



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: **C611/2022**

In the matter between:

KAYLA AVRIL JENECKER

Applicant

and

SA MEDICAL AND EDUCATION

FOUNDATION NPC

First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND

ARBITRATION

Second Respondent

COMMISSIONER ORLANDO MOSES

Third Respondent

Heard: 9 October 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and by publication on Caselines. The date for hand-down is deemed to be 17 October 2025.

Summary: An application to review an award which found that the dismissal of an employee for telling the Chief Executive Officer 'screw you' and repeating the phrase was fair, as the conduct amounted to gross insubordination. The employee denied uttering the words to the Chief Executive Officer, claiming that the Chief Executive

Officer had spoken them to her instead. The commissioner rejected the employee's version on the matter, a decision that is not challenged on review. The award is reasonable.

JUDGMENT

GANDIDZE, J

Introduction

[1] The applicant employee, Ms Kayla Jenecker, was dismissed for gross misconduct relating to insolence and insubordination after she, *inter alia*, told the Chief Executive Officer of the SA Medical and Education Foundation NPC, Mr Trevor Pols (Pols), 'screw you'. The phrase was repeated after Pols inquired whether he had heard what the applicant had said. An alleged unfair dismissal dispute filed with the Commission for Conciliation, Mediation, and Arbitration (CCMA) failed, with the commissioner finding, in an award issued on 14 October 2022, in case number WECT1114-22, that the applicant was insubordinate and that dismissal was appropriate. It is that outcome which is sought to be reviewed and set aside in an application under section 145 of the Labour Relations Act,¹ (LRA). The SA Medical and Education Foundation NPC, the employer, opposed the application.

[2] Before dealing with the merits of the review application, I address the preliminary issues raised by the employer.

Preliminary issues

That the review application was filed late

[3] It was submitted that the review application, which was filed on 5 December 2022, was late because it was due on 25 November 2022, and no

¹ Act 66 of 1995, as amended.

condonation application was filed. Because the applicant and her legal representatives ignored the advice given by the employer's legal representatives to file a condonation application, the review should be struck off the roll, or ideally dismissed, as it was too late to remove the matter from the roll and to direct the applicant to file a condonation application.

- [4] The award is dated 14 October 2022, and the parties were notified via short messaging service that the outcome was in favour of the employer and that the award would be sent. The award was then emailed to the parties on the same day. It was not in dispute that the email addresses for Pols and the applicant were incorrectly recorded, with the result that Pols and the applicant did not receive the award. The award was also sent to the applicant's mother's email address, which the applicant provided as an alternative contact in the 7.11 form.
- [5] The applicant alleges that because the award was sent to the wrong e-mail address, it was only on 24 October 2022 that the award was transmitted to her attorneys of record after they requested it from the CCMA. On behalf of the employer, it was argued that the applicant never pleaded that the award sent to her mother's e-mail address was not received. It was also submitted that the CCMA rules provide for service via e-mail, and therefore the applicant received the award sent to her mother's e-mail address, and that even if it is accepted that the e-mail address used by the CCMA for her was incorrect, having received the short messaging service on 14 October 2022 that the award would be sent and not having received it, she ought to have contacted the CCMA without delay to inquire about the award.
- [6] The applicant pleaded that she only received the award on 24 October 2022, following her attorneys' request to the CCMA earlier that day. Proof was provided that her attorneys made the request to the CCMA, and the award was provided to them on the same day. It was also proven that the award was forwarded to the applicant on 24 October 2024. The award would not have been forwarded to her if she had already received it.

- [7] But more importantly, the criticism against the applicant for not following up with the CCMA sooner than 14 October 2022 is disingenuous. The award was also sent to the wrong email address for Pols, and it was only on 26 October 2022, after the applicant's attorneys had already requested the award from the CCMA, that Pols requested the CCMA to provide him with a copy of the award.
- [8] The six-week period for filing a review application must be calculated from the date the applicant was 'served' with the arbitration award, which was on 24 October 2022. In this Court, a document is considered served when a party receives it, which is why affidavits of service are required to confirm that someone at the recipient's end confirmed receipt of the document sent via email. Therefore, the six weeks expired on 5 December 2022, the day the review was served and filed with the Registrar via email. Filing by email is permitted under the Rules of this Court, and there is no requirement that a document must be emailed during business hours, as Ms Myburgh sought to argue. The preliminary point has no merit as the review application was filed timeously, and a condonation application was not required.

No Rule 7A(8)(a)² Notice

- [9] The other preliminary point was that the review application was not properly before the Court because a rule 7A(8)(a) Notice (notice) is mandatory and the applicant did not file one. In response, it was argued for the applicant that the notice was not served or filed due to a *bona fide* oversight. However, this explanation is disingenuous because the employer's legal representatives informed the applicant's attorneys that the notice was mandatory, to which they responded that an answering affidavit must be filed because a supplementary affidavit was served. The answering affidavit also raised this issue, yet the applicant's attorneys persisted in claiming they were not required to file a notice.

² The Old Rules of this Court which applied at the time the review application was filed.

- [10] Rule 7A8(a) is drafted such that a notice must accompany a supplementary affidavit. The question that arises is what the implications are if a supplementary affidavit is filed without an accompanying notice.
- [11] In *Stars Away International Airlines (Pty) Ltd t/a Star Away Aviation v Thee NO and Others*³, (*Stars Away Aviation*), a decision relied upon by the employer, the Court found that a rule 7A(8) notice was mandatory and that the period for filing an answering affidavit did not commence until a notice and a supplementary affidavit were filed. However, it is not clear from that judgment whether the supplementary affidavit was ignored because a notice did not accompany it. Therefore, it is assumed that the contents of the supplementary affidavit were considered in deciding the review.
- [12] In oral argument, Mr Mashiane for the applicant referred to the decision of *Moschinsky v Commission for Conciliation, Mediation and Arbitration and Others*⁴, a decision which I rendered as an acting judge, and in which I found that the notice and the supplementary affidavit were filed late, the explanation for the delay was not reasonable, and that the review application would be determined based on the contents of the founding affidavit only, and that the supplementary affidavit filed late would be disregarded.
- [13] The facts of the present matter are distinguishable. A supplementary affidavit was filed on time, although it was without an accompanying notice. The employer responded to that supplementary affidavit, though briefly, despite stating that it would not do so because a notice did not accompany it.
- [14] Although the Rules of this Court do not qualify as a statute, the Constitutional Court (CC) clarified, in *National Union of Metal Workers of South Africa v Intervale (Pty) Ltd and Others*⁵, the approach to determining whether a provision has been complied with. The CC stated that whether or not the requirements of a statute have been met depends on whether there has been compliance with the provision, taking into account the purpose of the statutory requirement. The test is not whether there has been exact or substantial

³ (2013) 34 ILJ 1272 (LC).

⁴ (C706/2021) [2023] ZALCCT 44 (14 July 2023).

⁵ (2015) 36 ILJ 363 (CC) (*Intervale*)

compliance, but whether there has been compliance.⁶ The CC in *Intervalve*⁷ stated this:

[45] This test focuses on the statute's objective or purpose. It countenances deviation from statutory prescriptions provided the purpose has been met. Since *Maharaj*, courts have generally adopted a three-step approach to evaluate this; some courts add a fourth step:

1. What is the purpose of the statute as a whole, as well as the specific provision at issue?
2. What steps did the party take to comply with the provision? Here, only the acts of the party seeking to comply are relevant. The conduct of the other party is not.
3. Did the steps taken achieve the purpose of the statute and of the specific provision, even if the precise requirements were not met?
4. Was there any practical prejudice because of non-compliance.'

[15] The purpose of a notice is to record that a supplementary affidavit is being filed. In this case, the supplementary affidavit recorded that it was being filed in terms of Rule 7A(8), amplifying the grounds of review set out in the founding affidavit. Therefore, the purpose of the notice, which is to inform a respondent that a supplementary affidavit is being filed, was achieved. There was no practical prejudice to the employer, which in fact filed an answering affidavit responding to both the founding and the supplementary affidavit filed without the relevant notice. A further consideration is that a respondent need not respond to the notice, but only to the affidavits. Therefore, the absence of the notice does not prejudice a respondent.

[16] To clarify, the above should not be interpreted as allowing applicants to ignore rule 7A(8)(a) and to refrain from filing a notice along with a supplementary affidavit without facing consequences. This is not what this judgment

⁶ *Intervalve* (Ibid at para 44).

⁷ Id fn 5 at para 45.

indicates. As the Court mentioned in *Stars Away Aviation*, legal representatives for applicants are strongly advised to strictly follow the rule and file a rule 7A(8)(a) notice together with a supplementary affidavit, because the rules stipulate this requirement. If a notice is not filed and the oversight is brought to a party's attention, the non-compliance must be corrected, or the Court may, in its discretion, decide how to deal with the non-compliance.

- [17] The preliminary point is dismissed, and the supplementary affidavit will be considered in the determination of the review application.

Applicant's Heads of Argument filed late

- [18] The applicant did not file her Heads of Argument in accordance with rule 40 of the Rules Regulating the Conduct of the Proceedings of the Labour Court, 2024⁸, and as directed in the set-down notice. Her Heads of Argument were filed after the employer's Heads of Argument, which it subsequently supplemented. No application was made to condone the late filing of the applicant's Heads of Argument, and in oral argument, Mr Mashiane sought to explain from the bar. The Court registers its displeasure at such conduct by the applicant's legal representatives. Rules of this Court must be adhered to, and where this has not been done, an explanation must be provided to the Court, through a condonation application, and not through submissions from the bar. It is hoped that the applicant's representatives will seriously reflect on their conduct and avoid a recurrence.

- [19] Be that as it may, the applicant's Heads of Argument were considered to ensure that the review application was properly considered based on its own merits and the submissions of both parties.

- [20] I now return to the merits of the review application.

⁸ Government Notice 4775B of 2024.

Background facts

- [21] The applicant began working for the employer in February 2020 as a fundraiser. On 10 December 2021, she arrived at work 15 minutes late. Pols inquired why she was late, and she responded that it was due to traffic. Pols responded that the explanation was strange, as he had heard the other employees talking about how traffic into Cape Town that morning was flowing. The exchange happened in the presence of other employees at a meeting.
- [22] After the meeting, the applicant asked to speak privately with Pols in his office. She wanted to raise her concern with Pols about his accusation that she had lied in front of other employees. During that encounter, she also explained that the real reason she was late was that the driver of the vehicle she was travelling in had to divert to take a sick child to the Red Cross Hospital, and Pols responded that the explanation was plausible. The situation became heated, and Pols instructed the applicant, who was standing, to sit down. She refused. Pols then told her to leave his office. The applicant stormed out into the open area where the other staff were seated. As she entered this area, she continued to address Pols regarding his accusation that she had lied. Pols instructed the other staff to hang up their calls so that donors and clients would not hear the commotion. Pols informed the applicant that she was suspended for the day, that she was being given a written notice which she needed to sign, and that she could return to work on Monday, 13 December. The applicant refused to sign the written warning. Pols instructed her not to take any company property when she leaves. The applicant left with company property, but before she departed, she at some point told Pols '*screw you*'. Pols inquired what she had said, and she repeated '*screw you*'.
- [23] Pols informed the applicant that she would receive a notice to attend a disciplinary hearing. The allegations were outlined as follows:

'Details of the allegation

Your outburst and unacceptable behaviour in the office this morning and the clear disrespect towards senior management. You have been suspended as your actions caused a hostile working environment. You are also charged with inappropriate language towards senior management. You destroyed the employment relationship. You have culpably disregarded the rules of the workplace, your contract of employment and the express provisions of our disciplinary code. The SAME foundation operates within the confines of the applicable statutes and laws as contained and prescribed in the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995 and common law as pronounced and decreed by the courts’.

- [24] The disciplinary hearing was held on 15 December 2022, and the applicant was dismissed, for gross misconduct involving insolence and insubordination as per the notes.⁹ A referral to the CCMA followed.

The arbitration proceedings

- [25] Pols represented the employer and also testified. The applicant represented herself after her request for legal representation was denied.
- [26] Pols confirmed the applicant’s late arrival and the explanation she provided, which did not match what other staff had said about the traffic that morning. During the meeting, the applicant apologised, and he accepted the apology. He also testified about his meeting with the applicant in his office, noting that she was emotional, became angry and aggressive, and accused him of calling her a liar in front of colleagues. He asked her to sit down, but she responded that he could not speak to her like that, as he did not own her, and she pointed a finger at him. The applicant stormed out of Pols’ office into the open plan office area, where other employees were working. He instructed them to hang up their phones, as he did not want clients on the calls to hear the commotion.

⁹ Invective (insulting, abusive language) are considered misconduct for which a justifiable sanction is dismissal, even on the first occasion. You have destroyed and impaired the employment relationship, the dignity and reasonable sensibility of the person against whom it was directed (your employer) and in the presence of those present when uttered. Your behaviour also impacted the employer’s business interest and activities. The disciplinary hearing report records that the applicant pleaded guilty to the charge.

- [27] Pols informed the applicant that she was suspended for the day, that she had to leave the office, and return to work on Monday, 13 December. He also told her she was being issued a written warning. The applicant responded that Pols could not tell her what to do, that she was not leaving, and that she did not accept the warning. She also said '*screw you*', to which he replied '*excuse me*', and she repeated the phrase.
- [28] An employee present that morning, Ms Williams, confirmed she heard a commotion in Pols' office. She saw the office door open, and the applicant told Pols that he must not speak to her like that in front of colleagues. She verified what Pols conveyed to the applicant in the open area and stated that the applicant told Pols '*screw you*'. She also testified that she had reported the applicant to Pols for being insolent and that she was counselled.
- [29] Ms Nicholas, another employee, testified that she could not hear what was being said while Pols and the applicant were in Pols' office. However, she saw, through the glass, the applicant aggressively walking towards Pols, who was sitting in his chair and pointing at him. When the door opened, she heard the applicant tell Pols that he would not make her out to be a liar, and Pols responded that he was issuing her with a written warning and that she was suspended for the day. Then the applicant told Pols '*screw you*', and Pols said '*excuse me*', to which the applicant repeated '*screw you*'. Pols instructed the applicant not to take any office property with her when she leaves, but she left with office property. She denied that Pols had said '*screw you*' to the applicant and stated that the applicant always had an attitude that she knows what to do.
- [30] Another employee, Ms Hardenberg, also testified. She denied that Pols called the applicant a liar. She did not hear what was being said in Pols' office, but she saw the applicant move around the table and point a finger at Pols. Then, the applicant and Pols came out of the office, with the applicant accusing Pols of disrespecting her and calling her a liar in front of colleagues. She confirmed the version that the applicant told Pols to '*screw you*', and that '*you are not God*', after Pols informed the applicant that she was suspended for the day

and was being issued a warning. She denied that Pals said '*screw you*' and stated that it was the applicant who uttered those words, and repeated '*you heard me, screw you*'.

[31] The applicant testified that she arrived late, was questioned about it by Pals, and explained that the delay was caused by traffic. She stated that Pals accused her of lying, and she apologised for her tardiness. She also confirmed there was a discussion in Pals' office, where she explained that she was late because the driver of her vehicle had to take their child to the Red Cross Hospital. Additionally, she told Pals that he disrespected her by calling her a liar in front of colleagues and that he had aggressively ordered her to sit down. She responded that he could not tell her what to do and that only God could do so. She took the accusation of lying seriously because she is a Christian and felt accused of breaking a commandment. The applicant believed the real issue was related to vaccination. She confirmed leaving Pals' office, after which Pals told her she was suspended for the day and issued a written warning. She told Pals that she did not have to sign it. She also admitted taking office property with her despite being instructed not to. She denied telling Pals to '*screw you*,' asserting that it was Pals who used those words to her.

[32] The applicant's mother, Barbara Jenecker, testified about the applicant's character, stating that the applicant would never use those words because of her Christian beliefs.

[33] The commissioner appointed to arbitrate the matter found that the applicant was insolent and insubordinate and that the sanction of dismissal was appropriate. The specific findings made will be addressed when the Court assesses the grounds for review. Before that, I briefly refer to the applicable legal principles.

Legal principles

[34] In most review applications (with some exceptions), the trite test is whether, taking into account all the material before the Commissioner, the award is one

that no reasonable decision maker could have arrived at. This is a strict test that ensures that awards are not easily interfered with.¹⁰

[35] In *Palaborwa Mining Co Limited v Cheetham and Others*¹¹ (Cheetham), the court recognised that decision makers acting reasonably may arrive at different conclusions and that the LRA has delegated the decision-making authority to the commissioner, and there it remains. Therefore, the reviewing court must defer to the commissioner's decision and should only intervene in awards in very limited circumstances where it concludes that a reasonable decision maker could not have reached such a decision.

[36] In *Makuleni v Standard Bank of SA (Pty) Ltd and others*,¹² the Court said the following:

'[13] The Labour Court's view of the case differed from that of the commissioner. As shall be addressed hereafter there are serious flaws in the reasoning articulated in the judgment. However, what is immediately deserving of emphasis is that, even if the perspective of the Labour Court is plausible and reasonable, that is an insufficient reason to displace the award in terms of the review test addressed above. To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result. In our view, no material criticism can be advanced of the award that meets the threshold test for review.'

[37] Therefore, in review applications, it is well established that this Court does not reconsider or set aside an award simply because it might have reached a different conclusion than that of the commissioner. In other words, it is not the role of this Court, in cases like this, to judge whether the commissioner was correct or not; rather, the focus is on whether the conclusion he reached is one that no reasonable decision-maker could have arrived at. These principles form the basis on which the three grounds for review will be evaluated.

¹⁰ See: *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others (Fidelity Cash)* (2008) 29 ILJ 964 (LAC) at para 100.

¹¹ (2008) 29 ILJ 306 (LAC) at para 4.

¹² (2023) 44 ILJ 1005 (LAC).

Grounds for review

The commissioner mischaracterised the misconduct

[38] The applicant contends that the commissioner committed a gross irregularity by characterising her misconduct as insubordination rather than insolence. The submission is that because the applicant obeyed Pols' instructions to leave his office and to pack her belongings and leave, she had submitted herself to her superior's authority, and her conduct did not amount to a deliberate challenge to her superior as the commissioner concluded. The submission is also that, although the applicant had told Pols to 'screw you', considering the overall context in which the words were spoken, the commissioner should have found that the applicant's conduct was mere disrespect and not insubordination because there was no outright challenge to the employer's authority. For the last submission, the applicant relies on a decision of the Labour Appeal Court (LAC) in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*¹³ (*Palluci*). The conclusion on this submission is that, based on the evidence, a reasonable commissioner would have found that the applicant was guilty of insolence and not insubordination.

[39] On behalf of the employer, it is argued that the ground for review is essentially a complaint that the commissioner rejected the applicant's evidence regarding the events of 10 December 2021, and that the commissioner correctly relied on case authorities to conclude that the applicant's insolence was so severe that it elevated the misconduct to insubordination.

[40] Although the applicant denied during the arbitration proceedings that she had told Pols 'screw you' and claimed it was Pols who said those words to her, the commissioner found that she had indeed uttered them. That finding was wisely not challenged on review, with the applicant limiting her case to the grounds of review addressed in the judgment.

[41] The submission that the applicant left Pols's office and the premises when instructed to do so, and that these actions demonstrate her submission to

¹³ (2015) 36 ILJ 1511 (LAC).

authority, is a distortion of the facts. The applicant stormed out of Pols's office after being told that if she was not willing to sit down, she must leave. Therefore, she left Pols's office because she did not want to sit as instructed. While she did leave the premises as instructed, it is important to consider the events of the entire morning, during which she repeatedly failed to follow Pols's instructions. In any case, the facts show that initially the applicant refused to leave, stating that Pols was not God, and she would only leave if she chose to.

[42] Returning then to the applicant's main contention that she was insolent and not insubordinate, in *Palluci*, the Court stated (a) that there is a fine line between insubordination and insolence, (b) that insolence is when an employee displays disrespect,¹⁴ (c) that insolent conduct which is serious, persistent and a serious challenge to an employer's authority becomes insubordination.¹⁵ The LAC also stated that whether misconduct amounts to insubordination depends on several factors, including the wilfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer before the purported act of insubordination.¹⁶

[43] In characterising the applicant's conduct as insubordination, the commissioner relied on, *inter alia*, the case authority of *Sylvania Metals Pty Ltd v Mello No and Others*¹⁷ (*Sylvania*), LAC stated this:

'[17] Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given.'

[44] In that matter, the employee was dismissed, for *inter alia*, walking out of a meeting with a superior who wanted to understand the circumstances under

¹⁴ *Palluci* (Ibid) at para 40.

¹⁵ *Palluci* (Id fn 13) at para 29.

¹⁶ *Palluci* (Id fn 13) at para 33.

¹⁷ (JA83/2015) [2016] ZALAC 52 (22 November 2016) at para 17.

which the employee had committed the conduct complained of. The Court in *Sylvania* found that the dismissal was fair, reasoning that:¹⁸

[20] The evidence before the commissioner showed that the employee's behaviour went well beyond a reasonable or legitimate difference of opinion between employer and employee. The employee was aggressive, rude and disrespectful in his speech and behaviour towards Mr Malema during the course of the meeting. His refusal to adhere to a reasonable instruction given to him to explain the circumstances of the valve repair was both wilful and serious. His insistence that all future instructions to him to be signed by the plant manager, that he would not work according to Mr Malema's standards and his decision to leave the meeting before it had concluded posed a deliberate and serious challenge to the employer's authority. His conduct indicated a refusal to respect the authority of Mr Malema as his superior. It also indicated an approach which was impractical insofar as it sought to require Mr Malema to place all instructions to him in writing. The employee's chosen course of behaviour constituted serious misconduct. It was not merely insolent but also insubordinate in the refusal to respect and adhere to the line of authority in the workplace.' (My emphasis).

[45] In the current case, the commissioner was aware of the difference between insolence and insubordination. He also reaffirmed the principle that insolence could develop into insubordination when a superior's authority was seriously and deliberately challenged. The commissioner regarded the applicant's aggressive behaviour in Pols' office as insolent. He then referenced the applicant storming out of Pols' office and her refusal to accept the final written warning. Subsequently, the commissioner considered the applicant's conduct in telling Pols 'screw you' in front of staff members, which, in his view, elevated the misconduct from mere insolence to insubordination. He also specifically noted that many might see the phrase as a minor swear word, but in his opinion, the applicant had publicly challenged Pols' authority in front of other employees and repeated the conduct, making it serious and wilful.

¹⁸ Ibid at para 20.

[46] Telling a CEO, the most senior person in an organisation, 'screw you', in front of other employees, and repeating the words, constitutes a serious and wilful challenge to authority. Even if the applicant felt that Pols had disrespected her in the meeting with staff by accusing her of lying, this did not justify telling Pols 'screw you' later on. Even if others might regard the words as minor swear words, others, such as the commissioner and this Court, regard them as a serious challenge to Pols authority, given that the words were uttered publicly, and then repeated. On the facts, it cannot be said that the conclusion that the applicant was insolent and later became insubordinate is one that no reasonable decision maker could reach.

[47] But even if the commissioner committed an error by regarding the applicant's conduct as insubordination when it was mere insolence, (I have found otherwise), we know from *Head of the Department of Education v Mofokeng and Others*,¹⁹ that to vitiate the award, the error must have a distorting effect on the outcome. On a consideration of the evidence, the applicant's conduct was serious and wilful, and therefore insubordinate.

[48] There is no merit to this ground of review.

That dismissal was not an appropriate sanction

[49] The second ground of review is that the dismissal was not appropriate for two reasons. First, the misconduct was insolence rather than insubordination and therefore did not warrant dismissal. Second, the submission was that the employer's policy mandates dismissal for a second offence.

[50] Whether dismissal is appropriate or not is not determined by whether the conduct is insolent or insubordinate, as argued on behalf of the applicant. In *Palluci*²⁰ the Court stated the following:

¹⁹ (2015) 36 ILJ 2802 (LAC).

²⁰ Ibid fn 13 at para 22.

[22] ...However acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.'

[51] Therefore, dismissal is appropriate where the insolence or insubordination is gross. In this case, the commissioner found that, on the facts, both requirements were met.

[52] In any event, a commissioner's value judgment on the seriousness of misconduct should not be lightly interfered with. In *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²¹ the Court stated this:

[21] The framework of the Labour Relations Act 66 of 1995 (LRA) accords to different decision-makers authority to make certain decisions. Adjudging the severity of misconduct in context, is a power conferred on an arbitrator. It is partly, at least, a value judgement. The choice made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion.'

[53] The submission that the employer's policy mandates dismissal only on a second offence overlooks the fact that the sanctions listed therein are guidelines, as explicitly stated in the policy. Additionally, the policy

²¹ (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC).

recommends dismissal for the first offence of insolence, not insubordination. The commissioner found the employee guilty of both.

[54] Other considerations by the commissioner in concluding that dismissal was appropriate included the applicant's disciplinary record (an issue discussed below), and the fact that throughout the arbitration proceedings she failed to understand what she had done wrong, and therefore '*the possibility of correcting her behaviour is almost non-existent*'. Throughout the arbitration proceedings, the applicant falsely accused Pols of having uttered the offensive words that she had spoken to him, which was a continuous and serious challenge to Pols' authority.

[55] On what sanction should have been imposed, in *TMT Services and Supplies*²², the Court stated this:

'[25] The test to apply is higher than simply could a reasonable arbitrator have imposed a lesser sanction; rather the question is could no reasonable arbitrator have concluded dismissal was appropriate. Unless that threshold is exceeded, the award must stand.'

[56] On the facts of this matter, it cannot be said that no reasonable decision maker could have concluded that dismissal was unfair. Therefore, the sanction imposed by the Commissioner stands. This review ground also fails.

That the commissioner failed to lend a helping hand to the applicant

[57] It was also submitted, on behalf of the applicant, that after refusing her legal representation, the commissioner was required but failed to assist her in accordance with the helping hand principle as set out in case authority²³, and as provided for in Guideline 21 of the CCMA Guidelines on Misconduct Arbitrations. More specifically, it was submitted that the commissioner informed the applicant that he was only interested in hearing what happened on 10 December 2021. Yet, in determining the sanction to be imposed, he relied on the counselling session which took place in October 2020, and in

²² Ibid at para 25.

²³ See: *Klaasen v CCMA and Others* [2005] 10 BLLR 964 (LC).

circumstances where the commissioner did not draw it to her attention that she could dispute that version in the cross-examination of the employer's witnesses and also give her own version on the issue during her evidence in chief.

- [58] Even though the ground for review had not been explicitly pleaded in those terms, as correctly argued by Ms Myburgh, the Court was prepared to accept that the applicant pleaded that the commissioner took into account that she had been counselled and that, having refused her application for legal representation, the commissioner ought to have realised that as a lay person, she required assistance in challenging the version that she had been counselled.
- [59] The main obstacle to this ground of review, as submitted by Ms Myburgh, is that during the applicant's cross-examination, she was specifically asked by Pals who represented the employer whether she had not been counselled for insolent and insubordinate behaviour. The applicant confirmed that this was correct in relation to Williams, a team leader. The fact that this occurred during cross-examination and that the Commissioner did not assist her in putting that version to the employer's witnesses does not change the fact that she admitted to being counselled. Therefore, the counselling record could be considered when deciding the sanction.
- [60] The other challenge with this ground of review is that, as conceded by Mr Mashiane, throughout the proceedings the commissioner assisted the applicant in presenting her case. According to Mr Mashiane's own argument, it was only on this single issue that the commissioner did not help the applicant. That is a sufficient ground to set aside an award when it has been correctly acknowledged that the commissioner supported the applicant during the arbitration process. In any event, the applicant conceded that she had been counselled in relation to Williams. Therefore, the commissioner could take that information into account in deciding the fairness of the sanction for the misconduct that the applicant had committed.

Other grounds for review

[61] Other complaints raised in the supplementary affidavit, but not supported by references from the transcript, despite the applicant being legally represented, were that the Commissioner interrupted the applicant during examination in chief and cross-examination, that the Commissioner prevented the applicant from leading evidence, that the employer had an agenda against her, and that the Commissioner was hostile towards her. These issues were also not pursued during oral argument, which suggests they were abandoned, and therefore will not be addressed further.

Costs

[62] Not surprisingly, it was submitted on behalf of the applicant that there should be no order as to costs. In contrast, the submission on behalf of the employer was a punitive costs order against the applicant and/or her legal representatives. In this Court, costs orders are made taking into account the requirements of the law and fairness.

[63] All but one of the employer's preliminary points were found to have some merit, even though all points were dismissed. The review application is without merit. The applicant, who already lost a job she could have safeguarded, incurred legal costs in pursuing this application. An appropriate order is one in which each party pays its own costs.

[64] In the premise, the following order is made:

Order

1. The first respondent's preliminary points are dismissed.
 2. The review application is dismissed.
 3. There is no order as to costs.
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T. Gandidze
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mashiane

Instructed by: Moolla Attorneys Inc

For the Respondent: Advocate L Myburgh

Instructed by: Mr B Schiff of Bargraims Attorneys