with is considered, this misconduct was in the end never adequately proven by the applicant, who had the onus to do so. This all means that the outcome arrived at by the fourth respondent that the dismissal of the second and third respondent was substantively unfair resorts well within the bands of a reasonable outcome, and is unassailable on review. The applicant's review application thus falls to be dismissed.

[63] This then only leaves the question of costs. In terms of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I do not believe the applicant was *mala fide* in pursing this matter, and cannot agree with the fourth respondent where it comes to the motives ascribed to the applicant (which would have justified a costs order). The applicant simply got it completely wrong in dealing with the second and third respondents. A costs order was also not sought against the applicant by the first to third respondents. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs.

<u>Order</u>

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

1. The applicant's review application is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv S Hassim

Instructed by: Yusuf Nagdee Attorneys

For the First, Second and Third

Respondents: Mr S Mthiyane – Union Official