INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA14/15

In the matter between:

MSUNDUZI MUNICIPALITY **Appellant**

and

JAMES STEPHEN KRUGER HOSKINS **Respondent**

Heard: **12 May 2016**

Delivered: **2 September 2016**

Summary: Review of arbitration award – sanction of dismissal - employee dismissed for gross insubordination for defying municipal manager's instruction to stop representing fellow employees – employee not heeding to instruction and putting municipal manager on terms to dare taking any action – arbitrator finding that employee's conduct amounting to challenging the authority of the municipal manager- employee not showing remorse - and dismissal fair – Labour Court's finding that dismissal harsh set aside – commissioner's award falling within band of reasonable outcomes – appeal upheld.

Coram: Tlaletsi AJP, Ndlovu and Sutherland JJA

JUDGMENT

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TLALETSI AJP

[1] This is an appeal against the judgment of the Labour Court (Whitcher J) dated 04 March 2015 in which she reviewed and set aside an arbitration award made in the South African Local Government Bargaining Council (SALGBC) and substituted the award with an order that the dismissal of the respondent by the appellant was unfair on the basis that the sanction of dismissal was inappropriate. The Labour Court substituted the dismissal award with an order reinstating the respondent to his employment retrospectively but limited to a period of six months. In addition, the court *a quo* ordered that the respondent be issued with a final written warning.

[2] The appeal is with leave of the court *a quo*. The appellant also seeks condonation for the late filing of the notice of appeal, extension of time to file the record and the reinstatement of the appeal which is deemed to have been withdrawn by the appellant because of non-compliance with Rule 5 (17).[1] The respondent did not file papers in opposition to the appellant's condonation application. However, at the hearing of the matter, his counsel submitted that the application is opposed on the basis that the appellant has failed, on its papers, to make out a case that would entitle it to the condonation for the late filing of the notice of appeal as well as the reinstatement of the appeal.

[3] The notice of appeal should have been filed within 15 days from 22 April 2015, being the day on which leave to appeal was granted. The notice was however filed on 05 August 2015. The explanation offered by the appellant for the failure to serve and file the notice of appeal on time is contained in the founding affidavit deposed to by its attorney of record. The explanation is simply that after the application for leave to appeal was filed and the respondent having filed his opposing papers, they awaited the ruling of the Labour Court on the application. On 31 July 2015 whilst the appellant's attorney was in court on other matters he was asked by the respondent's counsel who was on brief in the court *a quo,* about progress in the appeal process. He responded that he was awaiting the ruling of the court *a quo*. Counsel advised him that he had learned that leave to appeal had been

[1] Rules for Regulating the Conduct of the Proceedings of the Labour Appeal Court.

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granted already. He attended at the Registrar's office and obtained a copy of the ruling as well as a copy of a fax transmission confirmation report showing that the ruling was faxed to his office. He made inquiries at his office and no one, including the lady who is tasked to receive and distribute faxes, acknowledged receipt of the ruling. She was adamant that had she seen the faxed document, she would have brought it to the attention of the attorney handling the matter. She further confirmed that no one phoned her to confirm receipt of the document as is the general practice with service by means of fax.

[4] It was then that the appellant's attorneys rushed to file the notice of appeal. At the time when the appellant's attorney became aware that leave to appeal had been granted, the sixty day period within which to file the record of the appeal, had already expired; and the appeal deemed withdrawn by operation of law. It was therefore necessary for the appellant to apply to the Judge President for the reinstatement of the appeal.

[5] The principles relating to applications of this nature are now trite and there is no reason to restate them in this judgment[2]. The delay in filling the notice of appeal is substantial. However, the explanation for the delay is not controverted and sounds reasonable. I shall now proceed to consider the merits of the appeal which play an important role in considering whether condonation for the late filing of the notice of appeal and reinstatement of the appeal should be allowed.

[6] The facts material to the determination of the appeal are largely common cause and are set out hereunder. The appellant employed the respondent as Human Resources (HR) Support Service Manager. In his capacity as HR official, the respondent advised other managers on employment related

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[2] See *Kerradam Properties (Pty) Ltd t/a Cabanga Conference Centre v Matthee* (JA 72/2010) [2012] ZALAC 19 (22 June 2012); *Sasol Infrachem v Sefafe and Others* (JA58/12) [2014] ZALAC 54; [2015] 2 BLLR 115 (LAC); (2015) 36 ILJ 655 (LAC) (21 October 2014); *Shaikh v South African Post Office Ltd and Others* (DA 4/09) [2013] ZALAC 18 (19 July 2013) at para 25; *MEC of the Western Cape Provincial Government Health Department v Coetzee and Others* (CA3/2011) [2015] ZALAC 35; [2015] 11 BLLR 1108 (LAC) ; (2015) 36 ILJ 3010 (LAC) (24 August 2015); *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* (JA 56/06) [2011] ZALAC 16; [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) (3 August 2011).

issues including guidelines on disciplinary matters. He was a member of the management team by virtue of his position and role at the appellant.

[7] He was not a member of a trade union, but had been a member of various trade unions as he moved up the ranks in the municipality. In his capacity as a member of the trade unions, he advised and represented co-employees who faced disciplinary charges at the municipality.

[8] The respondent continued to advise and represent co-employees in matters against the appellant when he was no longer a member of a trade union but part of the management team. This practice became a source of concern for the management of the appellant as it was viewed as a conflict of interest between his responsibilities as a manager and his role in representing other employees. Some of the managers felt uncomfortable to discuss issues openly in his presence in meetings fearing that whatever they say will be used against them by the respondent.

[9] The newly appointed Municipal Manager, Mr Nkosi wrote a letter dated 22 May 2012 instructing the respondent to cease representing fellow employees with immediate effect. The letter stated *inter alia*, the following:

> 'As a Manager; Human Resources and Support Services, one of your duties is to advise and guide Strategic Executive Managers and Process Managers on the interpretation, implementation, and compliance with all human resource and labour legislation, collective agreements and Council procedures, practices and guidelines. This would include advice on disciplinary matters as well.
>
> There is a clear conflict of interest, if you represent employees facing disciplinary charges against Council and also performing same duties. You are also required as one of your duties to attend regular meetings with SEM and Process Managers to consider labour issues and to advise them accordingly.
>
> It would be impossible to perform your duties in this regard as issues involving same employees are discussed in these meetings. I have been

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advised by your managers that they find it very difficult to discuss disciplinary matters during meetings in your presence.

I am mindful of the disciplinary code which makes reference to 'a fellow employee'. However, your position is different in that you are not an ordinary employee but one who is supposed to perform management functions and act in the best interest of Council.

Further to the above, you are not a shop steward or a trade union official and you are requested to recuse yourself on all matters currently handled by you against Council with immediate effect. You are also requested to advise the employees concerned accordingly.

Should you fail to comply with my instruction, I will have no alternative but to take further steps. I trust that this will not be necessary'.

In response to Mr Nkosi's letter, the respondent issued a letter dated 30 May 2012, which reads as follows:

'…

RE REPRESENTATION IN DISCIPLINARY ENQUIRIES

Your informant has done well and has correctly informed you that I represent employees. Will you forward to me the approved JD which contains the relevant duties you mentioned in paragraph 2. If it exists, immediately to legitimize your instructions as a bona fide RULE.

If you understand your Employee Relations sub-unit and the workflow, there is no conflict.

Clearly you are misinformed. Again in paragraph 5, your faceless, spineless, nameless advisors/managers need to correctly advise you that this is the sixth attempt to silence me.

From Mr Rob Haswell, to Mr Kevin Perumal, Mr Johan Mettler, Mr Sbu Sithole and the Acting Municipal Manager- Maseko, with zero success.

In 2011, Mr Maseko sought a legal opinion from Mr Kas Thaver. Mrs Faith Ndlovu also sought policy directions from Johan Greyveling of SALGA. I am

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aware that, in both instances, the advice received gave legitimacy [to] me or any other manager of same status, to continue my/our representation/advice to the affected employees.

You are now the 6th person to make an attempt to address the short fallings/failure of the Msunduzi Municipality to prepare winnable hearings against the employees who are currently facing disciplinary action, taken by the Msunduzi.

The issue you wish to address is not about the guilt but now the removal of fair representation.

You understand the line manager control over my post and clearly indemnify a weakness there, and yet you choose to ignore a procedure and deal with this on a personal level.

Well done!

…

…

If this is how you seek to operate through intimidation, victimization, and threats to take further steps against me, please proceed with your threat to take further steps in this matter, if you dare.

You are an employee of Msunduzi Municipality, and so am I.

NB: An apology is anticipated in this matter.

[Yours] in the struggle

James Hoskins

CC: DMM: CORPORATE SERVICES (Acting)

CC: LEGAL SERVICES

CC: PERSONAL MANAGER

SAMWU’

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[10] The letter was placed on a public notice board and was shown to a number of employees before it was delivered to the Municipal Manager. The respondent continued to represent employees in the disciplinary inquiries. The Municipal Manager after taking legal advice delivered a reply on 16 July 2012. In the letter, the Municipal Manager noted his great concern at the respondent's aggressive, disobedient and disrespectful approach to the instruction given to him and further drew his attention to about five disciplinary hearings and arbitrations at SALGBC handled by the respondent after an instruction to stop doing so. The letter further explained to the respondent the problems the municipality had with his actions and concluded thus:

> *'I request that you provide me with a complete schedule of all labour matters in which you are representing your fellow employees and further indicate as to when you have recused yourself from the matters and whom the new appointee representative is. This must be delivered to my office within 48 hours of receipt of this letter.'*

[11] It is common cause that the respondent did not provide a written response but continued to represent a fellow employee at a disciplinary inquiry. Subsequent to this letter and in view of its stance on the matter, the appellant charged the employee with gross insubordination, gross insolence and gross misconduct. All in all there were eight charges relating to gross insubordination by challenging the authority of the Municipal Manager by refusing to comply with his instruction to recuse himself from and ceasing to represent fellow employees in disciplinary proceedings instituted by the municipality; three counts of gross misconduct for failing to act in good faith, not acting in the best interest of the municipality and bringing the municipality into disrepute and one charge of gross insolence by being rude, disrespectful, sarcastic, abusive, insulting and provocative to the Municipal Manager. He was found guilty of all the charges and a sanction of dismissal was imposed.

[12] Aggrieved by his dismissal, the respondent referred a dispute of unfair dismissal to the bargaining council where it was ultimately arbitrated by an arbitrator acting under the auspices of the council. At the arbitration, the appellant tendered the evidence of the Municipal Manager; Mr GM

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Buitendach (the HR support manager); Mrs Faith Ndlovu (the process manager HRM), Mrs Xolile Hulane (staff officer and acting personal manager HR) and Mrs Zodwa Khumalo the HR support services manager, a position similar to the one occupied by the respondent. The respondent testified and tendered the evidence of Ms Poddywell Baxter who was the personal assistant to the Municipal Manager at the time. In light of the fact that the appeal is limited to the sanction imposed by the Labour Court in the review application and the fact that the findings of the arbitrator regarding the guilt of the appellant of 10 counts of misconduct were not interfered with by the Labour Court, it shall not be necessary to traverse the entire evidence tendered at the arbitration proceedings.

[13] The Municipal Manager testified, *inter alia*, that he was appointed to the appellant on 3 January 2012. When he joined, there were hostility and several strikes taking place. He met the respondent for the first time when they discussed strategies for dealing with illegal strikes. He soon thereafter learned that the respondent was to represent employees in a disciplinary inquiry. He found this conduct improper as they have held management discussions about discipline and strikes. He testified that the letter from the respondent was a shock to him, displaying insolence and anger. It suggested that the instruction he gave was illegitimate as the respondent specifically requested proof to legitimise the instruction. The words "faceless, spineless and nameless" were insults hurled at his fellow colleagues. The words "if you dare" were unacceptable and rude, whereas his letter was not intended to victimise but intended to merely warn him about his conduct, as he was playing a role that created a conflict of interest. He mentioned that the respondent placed himself at the same level as his by stating that he is also an employee as him. He denied that he had an 'agenda' to get rid of the respondent and on the contrary, he even tried to settle the matter at the disciplinary hearing. His attempts were in vain.

[14] The Municipal Manager testified further that the respondent, by virtue of his position had access to confidential information and strategies for employment relationships. The employment relationship was destroyed and if the

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respondent was to return to the appellant, it would undermine the entire spirit of the organisation. His actions were at war with the administration and showed no remorse. His own peers felt a level of distrust and dishonesty on his part and were unable to work with him. The Municipal Manager testified further that the respondent at the disciplinary hearing continued to be abusive and rude and at some stage mentioned that "*we will see how long you last*" referring to the Municipal Manager lasting in his position. He also believes that the respondent was part of the attempts to have him removed as the Municipal Manager. He confirmed that it would be impossible to work with the respondent. He made every effort to accommodate the respondent even after the commencement of the disciplinary hearing, but he refused to correct his conduct.

[15] Buitendach, Ndlovu, Hulane, and Khumalo had sight of the letter written by the respondent. Buitendach, when shown the letter by the respondent warned him that he would get into trouble. Respondent told him that the letter was sent. Hulane who received the letter from the respondent for filing in his personal file said to him after reading the letter that: "*James are you serious*". Khumalo when shown the letter by the respondent in his office was shocked. They mentioned that their responsibilities which were similar to those of the respondent excluded them from representing employees at disciplinary inquiries.

[16] The respondent testified, among others, that he was not grossly insubordinate because the Constitution of the Republic of South Africa, 1996, the Labour Relations Act 66 of 1995 (LRA) and the collective agreement guaranteed the employees' right to be represented; that the instruction of the Municipal Manager was unlawful and in blatant violation of the employees' rights; that there was no conflict of interest by representing the employees as he only assisted in cases that were not in his unit; that his impeccable record caused the Municipal Manager to employ two outside attorneys to preside at the hearings and that it is these attorneys who prompted the Municipal Manager to write the letter that ultimately led to his removal; that the Municipal Manager's letter was in the form of a threat and caused gross injustice to him.

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He testified that his "forward approach" caused his relationship with the Municipal Manager to be unfavourable. Baxter's evidence was tendered to support the respondent's version that when he delivered the letter he did not find the Municipal Manager and that she read the letter and advised the appellant that the letter was not professional, very personal and had to rewrite it. He heeded her advice and modified the letter which he submitted. This version was correctly rejected by the arbitrator and his finding is not being properly challenged since there is no cross-appeal.

[17] The arbitrator rendered a comprehensive award running into 37 pages. He dealt with the evidence tendered and made some credibility findings. He found the respondent not guilty of two charges and guilty of the rest. The ones on which he was acquitted were the charge accusing the respondent of not acting in good faith or in a diligent manner. The other charge related to bringing the municipality into disrepute when it was found by the bargaining council that he could not represent an employee as he was not a member of a trade union. It is interesting to note that the respondent subsequently joined the trade union and was allowed to represent the employee in those proceedings.

[18] Regarding the sanction, I can do no better than to quote the reasoning of the arbitrator in its entirety. He addressed the issue as follows:

> 'Sanction
>
> *[78] Mr Nkosi stated that the applicant's conduct after his dismissal was almost in the form of a threat. This was demonstrative of the fact that the applicant was bitter and hostile towards the municipal manager. It was clear that the employment relationship between the municipal manager and the Applicant was destroyed. Nkosi categorically confirmed that if the Applicant returned to work it would undermine the ethics and harmony of the workplace. I find that to have an employee that is somewhat disruptive and where there is no harmonious relationship, it impacts on service delivery and creates a breakdown in the administration and functionality of the municipality. There were a number of opportunities given to the Applicant to correct his attitude and behaviour. Even after the commencement of the disciplinary hearing there were efforts of settlement which was rejected by the Applicant. The*

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> *Respondent expected the Applicant to desist representing employees which he outright refused.*
>
> *[79] In terms of the collective agreement an employee may be dismissed on the first occasion for gross insubordination. In this instance I find that the dismissal was fair and in terms of the policy. There was no need for progressive discipline as the insubordination was a serious transgression. I also have taken cognizance of Nkosi's evidence that there had been a complete breakdown of the employment relation and it was clear that he could no longer work with the Applicant. To place an employee in such an enterprise will merely create further hurdles as the relationship was destroyed.*
>
> *[80] In this matter Nkosi went into grave detail outlining how the relationship had broken down. Furthermore the Applicant did not appear remorseful but rather defensive. Dismissal for insolence and insubordination is justifiable if the employee breaches his duty to show respect. If the insolence is wilful and serious it would amount to gross insubordination. I accordingly find that the sanction of dismissal was justified. The Applicants' claim is dismissed with him to pay the wasted costs of arbitration. I will not grant and order of legal costs as I do not find that the referral of the matter was capricious or frivolous'*.

[19] The arbitrator dismissed the respondent's application and ordered him to pay the wasted costs of the arbitration determined in the amount of R11 500-00.

[20] The respondent applied for the review of the arbitration award. He challenged the arbitrator's findings that he was guilty of the specified charges, the finding that his dismissal was both procedurally and substantively fair, the sanction of dismissal and the award of costs of the arbitration against him. He contended that the decision reached by the arbitrator was a decision that a reasonable decision-maker could not reach.

[21] The Labour Court confirmed the arbitrator's findings as to the lawfulness and reasonableness of the instruction; that it was not intended to provoke the respondent and was not disrespectful. The learned Judge found that the respondent was guilty and that he "committed a serious offence which highly

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impinged on his duty to be respectful to his superior, the head of his employer institution".

[22] The Labour Court, however, concluded thus:

> *'However, even on the strict review test, I am of the view that if the arbitrator had properly applied his mind to the material before him and truly thought about it, he would have found that the sanction of dismissal was harsh in the circumstances of this case. These circumstances include the fact that the applicant was over 50 years old, there were no evidence of past similar misconduct, the applicant had been in the employ of the respondent for over 25 years (basically all of his life) and his age militated against prospects of future employment. Moreover there was no evidence that the respondent had lead evidence that reinstatement was not practical. The applicant further did not work directly under the manager- in other words there was no evidence that he works closely with him and receives his daily instructions from the manager. In these circumstances I believe that a reasonable arbitrator would have found that such an employee deserves a second chance, albeit with a serious sanction imposed against him, such as a final written warning or punitive suspension. In determining the extent of the retrospective part of the reinstatement order, I have taken into consideration that considerable time has passed but the reasons for this is the fault of the applicant. If he had pleaded guilty, apologised and not persisted with consuming hearings, this case may not have arisen.*
>
> *In all these circumstances, I find that the sanction of dismissal was not reasonable based on the material before the arbitrator and I thus substitute the award with a reinstatement order. However, for the reasons set out above, I order that it be retrospective only for (6) months*.'

[23] The issue to be considered on appeal is whether the Labour Court misdirected itself in finding that the sanction of dismissal in the circumstances of this case was a decision that a reasonable arbitrator could not reach. Mr Pillemer SC, who appeared on behalf of the appellant contended that the Labour Court erred in its approach as to the applicable test on review. The Labour Court, it was contended, merely considered whether the sanction imposed was harsh as opposed to considering whether the arbitrator (in

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finding that the dismissal was fair on the basis of a value judgment of the arbitrator based on the evidence before her) had come to a decision which a reasonable arbitrator could have come.

[24] Mr Moodley, who appeared on behalf of the respondent, submitted, somewhat unusually, that despite there being no cross-appeal, this Court should nevertheless reassess the Labour Court's finding that the instruction of the Municipal Manager was lawful and reasonable. He further urged us to assess the fact that the arbitrator failed to take into account Schedule 8 of the LRA as she was required to do by law and that this failure led to the arbitrator reaching a decision which a reasonable decision-maker could not reach. Counsel further supported the reasoning of the Labour Court that the dismissal was harsh given the respondent's previous disciplinary record, his age, his prospects of future employment, the fact that he would rarely be required to deal directly with the Municipal Manager who is three management levels above him, and the fact that his insolence took the form of a single rude letter.

[25] It is not open to this Court to reconsider the correctness or otherwise of the finding by the court *a quo* that the instruction given by the Municipal Manager were reasonable and lawful in the absence of a cross-appeal. There is no explanation why a cross-appeal was not noted especially that counsel who appeared on behalf of the respondent in this Court is the same counsel who appeared for him at the arbitration proceedings and in the court *quo*. Be that as it may, there is nothing unlawful or unreasonable about the Municipal Manager's instruction to the respondent, who as part of management, is not expected to represent employees against disciplinary actions taken by management. The reasons why the conduct of the respondent was found to be unacceptable were conveyed to the respondent and are in my view valid. The respondent who is not even a union representative or official has no right to be a representative. It is, after all, the employee who is charged with misconduct that can legitimately complain that he/she is denied representation by a representative of his/her choice. That the respondent was bent on acting against his employer is made clear by *inter alia*, his evidence

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that his record against his employer was impeccable such that external attorneys had to be appointed by the municipality to match him. Instead of acknowledging the wrongfulness of his conduct, he is boastful about his "impeccable" record of winning cases against his employer and co-managers.

[26] It cannot be disputed that the respondent was found guilty of serious instances of insubordination and insolence. His insubordination was a direct challenge to the authority of the Municipal Manager. He without any doubt intended to seriously undermine the authority of the Municipal Manager and in so doing humiliated him. By posting the letter on the notice board, he wanted his feelings about the Municipal Manager known by other employees and any other person who reads the letter. The publication, also, has a potential to influence the reader not to respect the head of the institution. To further aggravate the situation, he distributed copies of the letter to other employees of the municipality and a union which he was not even a member of. This act could only have been intended to make the Municipal Manager lose the respect of his subordinates and the trade union.

[27] The contents of the letter are in my view a reflection of one of the most classical examples of gross disobedience that one can find. The respondent made it clear that he was not going to obey the instruction and even dared the Municipal Manager to take further steps he had warned would be taken should he continue with his conduct. He warns him that he is due to fail against him like his predecessors he named in the letter. He further refers to his fellow employees as faceless, spineless and nameless advisors.

[28] In line with his resolve, the respondent continued to represent the employees in blatant disregard of the instruction. When the Municipal Manager issued a further instruction, he chose not to respond to the letter and ignored its contents by continuing to represent the employees. The respondent had an opportunity to reflect on his decision to refuse to obey the instruction; and on the contents of his letter to the Municipal Manager. He squandered the opportunity to repent when warned by the Municipal Manager; and to heed the advice by his colleagues. His further conduct towards the Municipal Manager at the arbitration showed a lack of remorse. For his counsel to now

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submit from the bar that the respondent is remorseful, is nothing else but to regret what he has done because of the situation he now finds himself in. He dared the Municipal Manager and he took up the dare. Put differently, the respondent got what he called for.

[29] In my view, the arbitrator correctly applied his mind to all the material that was placed before him. He took into account the seriousness of the insubordination, the respondent's blatant well-publicised challenge to the authority of the Municipal Manager, that he showed no remorse when he appeared at the arbitration and found the dismissal to be an appropriate sanction. The fact that the arbitrator did not make specific reference to Schedule 8 of the LRA does not detract from the fact that factors relevant to sanction were in this matter taken into account. The arbitrator considered progressive discipline and found that given, *inter alia*, the seriousness of the transgression, lack of remorse and instead being defensive, the complete breakdown in the employment relationship between the respondent and the Municipal Manager, as well as the responsibility of the municipality to deliver services, it would not be practicable to restore the employment relationship. I also find no merit in the submission made on behalf of the appellant that the respondent was three management levels below the Municipal Manager and as such contact between the two in the course of the daily operations of the municipality would be either non-existent or minimal Contact between the two will not be avoidable because the respondent is part of the management team led by the Municipal Manager. Furthermore, since it is the respondent who published his gross insubordination and insolence to be known by all and sundry towards him, it would send a wrong message to the entire staff to hide the respondent from the Municipal Manager or create a no-go zone or an enclave for him in order to keep the respondent in employment.

[30] The proper test to be applied in a review of an arbitration award on sanction is whether the decision of the arbitrator about the fairness of the sanction imposed by the employer is a decision that a reasonable arbitrator could not

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reach[3]. The simple answer to this question in the circumstances of this case is that the decision is reasonable. The decision is indeed justified by the material placed on record. It was therefore not open to the court *a quo* to consider whether the sanction was harsh and impose a sanction that in its opinion is not harsh. It is the call of the arbitrator and not that of the Labour Court to assess the fairness of the sanction of the employer. The court *a quo* further misdirected itself by finding that the arbitrator should have found that the respondent deserved a second chance without advancing any reason why a second chance would be appropriate in the circumstances. As pointed out already, the respondent was given an opportunity to reflect on his conduct. He instead proceeded to do precisely what he was warned not to do. He would have continued to do so even if given a further chance as he was not open to any persuasion. The arbitrator, in my view, complied with what was required of him to do, in order to meet the standard set by the Constitutional Court, namely:

> ' *In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.*
>
> *To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances*'[4].

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

[4] Ibid paras 78-79. *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at paras 94-95.

[31] For the above reasons, there was no reason to interfere with the award. The appeal should succeed and the order of the Labour Court falls to be set aside. It would be in accordance with the requirements of the law and fairness that no order as to costs should be made. The appeal was initially set down for hearing on Tuesday 10 May 2016. On this day, there was no appearance by either the appellant's official or its legal representatives. Several enquiries had to be made for the whereabouts of the appellant's attorney and counsel. The matter had to be postponed to Thursday 12 May 2016 to accommodate the appellant. The request for the postponement was conveyed to us by the appellant's attorney in chambers. He only came to this Court as a result of a telephone call by the respondent's legal representative. As he was not in a position to argue the appeal, he requested that the matter be postponed and tendered wasted costs for that day. It is therefore only fair that wasted costs for that day be borne by the appellant.

[32] In the result the following order is made:

a) The application for condonation for the late filing of the notice of appeal as well as the record of the appeal is granted and the appeal is reinstated.

b) The appeal is upheld and the order of the Labour Court is set aside and replaced with the following:

"The application for review is dismissed with no order as to costs."

c) There is no order as to costs on appeal save for the wasted costs of 10 May 2016 which are to be paid by the appellant.

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Tlaletsi AJP

Ndlovu *et* Sutherland JJA concur in the judgment of Tlaletsi AJP.

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APPEARANCES:

FOR THE APPELLANT:	Mr M Pillemer SC
	Instructed by Mdledle Incorporated.
FOR THE RESPONDENT:	Mr S Moodley
	Instructed by Premrajh and Associates.

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