



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 326/16

In the matter between:

PETER TEBOGO JONKER

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION ARBOTRATION**

First Respondent

COMMISSIONER THEMBAKAZI MLINDAZWE N.O

Second Respondent

ESKOM HOLDINGS SOC LIMITED

Third Respondent

Heard: 10 July 2018

Delivered: 10 July 2018

Edited: 16 July 2018

EX-TEMPORE JUDGMENT

ENGELBRECHT. AJ

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the Commissioner) on 21 December 2015.
- [2] The applicant (Mr Jonker) had been employed by the third respondent (Eskom) as a senior high voltage engineer in the Eastern Cape Operating Unit (ECOU) when, in November 2014, he attended training offered by Eskom in Johannesburg, although he had not been given approval to attend the training.
- [3] In 2013, Mr Jonker had been invited to attend the (then compulsory) training course. The course did not take place and by 2014, attendance at the course was no longer compulsory. Mr Jonker's superior, Mr Ralph Reddy (Mr Reddy) was informed of this change, and he declined permission for Mr Jonker to attend the course offered in December 2014. Indeed, he had instructed Mr Jonker on several occasions not to attend, in circumstances where Mr Jonker sought over time to persuade him (and others) to allow him to attend the course, at Eskom's cost.
 - a. In October 2014, Kerry Nel (Ms Nel) had informed Mr Jonker that he had not been selected for attendance in the December 2014 intake. Mr Reddy made it clear that he would not authorize attendance on 27 October 2014. This, because Eskom's (and the ECOM's) financial circumstances were not such as to allow for the expenditure on the training course to be attended in Johannesburg (although Mr Jonker asserts that this was a fabrication, and inconsistent with the fact that other employees were allowed to attend the training course).
 - b. Ms Cikizwa James (Ms James) had also, in October 2014, suggested that Mr Jonker take annual leave if he wished to attend the training course and '*pay his own way*' (which he had himself suggested as a solution to the alleged financial constraints that militated against his attendance). On 27 October 2017, she explained that '*I have been very clear on this and I will not make any further comments*', when Mr Reddy asked her whether Mr Jonker's attendance could be motivated for in any way.

- [4] Mr Jonker refused also to obey the instruction that he capture annual leave for his absence (issued by way of a text message of 28 November 2014). He had made it clear that he would attend the course despite Mr Reddy's refusal to give him permission to do so. Mr Jonker expressed the view that he would deal with the consequences of his defiance in due course, and continued to attend the training course, despite being in receipt of a further message of 1 December 2014 reading '*Tebogo you do not have permission to be in Johannesburg, Megawatt Park attending MMP*'. Mr Jonker sent a message saying '*... as per forms signed by yourself and emails received from EAL and from myself making you aware that I was going on a course this week. There's been an objection about expenditure but not about attending the course. Let's deal with this matter on my return next week Monday*'. It is Mr Jonker's case that the instructions were issued, because Mr Reddy was dictated to by others, who insisted upon him issuing the instructions, in light of the uncovering of corruption by Mr Jonker. It is Mr Jonker's view that he had been selected for attendance and that Mr Reddy could not lawfully instruct him not to attend and/or to take annual leave if he wished to attend the course.
- [5] On 12 December 2014, Mr Jonker was served with a notice of intention to suspend him without pay. Prior to this, and also in response to the request for submissions on why he ought not to be suspended, Mr Jonker also made allegations that the ECOU in which he was employed, was '*rotten to the core*', that people like him '*are victimized and ill-treated*' and that '*shallow minded black managers*' oppress him and others so as to achieve their narrow personal interests and so that '*they can sell our souls*'. This, in the context of defending himself.
- [6] On 14 December 2014, he apologized for his '*heavy language*' and asked for the dates of his absence to be recorded as annual leave. By this stage he wished the matter to be resolved '*amicably*'. In the same communication he expressed the view that he ought possibly to leave the ECOU and/or report to another manager, since '*things have not been palatable to anyone*'. In argument before me, it was submitted that the apology followed upon advice he had received.

- [7] Mr Jonker was suspended on 8 January 2015.
- [8] In February 2015, Mr Jonker was charged with the following acts of misconduct:
- 8.1 various counts of misconduct relating to insubordination and insolence (given his attendance at the training course in defiance of the instruction issued, which instruction was said to have been reasonable); and
 - 8.2 for conducting himself in a manner that was inconsistent with the values and ethics espoused by Eskom (on the basis of the statements concerning the ECOU and allegations of ill-treatment informed by racial considerations, which were said to be false and racist in nature).
- [9] An internal disciplinary enquiry followed, and on 23 February 2015, Mr Jonker was dismissed, having been found guilty of all charges (except to the extent that the charges amounted to '*splitting*'). Dismissal is a valid outcome of a guilty finding on these charges, under the Eskom Disciplinary Code. The internal appeal (lodged by his trade union, the National Union of Mineworkers (NUM)) was unsuccessful.

The arbitration award.

- [10] Mr Jonker (assisted by NUM), referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), challenging both the substantive and procedural fairness of the outcome of the disciplinary enquiry.
- [11] Both Eskom and Mr Jonker led evidence, and Eskom was allowed to re-open its case, in order to deal with facts arising from Mr Jonker's evidence. What is clear from the record, is that there was very little factual dispute on the conduct of Mr Jonker that led to the charges being levelled against him. Such factual disputes as there were centered around additional issues, such as whether there were finances available to fund Mr Jonker's attendance and the cost centre from which costs were to be recovered. These disputes were not central to the determination of the case before the Commissioner.

- [12] The record shows that the Commissioner acted diligently throughout. She made meticulous notes, and clarified issues as they arose. The record is comprehensive.
- [13] In a reasoned award, the Commissioner concluded that Mr Jonker's dismissal had been both procedurally and substantively unfair. The evidence of the various witnesses and procedural matters are summarised, and the Commissioner offered the legal reasoning for her conclusion, by reference to the facts before her. It is this finding, issued on 21 December 2015, that is the subject of the present review.

The review.

- [14] The review was initiated through the service upon the respondents of a notice of motion on 3 March 2016. It was not accompanied by a founding affidavit, but the CCMA nonetheless complied with the duty to file with the Registrar of the court a copy of the record of proceedings before it (although access to the record was plagued by what can only be described as a comedy of errors, which led to delays, given that the record went to Port Elizabeth and later to Johannesburg). It was only on 12 August 2016, that Mr Jonker filed the notice of motion with the court. Then, on 20 June 2017, Mr Jonker filed a fresh notice of motion in these proceedings, seeking the same relief, but this time with the benefit of the record which had not become available. The second notice of motion was accompanied by a founding affidavit. Notably, Mr Jonker was no longer being assisted by NUM at this stage.
- [15] The founding affidavit sets out lengthy allegations of corruption and/or maladministration within Eskom and/or the ECOU. Under the heading '*Grounds for review*', Mr Jonker raises procedural grounds, based on the Commissioner's decision to allow Eskom to re-open its case, but also relies on inconsistencies in evidence (which ought appropriately to be considered in the context of the substantive grounds, and which are also raised under the heading of substantive unfairness). The further substantive grounds raised for the review are that the Commissioner had failed to interrogate the reasons for declining permission to attend the training course, which Mr Jonker now says was an

unfair labour practice. Extensive reliance is placed on allegations of victimization and corporate bullying, and the right of a whistleblower to be protected. Mr Jonker advances the case that the Commissioner had failed in her duties when she had not interrogated these. He also raises as a complaint that Eskom's policy did not provide for him to take annual leave if he wished to attend a training course.

[16] For purposes of this judgment, I shall treat the grounds for review as:

16.1 alleged procedural unfairness on the basis that Eskom had been allowed to re-open its case, when no proper case for this existed; and

16.2 alleged substantive fairness on the basis that the Commissioner:

16.2.1 failed to adjudicate on the corruption allegations, and their consequence for the assertion that the instruction given had not been lawful;

16.2.2 failed to properly bring into account inconsistencies in the treatment of Mr Jonker and other employees; and

16.2.3 failed to bring into account that Eskom had no policy in place to allow for the taking of annual leave whilst attending a training course; so that her finding that dismissal had been warranted was unreasonable in the circumstances of the case.

Points in limine.

[17] Eskom has raised various points *in limine*, which I am required to decide prior to engaging with the merits of the review. I deal with these in turn.

First point in limine – alleged irregularity in instituting the review application

[18] Eskom argues that, in terms of Rule 7A(2)(c) of the Rules for the Conduct of Proceedings in the Labour Court (the Labour Court Rules), a notice of motion in a review must be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the arbitration proceedings set aside. That requirement was not complied with, because the notice of motion

initiating proceedings had not been accompanied by an affidavit. A second notice of motion, accompanied by an affidavit as required, was only filed more than a year after the service of the original notice of motion. According to Eskom, the filing of the second notice of motion and the accompanying affidavit constituted an irregular step, and Mr Jonker ought to have withdrawn the initial notice of motion or to have filed an amended notice of motion.

[19] The complaint is raised as a jurisdictional issue, on the basis that there is no clarity on the date by which the review application was instituted. Moreover, Eskom advances the case that it is not clear whether this Court ought to consider the affidavit that was filed together with the second notice of motion and/or whether the time limits have been complied with.

[20] On the basis of the alleged non-compliance, Eskom prays for dismissal of the review application.

[21] My attention was drawn to the judgment of this Court in *Agulhas v Dispute Resolution Centre and Others*¹ where a review was struck from the roll on the basis that the notice of motion had not complied with Labour Court Rule 7A. There, it was considered that non-compliance with Labour Court Rule 7A(2)(a) and (b) may be condoned, but that non-compliance with Labour Court Rule 7A(2)(c) was '*fatal*'.

[22] In my view, the facts underpinning the judgment in *Agulhas*² are distinguishable for the following reasons:

22.1 the applicant, having been ordered to take steps to comply with the requirements of Labour Court Rule 7A(2), failed to do so. Notably, no affidavit had been attached to the amended notice of motion issued in that case, and the second notice of motion did not contain the required particulars. What is clear, is that the applicant had been given an

¹ [2014] ZALCPE 36 (12 December 2014),

² *Supra*.

opportunity to rectify the shortcomings in the review prior to the decision to strike the application from the roll.

22.2 In the present case, the point *in limine* is premised on the fact that a second notice of motion was filed, together with a founding affidavit setting out the requisite facts. By the time of the hearing of this review, Mr Jonker has brought his house in order, so to speak, so that the situation is not analogous to the *Agulhas* case. Notably, the second notice of motion asks for the same relief, and, in effect, Mr Jonker has simply filed a founding affidavit in support of the notice of motion, as he had been required to do.

[23] Importantly, an order striking a review application off the roll does not amount to a dismissal of the review. The difference between striking a matter off the roll and dismissing it, is that in the case of dismissal the matter is disposed of and cannot be set down on the roll again. An applicant who wishes to proceed will have to start the matter *de novo*. On the other hand, when a matter is struck off the roll, the applicant can, after remedying the defect arising from the incomplete or inadequate record, have the matter re-enrolled and set down for hearing.³

[24] In review proceedings, the dismissal option ought only to be followed only where an applicant has failed to explain why, despite ample opportunity, an applicant has failed to take appropriate steps to remedy the shortcomings in the review application. The ultimate determination as to whether or not to dismiss or strike a matter from the roll should be based on fairness and justice after an assessment of the conduct of the applicant and the circumstances of the case.⁴

[25] I conclude that *Agulhus* provides no precedent for me to dismiss a review application on the basis of non-compliance with Labour Court Rule 7A(2)(c). At best for Eskom, the judgment provides a basis for arguing that an applicant in a review must bring its house in order before the matter can be enrolled and

³ See *Solidarity obo Botha v CCMA* (2009) 30 ILJ 1363 (LC) at para 16.

⁴ See *Solidarity obo Botha supra* at paras 17 – 21.

heard. This has been done, and the applicant has explained the reason the defects arose in the first place. I bring these allegations into account in the interests of fairness. To dismiss the review application prepared by an unrepresented respondent on the basis that such applicant had initially not complied with the requirement that a founding affidavit be filed, would not be in the interests of justice and fairness in the circumstances of the case.

[26] In these circumstances, the first point *in limine* is dismissed.

Second point in limine – no condonation for the late filing of the review application

[27] Eskom relies on section 145(1)(a) of the Labour Relations Act⁵ (the LRA), which provides that a review application must be launched within six weeks of the date on which the award was served on the applicant. It says that the review application was launched 28 days late, even accepting the date of the issue of the first notice of motion (3 March 2016). No application for condonation was made and that therefore Eskom submits that the review must be dismissed accordingly.

[28] In support of its argument, Eskom relies on *SATAWU v Tokiso Dispute Settlement and Others*⁶ where the Labour Appeal Court (LAC) confirmed that compliance with the time period for institution of a review was a jurisdictional requirement and that the court cannot come to a party's assistance if that party is out of time and there is no application for condonation. This Court is bound by the judgment in *SATAWU*, and it accordingly enjoys no jurisdiction to entertain the review in the absence of a condonation application, if the factual underpinning for Eskom's submission stands.

[29] The award of the Commissioner is dated 21 December 2015, but Mr Jonker asserts that he was only informed of the outcome of the arbitration proceedings on 27 December 2015, by way of a text message. He thus became 'aware' of it in a general sense, but did not have a copy. Efforts to obtain a copy of the award from the NUM representative through other means, came to nothing until the end of January 2016 when the award '*was printed while I was waiting*'. This

⁵ Act 66 of 1995 as amended.

⁶ [2015] 8 BLLR 818 (LAC)

allegation is not disputed by Eskom, although in argument it was explained to me that Eskom finds it difficult to believe that Mr Jonker struggled to obtain the award.

- [30] Mr Jonker asserts that it is only from the end of January 2016 that the calculation of the time period for review ought to run, since he only received a copy of the award by then. His submission finds some support in the case of *G4S Secure Solutions (SA) (Pty) Ltd v Gungubele NO and Others*⁷, where the LAC considered that an appellant had become 'aware' of an award when it 'received the award'. Fairness dictates that this approach be followed, so as to not preclude an applicant from pursuing a review application when such applicant was unable to obtain a copy of an award in time.
- [31] Unfortunately, Mr Jonker did not plead the precise date in January 2016 when he became 'aware' of the award in this sense. Counting backwards from 3 March 2016 (when the notice of motion was issued), Mr Jonker's review would have been in time if he received a copy of the award on 22 January 2016, or thereafter. Given that Mr Jonker is an unrepresented individual, I shall accept for present purposes that the review was launched in time, since I take the reference to 'end of January' to be something later than 22 January 2016. It was put to me in argument that the 'end of January' meant the last week of January.
- [32] In these circumstances, I dismiss the second point *in limine*. Even if I am wrong in my conclusion, Eskom is not prejudiced, given my judgment on the merits. It is for this reason that I am treating the absence of a definite allegation on a clear date by which the award had been received as leniently as I do. My decision in this respect ought not to be read as precedent for allowing applicants in review applications to be imprecise in their assertion of the date by which they become aware of an award.

⁷ (2018) 39 ILJ 131 (LAC) at para 19.

Third point *in limine* – deemed withdrawal of the review application, archiving of the file and late filing of the record

- [33] In terms of Labour Court Rule 7A(6), the applicant in a review must furnish the Registrar and each of the parties with a copy of the record in arbitration proceedings. The Practice Manual of the Labour Court⁸ (the Practice Manual) requires records to be filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been received. Failure to do so will result in the applicant being deemed to have withdrawn the application, unless the applicant has asked and been granted consent for an extension by the respondent, or been given such consent in consequence of an application to the Judge President.
- [34] Eskom relies on *Mchunu v Rainbow Farms (Pty) Ltd, In re: Rainbow Farms (Pty) Ltd v CCMA*⁹, where it was held that the respondent in a review proceeding was entitled to bring a Rule 11 application to have the review dismissed when the record was not filed timeously, and in the absence of an extension being sought or granted.
- [35] In this case, the applicant complied with the requirement to file the full record only about 15 months after the filing of the notice of compliance with Labour Court Rule 7A(3) by the CCMA on about 10 June 2016. On Eskom's version, no steps in pursuit of the review were taken in the period between the filing of the original notice of motion in March 2016 and the filing of part of the record and a supplementary affidavit on 4 April 2017.
- [36] The consequence of this, Eskom says, is that the archiving had the same effect as the review having been dismissed, and that the applicant is required to make an application to have the matter revived before it can be entertained. In the absence of an application to remove the matter from the court's archives and to reinstate it, the matter cannot be entertained and must be struck.

⁸ April 2013.

⁹ [2017] ZALCD 17 (12 June 2017).

- [37] It contends, further, that, in the absence of an application for condonation of the late filing of the record, the record is not properly before me.
- [38] In the present case, Mr Jonker has explained on affidavit his various difficulties with production of the record. He also explained that he had been unaware of the practices and procedures of the Labour Court, as an unrepresented applicant. Although no notice of motion was filed in an application for condonation, or in respect of an application for reinstatement, the applicant dealt with the issue in his reply, and Eskom did not ask for permission to file a further affidavit to deal with these allegations. Moreover, Eskom has brought no application to dismiss the review, and my brother Coetzee AJ set the matter down for hearing by way of a directive issued on 23 February 2018. This differentiates the matter from *Butana v South African Local Government Bargaining Council and others*¹⁰, where no explanation had been offered, and where an application for dismissal had been launched on the basis of non-compliance with the Practice Manual.
- [39] In these circumstances, I dismiss the point *in limine* that is based on non-compliance with the Practice Manual. Given my judgment on the merits of the review, Eskom is not prejudiced, even if this conclusion were wrong. Again, my decision in this regard is not to be read as a basis for the applicants in reviews to flout the requirements of the Practice Manual.

Fourth point in limine – introduction of documents not used in the arbitration proceedings

- [40] Eskom argues that, since the relevant test in a review is reasonableness, the Court is confined to consider the evidence that had served before a Commissioner in arbitration proceedings to assess whether the standard was met. The Court, so Eskom argues, cannot make a fair assessment if new evidence is brought into account.

¹⁰ [2016] 5 BLLR 469 (LC).

[41] In the present case, additional documents were filed by way of a document described as a supplementary affidavit although constituting correspondence. None of these documents had served before the Commissioner.

[42] In *Xorile v CCMA*¹¹ it was held that it is not permissible to introduce in the review proceedings evidence that had not served before the Commissioner hearing the arbitration. Such additional evidence was accordingly disregarded in the assessment of the review application. I am bound by the judgment, and accordingly I am not at liberty to bring into account any of the evidence submitted to this Court and which had not served before the Commissioner. I shall adjudicate this review on the basis of an evaluation of the evidence that had served before the Commissioner.

Merits of the review.

Substantive grounds for review

[43] This Court is only entitled to interfere with the award of Commissioner Mlindazwe if her decision is one that a reasonable commissioner could not have reached, as *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹² makes plain. This would be the case if –

43.1 Commissioner Mlindazwe misconstrued the true nature of the enquiry (see *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*¹³); or

43.2 The result was unreasonable (see *Herholdt supra*), in the sense of it being disconnected with the evidence, unsupported by the evidence and/or involved speculation (*Quest Flexible Staffing Solutions (Pty) Ltd, a Division of Adcorp Fulfilment Services (Pty) Ltd v Legobate*¹⁴

[44] There is no evidence before this Court suggesting that the Commissioner misconstrued the nature of the enquiry before her. The Commissioner was confronted with the referral of an unfair dismissal dispute, not an unfair labour

¹¹ [2014] ZALCJHB 512 (8 December 2014),

¹² (2007) 18 ILJ 2405 (CC).

¹³ (2013) 11 BLLR 1074 (SCA) at para 25.

¹⁴ (2015) 36 ILJ 968 (LAC).

practice dispute. This much is clear from Mr Jonker's own belated attempt to bring an unfair labour practice matter to the attention of the Court. It is Mr Jonker that is seeking to misconstrue the nature of the enquiry that the Commissioner was embarked upon, when he seeks to make out an unfair labour practice case. The Commissioner clearly recorded the basis for her not entertaining the unfair labour practice case.

[45] In consequence, the only question before me is whether the substantive result was unreasonable in the sense defined above.

[46] The factual underpinnings of Commissioner Mlindazwe's finding are largely undisputed, and the legal standard applied is uncontroversial, as follows.

[47] As regards the instruction not to attend the training course –

47.1 It is common cause between the parties that Mr Jonker had been given an instruction not to attend to the training course in Johannesburg, and that he had travelled to Johannesburg and attended the course nonetheless. On Mr Jonker's version, his superiors had only denied financial backing from Eskom and not denied attendance altogether. But, properly interpreted, the explanation that was given was that he could not attend the training course, because there was no funding. A reading of Mr Jonker's own founding affidavit in the review, provides the basis for the conclusion –

47.1.1 he explains, for example, that he became '*adamant to attend in Megawatt Park*' in October 2014, suggesting that he had been made aware that he would not be able to;

47.1.2 he asserts that, also in October 2014, he was '*begging*' for approval to attend;

47.1.3 he described how, at the end of October 2014, he explained that he would not take annual leave, since there was no policy underpinning such an instruction, indicating that he knew at that stage that his absence would not be authorised without him taking leave;

47.1.4 his explanation in the affidavit is that Mr Reddy had sent him an '*sms turning around on his verbal approval*' on the Friday afternoon before he left for Johannesburg, which can only mean that Mr Jonker left for the course knowing full well that such approval as may have been given, had been withdrawn.

47.1.5 on his own version, Mr Reddy informed the course organizer that he was not authorized to attend.

47.2 It is also common cause that Mr Jonker had indicated that he would deal with the consequences of his actions upon his return from attending the week-long course. In doing so, he had defied a clear instruction. Mr Jonker did this, because he claimed that he was being treated differently from other employees who had been granted leave to attend the training course. The suggestion is that the instruction had not been lawful, on the basis that it resulted in inconsistent treatment of employees of Eskom in the ECOU. He also relied on the fact that, after he had travelled to Johannesburg to attend the course in the face of the instruction of Mr Reddy, Mr Reddy had instructed him to capture his absence as annual leave. This, he argued, introduced doubt over the submission that the instruction not to attend had been clear. But these submissions only introduce supposed justification for the conduct of Mr Jonker; they do nothing to undermine the common cause conclusion that he knew of an instruction, chose to disobey it and did so in the full knowledge of the consequences might attach to that election.

47.3 The argument that the instruction not to attend the training course had not been clear, is unpersuasive, and it was reasonable for the Commissioner to have come to the conclusion that the instruction had indeed been clear. Mr Reddy's offer of the alternative solution (taking leave) was after the fact, when Mr Jonker had already given a clear indication that he intended to travel to Johannesburg and attend the course (showing once more that he was '*adamant*' that he would attend, whatever his superior said). In a sense, Mr Reddy was giving Mr Jonker an opportunity to avoid the severe consequences of his failure to follow a lawful instruction. Had Mr Jonker

followed the instruction to capture leave in order to justify his absence from work, he might have been able to rely on this as a consideration. He did not. He rejected this alternative, and thus disobeyed yet another instruction. This, because he wanted to have a policy proving why he had to capture leave. But the point of capturing leave was that he wanted to do something for his own benefit for which he was not authorized to be away from work for. The only basis on which he could be absent was to capture leave. No policy direction was required for this.

47.4 Even if it is accepted as true that employees were not treated the same (on the basis that some were selected to attend training courses and others not), this did not provide a basis for willful disobedience of the direct instructions given. The proper way of dealing with this complaint would have been to take it up with Eskom through internal procedures that were available to Mr Jonker, in the hope that he might be selected to attend training on another occasion. Alternatively, he could have accepted the alternative solution (to attend the course during annual leave) whilst reserving his right to challenge this after the fact, and might have then, upon his return, made submissions to Eskom on why those leave days were to be written back to him and/or that the costs occasioned by his travel and attendance at the course were to be borne by Eskom.

47.5 What appears to escape Mr Jonker is that the inconsistency in treatment between him and other employees did not provide a basis for him to disobey an instruction. An employer might approve attendance for some employees and not for others, and there is nothing before me to suggest that Mr Jonker had a '*right*' to attend the training course, as he seeks to assert. In any event, the solution was not to disobey an instruction. He might have instituted unfair labour practice procedures at the time, if he considered that that he was being victimized, but he did not. It was too late for him to rely on his alleged victimization by the time he had already disobeyed instructions. What he did, was to disregard a lawful instruction, thereby making himself guilty of gross insubordination as defined in *National Union of Public Service and Allied*

*Workers Union obo Mani and Others v National Lotteries Board*¹⁵ and *Pallucci Homes Depot (Pty) Ltd v Herskowitz and Others*¹⁶

47.6 The Commissioner correctly applied the judgment in *Slagment (Pty) Ltd v Building Construction and Allied Workers Union and others*¹⁷, where it was held that dissatisfaction or frustration with working conditions do not constitute a sufficient ground for an employee to claim that an instruction is not reasonable. She also, correctly, placed reliance on *Johannes v Polyoak Industries*¹⁸ which confirms that an employee takes a risk when disobeying an instruction pending resolution of a grievance. Dismissal as a legitimate outcome followed from the consideration that the instruction had been issued repeatedly, and that Mr Jonker knew full well that he was acting in direct contravention of an instruction issued.

47.7 The Commissioner's conclusions on this charge are entirely reasonable in the circumstances.

[48] As regards the statements made –

48.1 It is not disputed that Mr Jonker made the statements about ECOU being '*rotten to the core*' and that its '*black managers*' acted oppressively. Indeed, there is a written record of this. Again, the statements were sought to be justified by reference to Mr Jonker's frustration, but the justification sought to be advanced is based on the recognition that the statements were made.

48.2 The Commissioner concluded that the statements were derogatory and racist, and therefore not in compliance with Eskom's values and ethics. She did not offer any analysis for her conclusion that the statements were racist, but it appears from the award that she, in any event, based the sanctioning of the dismissal on the gross insubordination evidenced by the refusal to comply with the instructions given.

48.3 In any event, I am guided by the judgment of the Constitutional Court in *Rustenburg Platinum Mine v SAEWA obo Meyer Bester and others*¹⁹

¹⁵ [2014] ZACC 10 at para 57.

¹⁶ (2015) 5 BLLR 484 (LAC).

¹⁷ (1994) 15 ILJ 979 (A).

¹⁸ [1998] 1 BLLR 18 (LAC),

¹⁹ [2018] ZACC 13 (judgment of 17 May 2018),

where language referencing race was, in the context, held to be racist. Mr Jonker might well have expressed his views on the Eskom management without coupling his statements with a reference to the race of the managers. That Mr Jonker himself is black does not alter the position: given South Africa's past of institutionalized racism and unacceptable associations between race and competence, his association of alleged corruption and/or incompetence with the race of the managers, fell to be sanctioned severely. There was no justification in this case to use race as a signifier (even if it were true that all of the managers were black, which they are not, when regard is had to the submissions on alleged corruption raised by Mr Jonker).

- [49] This Court accepts that an employee must not be dismissed for raising genuine concerns of corruption. But there is a manner in which to do this, and it is not through disobedience and the making of derogatory, even racist, remarks.

49.1 If Mr Jonker considered his position to be that of a whistleblower that revealed widespread corruption within Eskom, or the ECOU, in accordance with the Protected Disclosures Act²⁰ (PDA), and who had been victimized for this reason (by not granting him the opportunity to go to the training course he wished to attend, in circumstances where others who were similarly situated were granted such an opportunity), he might have referred an unfair labour practice case at the time. He did not, although he has sought to do so after the fact, by way of an application for condonation of June 2017. He disregarded instructions and then made derogatory and/or racist remarks that did nothing to advance his alleged pursuit of uncovering corruption.

49.2 Furthermore, if an employee suspects that he is being victimized for having revealed corruption in an organisation, he might be expected not to behave in a manner that would provide fuel to the employer's alleged intention to '*get rid of him*'. Even if Eskom wanted to dismiss Mr Jonker for fear that he might expose corruption, it would not have been able to do so

²⁰ No 26 of 2000.

lawfully had Mr Jonker not disobeyed an instruction and/or made remarks that exposed him to disciplinary procedures.

49.3 It was not for the Commissioner (nor is it for this Court) to establish whether there was any truth in the allegations made by Mr Jonker in relation to corruption; rather the question was whether Mr Jonker had acted in a manner that warranted a finding that he be dismissed. She correctly confined herself to a finding on the derogatory and/or racist nature of the statements made.

[50] The arbitration award of the Commissioner reveals that she was fully aware of her duties, and that she applied the available case law to come to the conclusion that Mr Jonker had made himself guilty of gross insubordination, which warranted dismissal. She accordingly concluded that there was no reason to interfere with Eskom's decision to dismiss Mr Jonker. Her conclusion is entirely reasonable, and there is no basis for this Court to interfere with the award.

Procedural unfairness as a ground for review

[51] The only true basis for the allegation of procedural unfairness raised is that Eskom was allowed to re-open its case. However, Mr Jonker's team had not objected to the re-opening of the case. Mr Jonker's case was not prejudiced as a result of the re-opening of the case, since the finding had not hinged on whether there had been a budget available to send Mr Jonker on the training course or other evidence introduced upon the re-opening of the case. The simple basis for the award was the gross insubordination, which was unrelated to the question whether the reasons for declining permission to attend the course were good, bad or indifferent.

[52] In these circumstances, no basis for review lies in the allegation that the proceedings were unfair.

[53] In the circumstances, the following order is issued –

Order.

1. The first to third points *in limine* raised by the third respondent are dismissed.
2. The fourth point *in limine* is upheld, and the documents not serving before the second respondent are not treated as forming part of the record on review.
3. The application for review is dismissed.
4. There is no order as to costs.

G. Engelbrecht

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: P.T. Jonker

Instructed by: In Person

For the respondents: T Rapuleng

Instructed by: Cliff Dekker Hofmeyr Inc

LABOUR COURT