REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1782/2012

In the matter between:

BLITZ PRINTERS **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER D K NKADIMENG N.O. **Second Respondent**

CEPPWAWU obo JOHANNES RABOROKO **Third Respondent**

Heard: **20 August 2013**

Delivered: **11 February 2014**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Requires the commissioner rationally and reasonably consider the evidence as a whole – determinations of commissioner compared with evidence on record – commissioner's decision irregular and unsustainable – award reviewed and set**

aside

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – commissioner failing to determine evidence reasonably and rationally – award set aside

Misconduct – gross negligence – principles applicable – conduct of the employee constituting gross negligence – dismissal justified

Misconduct – gross insubordination – instruction to do additional duties – employee's refusal constitutes gross insubordination – dismissal justified

Misconduct – issue of remorse – absence of remorse and persistent reliance on false version – destructive of employment relationship – dismissal justified

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The applicant dismissed the individual third respondent, Johannes Raboroko ("Raboroko"), on 3 October 2011 on charges of gross negligence and failing to obey instructions (insubordination). The third respondent union, CEPPWAWU, then pursued the dismissal of Raboroko as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration over three days in January, March and May 2012, and the arbitration concluded on 8 June 2012. In an award dated 17 June 2012, the second respondent determined

[1] No 66 of 1995.

that the dismissal of Raboroko by the applicant was substantively unfair, and consequently made a determination in terms of which the applicant was directed to reinstate Raboroko with full retrospective effect to the date of his dismissal and pay him some eight months' salary in back pay. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was timeously filed on 1 August 2012.

Background facts

[3] The applicant conducts business in the printing industry. Rabaroko had been employed with the applicant for some time, having commenced employment in 1991, and at all relevant times working as a machine operator. Raboroko reported to the floor manager, Alpheus Mamorobela ("Mamorobela").

[4] The applicant acquired a five colour printing machine in 2006/2007, and Raboroko was designated as the operator of this machine (hereinafter referred to as "the machine"). In his capacity as operator of the machine, Raboroko was not only required to actually operate the machine, but was also responsible to order parts for the machine, arrange for the storage of these parts in the store room, immediately report any faults on or breakages of the machine, and conduct maintenance on the machine. To put it simply, the duty of Raboroko was to ensure the continued production by the machine.

[5] The applicant had been experiencing serious difficulties in the business since 2010 due to a downturn in work. The applicant proceeded to cut costs wherever it could to save the business, and even went so far as to terminate the contracts of external service providers to the business and then itself do as best it could to fulfil these functions internally. Of relevance to this matter, this included the termination of the contract with the cleaning contractor. Regrettably, and despite all these efforts, the applicant was compelled to ultimately conduct retrenchments, but fortunately for Raboroko, he was not affected thereby.

[6] The applicant did however, later experience some good fortune. In August 2011, the applicant managed to get a large contract, involving regular orders. This was a lifeline for the applicant's business. However, the contract had very tight delivery times and in fact required that each order placed by the customer had to be actually delivered within 3 days of each individual order being placed. In order to ensure that these delivery requirements were met, the applicant placed its employees on continuous working shifts. With regard to the machine, Raboroko was dedicated to working the day shift, and his manager, Mamorobela in fact did the night shift operations. The continuous operation of this machine was essential to the compliance with the delivery deadlines under this contract.

[7] As touched on above, part of the duties of Raboroko was maintaining the machine. In conducting such maintenance, and on 8 August 2011, Raboroko however, pulled the gear chain too tight on the machine, resulting in two of the gears breaking. This rendered the machine inoperative. The breakage was reported, assessed, and it was determined that the 88T gear and the 152T gears has to be replaced. It was part of Raboroko's duties to obtain these gears, but inexplicably he only requested on 8 August 2011 that the 152T gear be ordered. The fact is that the machine needed both gears to work, and thus remained inoperative. Only on 10 August 2011, two days later, did Rabaroko advice that the 88T gear also had to be ordered.

[8] By 15 August 2011, the machine was still not working and the customer was threatening to cancel the contract. The applicant was consequently placing pressure on the manufacturer to provide the gears and it had been requested that the manufacturer urgently manufacture the gears and a driver was in fact arranged by the applicant to travel to Johannesburg to collect the gears on 18 August 2011, when the manufacturer advised the gears would be ready.

[9] It is during this time that Raboroko in fact came forward and said that the applicant did not need to order the gears, as the gears were actually in stock at

the applicant and he (Raboroko) had forgotten about them being in stock. Raboroko never explained when and how he ultimately came to realize this.

[10] As a result of the above conduct of Rabaroko, the operation of the machine had been unnecessarily delayed for several days, gears had been unnecessarily ordered, and additional overtime had to be worked once the machine was restored to working order, to comply with the customer's requirements who was threatening contract cancellation. By the time Raboroko had made his revelation, the driver had also been dispatched to Johannesburg to collect the gears. All of this caused the applicant substantial prejudice and actual financial harm.

[11] There is also a further issue that arose in this matter. The evidence, as touched on above, was that as a result of the applicant's financial constraints, it had to terminate the services of its cleaning contractor to save costs. As a result, all the employees were placed on a roster to take turns to clear the bathroom. This included Raboroko. All the other employees complied with this and everyone else worked together with the applicant in this regard. Raboroko refused. He was then instructed to clean the bathroom when it was his turn. He still refused, and persisted with this refusal. He conveyed this refusal in the presence of other employees as well, and was the only one who refused.

[13] There was also an issue with Raboroko refusing to work overtime he was instructed to work.

[14] As a result of all of the above, Raboroko was then charged with gross negligence, and the persistent refusal to obey reasonable instructions from management. Raboroko was then subjected to disciplinary proceedings held on 29 September 2011, which proceedings were presided over by an independent chairperson. In a written finding dated 30 September 2011, the chairperson found Raboroko guilty of the charges against him and after considering mitigating and aggravating factors, recommended his dismissal. This recommendation was accepted by the applicant, and Raboroko was dismissed on 3 October 2011.

[15] As stated, this dismissal then came before the second respondent for a determination as to whether the dismissal was fair, and the second respondent then found that Raboroko was not grossly negligent, the existence of insubordination was not shown by the applicant to exist, and that Raboroko in fact committed no misconduct. The second respondent however, did conclude that the dismissal of Raboroko was procedurally fair. The second respondent in the end concluded that the dismissal of Raboroko was however substantively unfair, and afforded him reinstatement and back pay, giving rise to these proceedings.

The relevant test for review

[16] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa, AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held:

> 'It is clear...that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[17] The *Sidumo* review test was applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[5], and the

[2] (2007) 28 ILJ 2405 (CC).
[3] Id at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 ILJ 964 (LAC).

Court, as to what would be considered to be unreasonable for the purposes of this test, said:[6]

> '…It seems to me that,…there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[18] In applying this review test, the SCA in *Andre Herholdt v Nedbank Ltd*[7] concluded as follows:[8]

> 'In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[6] Id at para 102.
[7] 2013 (6) SA 224 (SCA) per Cachalia and Wallis JJA.
[8] Id at para 25.

What the Court was saying, simply put, and is that if the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[19] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has now in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[9] again interpreted and applied the *Sidumo* review test and held as follows:[10]

> 'Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. … In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

The Court concluded:[11]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[20] Therefore, the first step in a review enquiry is to consider and determine if a material irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as

[9] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[10] Id at para 14.
[11] Id at para 16.

gathered from the review record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.

[21] Should the review court however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court need not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed as part and parcel of the first part of the review test. The review court, in essence, at the second stage of the review test, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision-maker, even if it is for different reasons. If, and pursuant to this second step in the review enquiry, the review court is satisfied that the same outcome could not reasonably follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome. The end result always has to be an unreasonable outcome flowing from an irregularity, for a review to succeed.

[22] I will now proceed to determine the applicant's review application on the basis of

the above principles and the two step enquiry in the application of the *Sidumo* test as I have set out above.

The reasoning of the arbitrator

[23] The second respondent, as arbitrator, commenced his reasoning by finding that in this matter, he had the evidence of Raboroko as directly opposed to the evidence of Mamorobela. Unfortunately, the second respondent never says which of these witness' evidence he actually then prefers and why he does so. He records his view that conflicting evidence exists, and leaves it there.

[24] The second respondent had reasoned that the gross negligence charge against Raboroko was based on two foundations, the first being that he pulled the chain too tight on the machine causing the gears to break, and the second being that he had forgotten that the gears were actually in stock causing the whole state of affairs listed above. I agree with the second respondent that this is indeed the substance of the applicant's complaint of gross negligence against Raboroko.

[25] In firstly dealing with the fact that Raboroko forgot about the two gears being in stock, which the second respondent actually accepted was indeed the case, the second respondent found that to forget such things may constitute negligence, but considering that the parts were ordered three years ago, this did not constitute "punishable" negligence. On this basis alone, the second respondent found that Raboroko was not guilty of gross negligence in this respect.

[26] As to the issue of the chain being pulled too tight, the second respondent found that this needed to be dealt with by an expert in respect of the machine. The second respondent found that he could not accept any evidence by both Raboroko and Mamorobela in this regard. Because of this reason alone, the second respondent then accepted that no gross negligence on the part of Raboroko with regard to the issue of pulling the chain too tight exists.

[27] As to the refusal by Raboroko to obey the instruction to clean the bathroom, the second respondent found that in the absence of a job description, it was hard to believe that a machine operator such as Raboroko could be required to clean a bathroom. For this reason alone, the second respondent concluded that Raboroko was not guilty of insubordination.

[28] The second respondent also dismissed the applicant's insubordination case of Raboroko refusing to work overtime on the basis that it could not be shown that Raboroko had actually agreed to work overtime, and as such he could not be instructed to work overtime.

[29] Based on the above reasoning, the second respondent then concluded that the dismissal of Raboroko was substantively unfair and awarded him fully retrospective reinstatement because, according to the second respondent, he would be acting outside his powers of he did not make such an award.

Merits of the review: the issue of gross negligence

[30] The applicant raised a number of issues as to why the second respondent committed a reviewable irregularity in finding that the dismissal of the second applicant was substantively unfair. In broad terms, the applicant contends that the second respondent did not evaluate and determine the evidence properly, actually ignored pertinent evidence, and also that the second respondent failed to have regard to the relevant legal principles, especially relating to gross negligence and the issue of a complete lack of remorse on the part of Raboroko.

[31] I will firstly deal with the issue of Rabaroko forgetting about the parts. What the second respondent completely failed to do was to have regard to any proper context. The second respondent in essence determined this issue in a vacuum, and only had regard to one consideration, being that the parts were ordered three years ago. The nub or the reasoning of the second respondent is thus that as these parts were ordered so long ago it is understandable that Raboroko

would forget about it. In my view, the proper context within which to have considered this issue is the fact that continued production was a pressing issue at the time and of critical importance to the applicant's business. It already had a very demanding customer who required strict turnaround times, of which all the employees, and especially Raboroko, must have been patently aware. I find it simply incomprehensible that Raboroko, under such circumstances, did not simply go into the parts store to check if there were parts, especially considering he was responsible for part maintenance, storage and control. This, surely, and also considering Raboroko was dedicated to this machine, is in any event an issue of common sense conduct. Proper context consideration means that it simply does not matter if the parts were ordered three years ago, as the necessary effort in just checking the parts store and exercising proper control over stored parts available would completely negate this.

[32] There is also further context which in my view the second respondent completely ignored. This is the fact that initially Raboroko only requested that the 152T gear be ordered, and only two days later, did Raboroko request that the 88T gear also had to be ordered. This, in my view, shows complete indifference to his duties to ensure that the machine returns to proper working order as expeditiously as possible. This in fact creates the impression that one gear was indeed in stock, and was later then found not to be in stock. As it later turned out, both gears were actually in stock. This in itself smacks of entirely indifferent parts stock control by Raboroko. This stock control was Raboroko's direct responsibility, where it came to parts for the machine.

[33] I also consider another pertinent piece of evidence the second respondent had no regard to whatsoever in his award. This is the fact that as part of Raboroko's duties of maintenance of storage of spare parts for the machine, which he is dedicated to, he had to conduct regular inspections of the parts store so as to ensure all the required spare parts are in stock. This being the case, and with no such gears at issue in this case being ordered in three years, then surely it must

have been patently apparent in the course of these regular inspections that the gears were in stock. If not, they would be ordered. To describe it simply – these regular inspections must have refreshed Raboroko's memory. Again, and also in this regard, surely a simple inspection of the parts store when the gears broke, by Raboroko, would have found the gears in stock.

[34] To add to what happened in this matter, there is not even an explanation by Raboroko as to why it took so long for him to discover the gears were in stock, and how he even came to discover this. One is compelled to ask the question whether it is simply not a case of Raboroko not actually bothering to even check the parts store in the first place, until later. By the time Raboroko did make the revelation that the gears were in stock, the manufacturer was hurrying to manufacture the parts and a driver had been dispatched to collect it, all against the backdrop of a very irate customer whose continued satisfaction was important to the survival of the applicant's business and the machine which remained inoperative. It is not even clear how long Raboroko had known the gears were in stock, before making the revelation. There can in my view be no justification for Raboroko's conduct in this regard, which shows complete indifference to his duties.

[35] The second respondent seems to accept there was negligence on the part of Raboroko. He however, finds that it was not "punishable negligence". I cannot fathom the concept of punishable or non punishable negligence. Conduct is either negligent or not. The degree of negligence does not negate the existence of negligence in the first place, but is relevant to the enquiry whether the negligence is gross or not. The simple point is that negligence of a lesser degree does not make it anything else but negligence. If the negligence is not gross or not material, this would impact on the issue of the sanction to be imposed. This means that for lesser negligence, so to speak, dismissal as a sanction could be unfair, whilst for gross negligence dismissal could be appropriate even for a first offence. The point however, is that the misconduct actually still exists, being that

of negligence. For the second respondent to in essence find that there exists unpunishable negligence and because of this the misconduct is not proven to exist is simply irrational, unreasonable and unfounded in law. What the second respondent should have done was to find that misconduct exists in the form of negligence in this regard, and then considered the degree of negligence in order to determine an appropriate and fair sanction. He committed a material irregularity by concluding that what he called “unpunishable negligence” was not misconduct, which it clearly was. In my view, therefore, there can be little doubt that the conduct of Raboroko with regard to “forgetting” about the two gears in stock is certainly negligence, and therefore this misconduct had in fact been proven by the applicant to exist.

[36] The next issue to consider with regard to the negligence charge relates to the issue of the tightening of the chain on the machine causing the gears to break. It was undisputed that Raboroko indeed tightened the chain on the machine. Mamorobela testified that as a direct result of Raboroko tightening the chain, the gears broke. It must also be remembered that Mamorobela was the floor manager, and similar to Raboroko, actually worked on the machine since it was procured and knows exactly how it works. Mamorobela testified under cross examination that he had four years’ experience on the machine and had trained Raboroka to service the machine. Mamorobela testified that Raboroko admitted the gears broke because he tightened the chain. Mamorobela also explained how the chain and the gears worked. He said the chain pulled two gears on the machine and if the chain was pulled too tight the gears would run uneven and break. Mamorobela specifically said that Raboroko was grossly negligent in this regard. As opposed to the evidence of Mamorobela, Raboroko testified that the gears were in fact not broken. Raboroko testified that both he and Mamorobela adjusted the machine (referring to the chain). Raboroko stated that the gears were ordered in August so the applicant could have extra gears in stock, after he (Raboroko) had actually replaced the gears in June. Raboroko went so far as to

testify in giving evidence in chief that it was not true that the machine was broken down in the first place, but ultimately, did concede under cross examination that the machine had broken down and had to be repaired. The above was then the two conflicting versions the second respondent had to determine and which he identified at the start of his reasoning in his award.

[37] Significantly, the second respondent never accepted that the machine was indeed in working order as suggested by Raboroko. In fact, a proper consideration of the second respondent's award shows that he seemed to accept the gears broke and the machine was inoperative, but the approach he adopted was that without the evidence of an expert he could not determine why this had happened. Therefore, and in effect, this had to mean that the version of Rabaroko that the gears had not broken in the first place had to be untrue, on the second respondent's own reasoning. This being the case, the second respondent then actually had to consider the evidence of Mamorobela on the one part and Rabaroko on the other, and then decide which version was true, as to the issue of what caused the gears to break. It was improper and irregular for the second respondent to in fact decline to make such a determination, citing that an expert was needed as excuse for not making the determination. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[12] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him...'

[38] The second respondent failed to make any credibility finding or determine the truth of the two conflicting versions. This is despite the fact that at the very start of his reasoning, the second respondent appeared to comprehend that central to this matter was the determination of the conflicting evidence of Mamorobela and Raboroko. The second respondent, had he discharged his duties properly, was compelled to determine this conflicting evidence and thus decide what evidence to accept, and what to reject. The second respondent had to assess credibility and probabilities and come to proper and reasoned finding as to what evidence

[12] (2011) 32 ILJ 723 (LC) at para 9.

to accept. The second respondent did none of this. In *Network Field Marketing (Pty) Ltd v Mngezana NO and Others*[13] the Court said the following, in concluding that the commissioner committed a reviewable irregularity, which *ratio* in my view is quite apposite *in casu*:

> 'In the few instances where the arbitrator reveals his analysis what stands out is the boldness of his conclusions about the reliability of the witnesses, which he appears to base on the most slender factual foundation. He also does not tell us why an analysis of the conflicting evidence using a balance of probabilities could not have produced an outcome and why it was necessary to resort to making credibility findings to determine the matter.'

The Court in *Network Field Marketing* then concluded as follows:[14]

> 'It is possible that there might have been another basis for doubting the value of Little and Steinberg's evidence but if there was it did not form part of the arbitrator's reasoning in dismissing the credibility of Steinberg's testimony on the most slender basis and, in the case of Little, there was no factual basis at all. By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties...'

[39] Similarly and in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[15], the Court, in dealing with issues of a commissioner having to determine conflicting evidence, held as follows:

> 'To resolve the factual controversy between Carstens and Nkunzi, the commissioner had to embark upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions. But the commissioner did nothing of the sort - and instead simply plumbed for Nkunzi's

[13] (2011) 32 ILJ 1705 (LC) at para 16.
[14] Id at para 23.
[15] (2010) 31 *ILJ* 452 (LC) at para 20.

> version. In the result, the award is bereft of any reason whatsoever for why Nkunzi "was able to establish" her version on this score...

The Court concluded that the failure to do the above was a failure to have regard to the evidence as required. This ratio, in my view, is most descriptive of the second respondent's failure *in casu*, and a similar consequence must follow.

[40] I have touched on the judgment of *Sasol Mining*[16] above. This judgment however requires more attention, especially where the Court said the following, which *ratio* can equally be applied in this instance:[17]

> 'Regrettably, the commissioner's logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this court. Some commissioners appear wholly incapable of dealing with disputes of fact - their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner...'

The Court in *Sasol Mining* concluded:[18]

> '.... The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or

[16] (*supra*) footnote 12.
[17] Id at para 7.
[18] Id at para 9 and 13.

> improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. …'
>
> 'In short: the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award clearly may have been different had the commissioner properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the commissioner in the conduct of the arbitration proceedings.'

I fully agree with the above reasoning, which in my view is directly applicable to the conduct and failure of the second respondent *in casu*.

[41] In determining the conflicting evidence between Raboroko and Mamorobela, the second respondent should have done as follows, as determined by the SCA in *SFW Group Ltd and Another v Martell et Cie and Others*[19]:

> '…The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf…, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or

[19] 2003 (1) SA 11 (SCA) at para 5.

observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues...'

[42] I am unfortunately again compelled to point out that the second respondent did none of the above. Instead, he made no finding at all and referred in passing to some or other nonexistent expert as the required deadlock breaking mechanism. The second respondent had to consider the testimony, as referred to above, and had to make a call as to what conflicting evidence to accept. If the evidence of Mamorobela was to be accepted, then the evidence the second respondent had to use to determine the issue of the negligence of Raboroko was that Raboroko was properly trained in the maintenance of the machine, had incorrectly tightened the chain, this caused the two gears to break, and Raboroko in fact admitted that this is what happened. There would also have been no explanation by Raboroko for this conduct. If the evidence of Raboroko was to be accepted then the evidence the second respondent had to use to determine the question of negligence was that Raboroko did not do maintenance on the machine, he was never trained to do so, that he and Mamorobela adjusted the chain together and the gears never broke as a result. As the second respondent had to decide one way, or the other, in this regard, and because he never did this, he actually failed to consider and determine pertinent evidence before him, and this would certainly be a material irregularity. As was said in *Network Field Marketing*[20]:

'… By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties…'

[43] Further as to this failure by the second respondent, I refer to what the Court said in *Pam Golding Properties (Pty) Ltd v Erasmus and Others*[21]:

[20] Id at para 23.
[21] (2010) 31 ILJ 1460 (LC) at para 6.

'In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct in these terms:

'It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ...the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2) *(a)* (ii) of the LRA. …''

[44] The Court in *Gold Fields Mining*[22] also dealt with the consideration of a review application where the review ground related to the question whether the commissioner ignored or negated material evidence, and the Court said:

'…. The questions to ask are these: … (ii) Did the arbitrator identify the dispute he was required to arbitrate….? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?.. (iv) Did he or she deal with the substantial merits of the dispute? and (v) is the arbitrator's decision one that another decision-maker could reasonable have arrived at based on the evidence?

Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome…'

[45] Accordingly, I conclude that where it comes to the issue of the determination of the negligence charge relating to the tightening of the chain, the second respondent committed a material irregularity, and that he failed to properly consider the evidence before him in this regard, and simply did not substantially deal with the conflicting evidence before him in this regard as he was required to do. The second respondent also committed a material irregularity in determining the issue of the gross negligence charge in respect of the issue of Raboroko

[22] *Gold Fields Mining* above n 9 at para 20 – 21.

forgetting about the gears in stock, for the reasons set out above, which in a nutshell also concerns the second respondent having ignored and negated pertinent and crucial evidence.

[46] Since the second respondent's determination of the gross negligence charge therefore constitutes a material irregularity, the next question in the application of the review test is then whether this material irregularity has the effect of causing that the ultimate outcome arrived at by the second respondent would be unreasonable. Put differently, is the ultimate conclusion of the second respondent that Raboroko did not commit misconduct in respect of this charge still sustainable and constitutes a reasonable outcome for any other reasons, based on the evidence properly on record as a whole. In making this determination, I must then actually consider the evidence properly before the second respondent, as a whole, and the first step in doing so would obviously be a determination as which version to prefer, being that of Raboroko or that of Mamorobela. I have little hesitation in preferring the evidence of Mamorobela, for several reasons. The first reason is that material parts of the version of Raboroko was never put to Mamorobela under cross examination[23], with one critical issue in this regard standing out, being the contention by Raboroko that the machine was never broken and the gears were ordered just to have stock in the store never having been so put. The second reason is that a reading of the record shows that Raboroko was very argumentative when giving evidence and had difficulty in answering questions directly, and properly. The third reason is that

[23] See *ABSA Brokers (Pty) Ltd v G N Moshoana N.O. and Others* (2005) 26 ILJ 1652 (LAC) at para 39 where the Court said: 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness …. He has not only a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation … A failure to cross-examine may, in general, imply an acceptance of the witness' testimony…';See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) footnote 13; *Masilela v Leonard Dingler (Pty) Ltd* (2004) 25 ILJ 544 (LC).

Raboroko's version was simply on the probabilities entirely unlikely, considering the actual undisputed background facts. The fourth reason is the complete incompatibility of two versions offered by Raboroko, the one being that he simply forgot about the parts in the store because they were ordered three years ago, and the other being that he actually used these parts as replacements on the machine in June which is why new parts were ordered in August, which in my view shows a propensity towards fabricating evidence. The final reason is that Raboroko could offer no explanation for his behaviour, which in my view, was incumbent on him to do.[24]

[47] Therefore, a proper determination of the conflicting evidence on record in line with the principles prescribed in the judgment of *SFW Group*, can only lead to the preferring of the evidence of Mamorobela over that of Raboroko. Along with this evidence of Mamorobela, the documentary evidence must also be considered, along with the evidence offered by Raboroko himself not in conflict with that of Mamorobela and the common cause evidence. From this totality of evidence, the following is in my view the pertinent issues that come to the fore in the determination of the gross negligence charge: (1) Raboroko was specifically tasked to operate and maintain the machine, and had been doing so for some four years at least; (2) Raboroko was responsible to order parts for the machine, and exercise proper control over parts stock in the store; (3) Raboroko, in the process of maintaining the machine, in fact did tighten the chain too tight causing the two gears to break; (4) Raboroko could offer no explanation for this conduct; (5) Raboroko could have immediately repaired the machine, as the parts were in stock, but he either did not exercise proper control of the parts stock or did not even bother to check the stock; (6) For no apparent plausible reason, Raboroko first just ordered one part, and several days later the other, and in the meantime the machine was inoperative; (7) Raboroko never explained how and exactly when he discovered the two gears were indeed in stock, and why he could not

[24] See *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 2567 (LC).

have disclosed or even discovered this earlier; (8) what is apparent is that Raboroko waited until the point of a driver being dispatched to collect the gears from the manufacturer in Johannesburg before saying anything; (9) solely as a result of the above conduct of Raboroko, the machine was out of production for more than a week, with an irate customer threatening to cancel the contract, and the business of the applicant already being under financial constraint.

[48] There can therefore be no doubt that on the proper evidence, Raboroko was indeed negligent. This is the only reasonable outcome that could possibly result in this matter. The second respondent's determination that no misconduct in the form of negligence in fact existed is thus entirely unsustainable, and clearly in my view not an outcome a reasonable decision maker could come to. This conclusion of the second respondent thus has to be reviewed and set aside.

[49] The next point to however consider, in the context of a reasonable outcome determination, is that the finding of the existence of negligence does not per se lead to dismissal. Whether or not misconduct in the form of negligence justifies dismissal is a question of the degree of the negligence, and it is in this context that the concept of "gross negligence" comes into play. In dealing with the issue of gross negligence as a concept, the Court in *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*[25] said:

> '…Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143C - J.) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question

[25] 2003 (2) SA 473 (SCA) at para 7.

may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl's* case supra at 557A - E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, dolus eventualis; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (*Van Zyl's* case supra at 559D - H). It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross… Lee in *The Elements of Roman Law* 4th ed at 288 describes gross negligence as being 'a degree of negligence which indicates a complete obtuseness of mind and conduct'. Buckland in *Textbook of Roman Law* 3rd ed at 556 suggests that what is contemplated is a 'failure to show any reasonable care'. *Dicta* in modern judgments, although sometimes more appropriate in respect of *dolus eventualis,* similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); 'a total disregard of duty' (*Rosenthal v Marks* 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (*S v Smith en Andere* 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D).” It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete

obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care…'

[50] In my view, the conduct of Raboroko *in casu* can safely be categorised as an extreme departure from the norm, in the form of a complete failure to take care, which would constitute gross negligence. What the proper factual matrix in this matter firstly shows is that Raboroko in maintaining the machine in the first instance, and despite his wealth of experience, failed to exercise a basic level of care, causing the gears to break. Then, and following on, how Raboroko behaved after that not only compounds the effects of his initial failure to take care, but in itself demonstrates a further instance of a total failure to take care. I say this because, in my view, a simple inspection of the parts store by Raboroko, who was responsible for parts stock management in the first place, would have found the gears in stock. Instead, and inexplicably, Raboroko then orders one part only, and several days later, another part. He does not even explain how he later came to discover both gears in stock. This all shows a complete indifference to his duties. I also consider the context of the demanding customer with strict deadlines and the importance of the machine remaining operative to the business of the applicant. I therefore conclude that the only reasonable outcome that could have been arrived at, as a matter of law, and in applying the facts in this matter to the law, is that Raboroko actually committed misconduct in the form of gross negligence, on the basis of both his maintenance of the machine and his parts stock management. There is accordingly no other basis on which the ultimate outcome arrived at by the second respondent can be sustained, and as such, his conclusion has to be reviewable. I refer in this regard to *F N Marketing Distribution Services v Commissioner Matee and Others*[26] where it was held as follows, and in respect of which the comparisons to the matter *in casu* is immediately apparent:

'In my view the statement by the arbitrator that there is 'no evidence to suggest'

[26] (2002) 23 ILJ 1413 (LC) at para 14.

the employee's guilt, taken together with his failure to refer to and to analyse key portions of the evidence referred to above, demonstrates a failure on the part of the arbitrator to direct his mind to material, and largely common cause, evidence. Mr Morapedi's evidence that he placed the ten boxes of Panado next to the employee's vehicle and that the employee was then responsible to see that they were loaded on to the vehicle, was never challenged. The employee's own evidence was that it was his responsibility to check that the items to be delivered were loaded on to his truck. On his own evidence he failed to do this. In my view this establishes negligence - and possibly gross negligence - on the part of the employee. The arbitrator's award, however, gives no indication that he applied his mind to any of this evidence, nor that he considered whether this evidence was sufficient to justify finding the employee guilty of the charge against him. In my view this is a sufficient basis to review and set aside his award. (See *Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana and Others* (1998) 19 ILJ 1266 (LC) at para 26; *Vita Foam SA (Pty) Ltd v I CCMA and Others* (2000) 21 ILJ 244 (LC); [1999] 12 BLLR 1375 (LC) at paras 16-24.)'

[51] A further judgment of relevance is that of *Nampak Corrugated Wadeville v Khoza*[27], in which case the employee party was charged and dismissed for gross negligence in that he had failed to take proper care of equipment for which he was responsible. The Industrial Court found that the employee was negligent but could not find gross negligence. The LAC disagreed with the Industrial Court and held:

'…The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the Industrial Court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.'

[27] (1999) 20 ILJ 578 (LAC) at para 35.

The above must be considered especially in the absence of any proper explanation by Raboroko for his misconduct in the current matter.[28]

[52] A final consideration in the determination of the gross negligence issue is the fact that throughout the disciplinary proceedings, and even as late as in the arbitration proceedings, Raboroko still maintained the entirely unjustified and unreasonable view that he did nothing wrong, and even offered what I consider to be an entirely unlikely, if not false, explanation for what happened. As such, the dismissal of Raboroko for this misconduct, which indeed existed, was justified. In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[29] it was held:

> 'The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26E-G.'

[53] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[30] the Court held as follows, which in my view is quite apposite to the current matter:

> '…Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

And:

[28] See also *Universal Product Network (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1496 (LC) at para 35 – 38.
[29] (2010) 31 ILJ 2475 (LC) at para 23.
[30] (2000) 21 ILJ 1051 (LAC) at para 22.

> '…Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.'[31]

[54] It is thus my conclusion that Raboroko had indeed committed misconduct in the form of gross negligence for which he had been charged with by the applicant. Any finding to the contrary, on the evidence, is entirely unsustainable and a reviewable irregularity. It is also my view that based on this charge alone, the dismissal of Raboroko was certainly justified, and any finding to the contrary is equally a reviewable irregularity.

Merits of the review: the issue of insubordination

[55] The next issue to consider is the insubordination charge against Raboroko. Fortunately, and in considering the insubordination issue, the enquiry is a much simpler one. In this regard, the applicant had two grounds of complaint against Raboroko, the first being that Raboroko refused to work overtime as instructed, and the second that he refused to comply with the instructions to clean the bathrooms when it was his turn to do so.

[56] I am able to immediately dispose of the overtime issue. I could find no evidence on the record that Raboroko in fact agreed to work overtime. In terms of Section 10 of the BCEA[32] agreement by an employee is required for an employee to be obliged to work overtime. Without Raboroko thus agreeing to work overtime, any instruction to him to work overtime would be unlawful and contrary to the BCEA[33], which is a complete defense to any misconduct charge based on insubordination. As was said in *Maneche and Others v Commission for*

[31] Id at para 25.
[32] Basic Conditions of Employment Act 75 of 1997.
[33] See for example *Coca-Cola Bottling East London v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 823 (LC) at para 52; *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2008) 29 ILJ 667 (LC) at para 13.

Conciliation, Mediation and Arbitration and Others[34]: 'For the reasons stated above, I am satisfied that the commissioner committed a material error of law by regarding a basic condition of employment as a standard capable of being trumped by a unilaterally imposed workplace rule or practice. …' The second respondent, in his award, was very much alive to this issue, where he recorded that the applicant had to discover Raboroko's employment contract in the arbitration in order to establish an agreement by Raboroko to work overtime. The outcome the second respondent arrived at in this respect is entirely reasonable, and thus sustainable. I will accordingly devote no further attention to the consideration of this issue, as there is no basis to interfere with this conclusion of the second respondent.

[57] This then brings me to the issue of insubordination relating to the cleaning of the bathrooms. In this regard, the evidence was actually largely undisputed, and straight forward. The fact is that due to financial constraints, the applicant had cancelled the contract with its cleaning service provider so as to save some of the costs it needed to survive. What was then required is that all the employees each had a turn to clean the bathrooms, and this included Raboroko. All the other employees went along and cleaned the bathroom when it was their turn to do so. Raboroko however refused, and despite several clear instructions to do so, persisted with this refusal. Raboroko in fact conceded in evidence that he refused and would continue to refuse. The basic premise for this refusal was that Raboroko contended cleaning the bathroom was not his duty.

[58] The second respondent unfortunately again, in essence, shirked around the real issue. What the second respondent did was to find that in the absence of a job description, Raboroko could not be found to have been insubordinate when he refused the clean the bathroom. Such an approach by the second respondent is a complete failure by him to come to grips with the true issue he was called on to determine. Now it was common cause that Raboroko had been given clear and direct instructions to clean the bathroom when it was his turn to do so. It is

[34] (2007) 28 ILJ 2594 (LC) at para 16.

equally common cause that he persisted at all times in refusing to do so. What this possibly could have to do with a job description being absent as some or other ground of justification is unclear. The fact is that the conduct of Raboroko in this regard, at the very least on a *prima facie* basis, would be tantamount to insubordination, as he received a clear instruction which he refused to obey. The only question that then remains is simply whether Raboroko was entitled to so refuse, and to simply refer to and rely on the absence of a job description, is far short of an acceptable determination of this question by the second respondent.

[59] In dealing with the concept of insubordination, the Court in *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and Others*[35] held as follows:

> '…In our view a disregard by an employee of his employer's authority, especially in the presence of other employees, amounts to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which is the very essence of a master-servant relationship cannot, under these circumstances, continue. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship...'

[60] The erstwhile Industrial Court considered the issue of insubordination in the matter of *Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*[36] and said the following about what constitutes insubordination: '…. insubordination can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of (see especially The Shorter Oxford English Dictionary above) the authority of the employer. It is, of course, required that the insubordination must be deliberate (wilful) and serious (above).' In *A Mauchle (Pty) Ltd t/a Precision*

[35] (1991) 12 ILJ 1032 (LAC) at 1037F-H.
[36] (1989) 10 ILJ 311 (IC).

Tools v National Union of Metalworkers of SA and Others[37] the Court, in upholding a dismissal for insubordination, held:

> 'The company had a valid reason for dismissing the applicants:
>
> - an instruction was in fact given;
>
> - the instruction was lawful;
>
> - the instruction was reasonable;
>
> - the refusal to obey the instruction was serious, deliberate and repeated.*'*

With specific reference to the judgment in *Mauchle*, the Court in *Air Products (Pty) Ltd v CWIU and Another*[38] said the following:

> 'I would respectfully venture to suggest that for the purposes of determining an unfair labour practice dispute under the old Act it is unnecessary to have separate requirements of "lawfulness" and "reasonableness", and that it would suffice simply to ask whether the instruction was fair. If fair, it is lawful. If unfair, it is unlawful. Fairness equates to lawfulness under the old Act. This approach would also avoid the confusion generated by the distinction between contractual "lawfulness" and statutory "fairness".'

The instruction to Raboroko was given and was deliberately refused. All that remains to be determined is whether the instruction was lawful and reasonable, or as the Court said in *Air Products was "fair",* which will be next addressed.

[61] Some examples of insubordination bear mentioning. In *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd*[39] the Court held 'In respect of charge 5, Vass wilfully absented himself from the workplace. This conduct made him guilty of gross insubordination and insolence.' In *National*

[37] (1995) 16 ILJ 349 (LAC) at 359E-F.
[38] [1998] 1 BLLR 1 (LAC) at page 15
[39] (2010) 31 ILJ 387 (LC).

Union of Metalworkers of SA on behalf of Sibiya v Bell Equipment (Pty) Ltd[40] it was held that an employee failing to comply with an employer's instruction to attend disciplinary hearing involving worker against whom she had preferred charges of sexual harassment amounted to insubordination. In *Arangie v Abedare Cables*[41] an employee refusing to take alcohol test or to leave employer's premises was considered to be conduct amounting to insubordination. In *National Union of Metalworkers of SA on behalf of Hlekwayo v Bell Equipment Co SA (Pty) Ltd*[42] an employee's refusal to work contractually agreed night shifts unless provided with transport was found to be insubordinate. Finally, in *Ncithingana v Five Star Service Station*[43] the matter concerned a situation where it was part of the employee's duties to have washed the walls, she knew that it was part of her duties, she was previously instructed to clean the walls, and then did not clean the walls, and this was held to be insubordination. In the context of the aforesaid examples, it therefore could quite feasibly be true that a refusal to clean the bathroom when instructed to do so is insubordination by Raboroko.

[62] As to the consequences of insubordination to the employment relationship, the Court in *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[44] said:

> 'By its very nature the employment relationship places certain obligations upon the employee, two aspects of which are the generic duties of the employee to maintain a harmonious relationship and to cooperate with her employer. Brassey notes that the employee's obligation to ensure a harmonious relationship with the employer and other staff requires that she should do nothing to undermine it. The learned author points out that employers 'and the managers through whom they enforce their will, are likewise entitled to respect' and that failure to demonstrate this amounts to insubordination which suggests, he says, that the offence

[40] (2009) 30 ILJ 2204 (BCA).
[41] (2007) 28 ILJ 249 (CCMA).
[42] (2007) 28 ILJ 1632 (BCA).
[43] (2007) 28 ILJ 2121 (BCA).
[44] (2012) 33 ILJ 2117 (LC) at paras 116 and 121.

'consists in a failure to submit to the employer's authority'.'

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

[63] Now one has to accept that an operator such as Raboroko would not normally be expected to clean bathrooms as part of his duties. But does the fact that he was expected to merely on occasion also clean the bathroom, as was also required of all his colleagues, amount to a unilateral change of his employment conditions or a variation of his job? In my view, this cannot be the case. Raboroko remained an operator and clearly still spent the vast majority of his time doing this very work. The bathroom cleaning requirement was not a change in employment conditions. It was an introduction of a work practice necessitated by circumstances that were far from normal, and was very limited in application. It was apparent that the applicant's survival was actually dependent on cutting out the costs of cleaning contractors and then instructing all its employees to participate in taking turns to clean the bathroom. The instruction therefore has a particular context, is limited to an ad hoc and limited additional duty imposed on the employees. A similar situation came before the Court in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*[45]. Similar to the matter *in casu*, the employee party in *Silverton Spraypainters* was instructed to fulfil additional duties not normally contemplated by his duties as estimator. The Court in *Silverton Spraypainters* commenced its reasoning by holding as follows:[46]

'It is trite that an employee is guilty of insubordination if the employee concerned

[45] (2013) 34 ILJ 1440 (LAC).
[46] Id at para 31.

> wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified. … The case for Mr Van Jaarsveld is that he was not guilty of misconduct, in the first place, because he was entitled to refuse to obey an unlawful and unreasonable instruction given to him by the company, on the basis that the instruction constituted an impermissible unilateral change to his terms and conditions of employment as an estimator.'

In casu, Raboroko raises a similar issue so as to justify this refusal to clean the bathroom. In dealing with this, in *Silverton Spraypainters*, the Court considered the context within which the employee was given the instruction to fulfil this different duty, and said:[47]

> 'I am satisfied that the instruction for Mr Van Jaarsveld physically to go out and solicit work from assessors and fleet companies during an economically threatening period, was simply something that could be inferred from, or at most, which was ancillary to, his normal duties. Put differently, it was simply a variation in his work practice or a change in the manner his job was to be performed — a situation that was occasioned by sound and compelling operational reasons on the part of the company. …'

It is my view that the current matter and what Raboroko was instructed to do was comparative to the above. This was a change in the manner in which Raboroko was required to do his job, being that in addition to his principal duties he would from time to time and on a shared basis with all his fellow workmates clean the bathroom, and this was necessitated by compelling operational reasons.

[64] The instruction by the applicant to Raboroko to from time to time clean the bathroom is consequently a reasonable and lawful instruction. Raboroko persistently refused to obey this instruction and did so in the presence of other employees. He was not entitled to do so, was obliged to comply with the

[47] Id at para 39.

instruction and was consequently grossly insubordinate. As the Court said in *Silverton Spraypainters*[48], which in my view is of equal application *in casu*:

> 'It appears to me … that the company's instruction was a lawful and reasonable one which Mr Van Jaarsveld was obliged and obligated to carry out. His blatant, persistent and public refusal to comply with this lawful and reasonable instruction constituted gross insubordination on his part. He seriously and inexcusably undermined the authority of management. In my view, he was correctly convicted of the misconduct as charged and his dismissal was, therefore, substantively fair...'

[65] In *Air Products*[49] the Court dealt with an instance where the employer sought to transfer an employee for operational reasons, even though the employment contract and employment policies did not specifically provide a right to employer to effect such a transfer. The employer, despite not having a specific contractual right to do so, then gave the employee an instruction to transfer, which the employee refused to obey and the employee was ultimately given a notification to attend a disciplinary enquiry for the failure to carry out a lawful instruction. The Court held:[50]

> "The transfer of Mmadi from the cylinder test plant to the hp plant did not constitute an amendment to Mmadi's contract of employment. It was not an express, implied or tacit term of the contract of employment that he would work only at the cylinder test plant. …. The only difference between the one job and the other was that at the hp plant he was required to work night shift every second week, whereas at the cylinder test plant he was required to work day shift only. His job, however, did not change.'

The Court went further, despite so concluding, and said:[51]

[48] Id at para 43.
[49] (*supra*) footnote 38
[50] Id at page 5
[51] Id at page 6

> 'The transfer of the employee from the cylinder test plant to the HP plant did amount to a change in working conditions to his potential prejudice in the sense that he would be required to work night shift every second week at the HP plant whereas at the cylinder test plant he did not have to work night shift at all.
>
> What was required of the company in those circumstances, as a matter of fairness and sound industrial relations practice, was to attempt to persuade [the employee] to cooperate and to accept the change in working conditions ….'

The above situation is comparative to the matter *in casu* and the applicant clearly sought to do what the Court suggested in *Air Products* as the proper approach. It on several occasions instructed Raborko to clean the bathroom when it was his turn to do so, and tried to convince him to do this. Raboroko persisted with his refusal to comply. It was clearly understood by all parties why it was necessary that all employees needed to participate in the cleaning of the bathroom and why the instruction needed to be given. Raboroko chose to ignore this reason. This left the applicant with no other alternative but to discipline Raboroko.

[66] The Court in *Silverton Spraypainters*[52] also made specific reference, with approval, to the judgment of the former LAC in *Mauchle*[53]. In my view, the judgment in *Mauchle* is equally apposite to the consideration of the current matter, as the matter in *Mauchle* concerned several employees also employed as machine operators who were instructed by the employer when the employer received a special order that had to be attended to urgently, to operate two machines instead of the one machine they were normally required to operate, in order to dispose of the special order. The employees refused to comply with the instruction, also on the basis that in terms of their contracts they were required to operate only one machine and that the instruction thus constituted a unilateral change, by the employer, to the terms and conditions of their employment contracts. These employees were then also dismissed for insubordination. Based

[52] Id at para 37.
[53] (*supra*) footnote 37.

on these facts, the Court in *Mauchle* said:[54]

> '…. A description of the work to be performed as that of "operator" should not, in my view, "be construed inflexibly provided that the fundamental nature of the work to be performed is not altered" (Wallis *Labour and Employment Law* para 45 at 7-9). I agree with the view expressed by the learned author at 7-23 n 9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. In *Crewswell v Board of Inland Revenue* (1984) 2 All ER 713 (ChD) at 720b-d Walton J said:
>
> 'I now turn straight away to a consideration of the main point on which counsel for the plaintiff relied. He put his case in this way, that although it is undoubtedly correct that an employer may, within limits, change the manner in which his employees perform a work which they are employed to do, there may be such a change in the method of performing the task which the employee was recruited to perform proposed by the employer as to amount to a change in the nature of the job. This would mean that the employee was being asked to perform work under a wholly different contract and this cannot be done without his consent. ….
>
> It is a very fine line from counsel's submissions to the submission that employees have a vested right to preserve working obligations completely unchanged as from the moment when they first begin work. This cannot surely, by any stretch of the imagination, be correct.'

[67] The point that must therefore be made, *in casu*, is that what the applicant instructed Raboroko to do did not actually change his job. It did not change his duties as operator fundamentally. The applicant was entitled to impose the duty on Raboroko that it did, and Raboroko had no vested right to insist that all his working conditions be preserved in a completely unchanged state throughout his

[54] Id at 357F-358B.

employment. I conclude by referring to the following extract from the judgment in *Silverton Spraypainters*:[55]

> 'In the present instance, Mr Van Jaarsveld wilfully, persistently and publicly defied a lawful and reasonable instruction given to him by his employer, Mr Cronje, who was the sole director of the company. On one of the occasions when Mr Van Jaarsveld defied the instruction it was in the presence of Ms Spaans, one of the company employees. It is trite that mutual trust and respect constitute a fundamental pillar in every sustainable employer-employee relationship. In my view, Mr Van Jaarsveld's unbecoming conduct completely ruined his employment relationship with the company, which rendered his dismissal justified. The misconduct was so serious that the sanction of dismissal would, in my view, have been justified.'

The above *ratio* equally applies to the conduct of Raboroko. Similarly, and for the very same considerations as set out in *Silverton Spraypainters*, Raboroko earned his dismissal on the insubordination charge as well.

[68] I therefore conclude that Raboroko equally committed misconduct in respect of the insubordination charge, insofar as it concerns the instruction given to him to from time to time clean the bathroom. Once again, any finding to the contrary would be unsustainable and simply not a reasonable outcome, and thus reviewable.

Conclusion

[69] The applicant in argument also referred to the issue of the complete lack of remorse on the part of Raboroko, which prevailed even at arbitration, in substantiation of a determination that his dismissal was justified. In my view, there is merit in this argument. It is actually clear from the record that Raboroko has not shown any remorse of any kind, nor has he ever acknowledged any wrongdoing. In fact, a proper reading of the record paints the picture of Raboroko

[55] Id at para 47.

as a confrontational and obstructive employee, blaming everyone else without doing any introspection as regards his own failures and conduct. Added to this, and in the arbitration, Raboroko then even raised a false defense. In the absence of remorse and acknowledgement of wrongdoing, rehabilitation of the damaged employment relationship is not possible, and as such, dismissal was really the only viable option. As the Court said in *De Beers*:[56]

> 'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk to continue to employ the offender is unacceptably great.'

[70] I also consider what the Court said in *Greater Letaba Local Municipality v Mankgabe NO and Others*[57] on the issue of remorse, where it was held: 'In the instant case I am of the view that the employee's remorseless attitude did the employment relationship untold harm. Over and above the gravity of the misconduct, coupled with the magnitude of the employer's loss, the employee still falsely persisted on oath in his answering affidavit that he had done no wrong. …. His repeated but false denial speaks volumes. The employer was understandably anxious and apprehensive that there was a great risk, that given another chance, the remorseless employee who did not acknowledge the wrong he had done, would do it again and that he would remain a great risk to retain as a member of the workforce … .' I further find the analogy used in *Independent Newspapers (Pty) Ltd v Media Workers Union of SA on behalf of McKay and Others,*[58] particularly appealing, where the Court said: 'The analogy of a marriage, used by Mr *Van Zyl*, is perhaps a useful one. It is not unheard of for one

[56] Id at para 25.
[57] (2008) 29 ILJ 1167 (LC) at para 34.
[58] (2013) 34 ILJ 143 (LC) at 146.

partner in a marriage relationship who has been cuckolded to give the other partner a second chance, as it were, in the face of true remorse and a true effort to rebuild the trust relationship.' Using this analogy, Raboroko did none of these, he made no attempt to rebuild the trust relationship, and instead persisted with a course of action of even falsely denying any wrongdoing.

[71] For the sake of complete picture on this issue, I also refer to *National Commissioner of Police and Another v Harri NO and Others,*[59] where the Court held: 'Instead of coming clean, Lamastra advanced a manifestly dishonest defence at the disciplinary enquiry. It is true that he had long service and that the chairperson took this into account as a mitigating factor. However, as the Labour Appeal Court pointed out in *De Beers Consolidated Mines Ltd v CCMA and Others*, long service is not necessarily a guarantee against dismissal. As Conradie JA said, 'the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed'. He also noted that long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it.'

[72] This kind of conduct of persistently pursuing a false defense in fact constitutes an act of dishonesty on the part of Raboroko in itself. In *City of Cape Town v SA Local Government Bargaining Council and Others (2)*[60] the Court, in referring to the conduct of an employee in showing no remorse and persisting with a false defense, said that:

> 'Her actions should further be viewed against the fact that the respondent occupied a position in the workplace which requires her to be honest. The question which needs to be answered is whether or not her conduct impacted on her employment relationship in such a way that her actions resulted in the breakdown of the trust relationship between her and her employer. Trust is

[59] (2011) 32 ILJ 1175 (LC) at para 50.
[60] (2011) 32 ILJ 1333 (LC) at paras 21 – 22.

considered to be an important element of the employment relationship whether or not the employee is employed in private business or within the public sector…'

The Court in *City of Cape Town* then concluded that:[61]

'….The fact that an employee shows remorse for his or her actions and takes responsibility for his or her actions may militate, depending on the circumstances, against imposing the sanction of dismissal. The converse also applies, dismissal may be an appropriate sanction where the employee commits an act of dishonesty, falsely denies having done so and then shows no remorse whatsoever for having done so… It is also important to point out that the respondent had persisted with her lying not only in the course of the investigations but also at her disciplinary hearing and in her sworn testimony before the arbitrator...'

[73] Finally, and as to Raboroko trying to shift blame to everyone else, I refer to what the Court said in *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others*[62]:

'It was also significant that the third respondent elected not to own up to his misdemeanour. In other words, he showed a complete lack of remorse or contrition for what he did. Instead, he attempted to shift the blame to the site manager whom the third respondent apparently induced to signing the falsified timesheet...'

In the end, in this regard, I conclude with the following apposite *dictum* in *Timothy v Nampak Corrugated Containers (Pty) Ltd*[63] where the Court said:

'…. Throughout the disciplinary hearing and the hearing before third respondent appellant continued to take the view that the allegations brought against him were no more than lies. Appellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial. …. In other words, in

[61] Id at paras 29 – 30.
[62] (2010) 31 ILJ 901 (LAC) at para 37.
[63] (2010) 31 ILJ 1844 (LAC) at 1849F-1850B.

> a case such as the present, where there is an egregious act of dishonesty, and I use that word advisably because, as I have already indicated, appellant's conduct throughout this dispute constituted a perpetuation of the dishonesty, by way of a denial, conversely a complete lack of acknowledgment of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction. …'

[74] Therefore, applying the above legal principles to the facts of this matter, Raboroko thus showed no remorse or acknowledgment of wrongdoing as would be required to enable the applicant to bring Raboroko back into the fold of the employment relationship. The situation is exacerbated by what is tantamount to an act of dishonesty in that Raboroko persists with a false defense and denial of any wrongdoing even to the point of the arbitration. In my view, Raboroko certainly earned his dismissal.

[75] Therefore, and having regard to what I have set out above with regard to the merits of the applicant's review application, and based on the application of the review test as I have also set out above, the first step in the review enquiry in this matter must be answered to the effect that the second respondent committed material irregularities relating to his conclusions in respect of the gross negligence change, and in respect of the insubordination charge where it came to the cleaning of the bathroom. I am then further of the view that without the existence of these irregularities, the outcome arrived at by the second respondent simply cannot be a reasonable outcome. I am satisfied that the second respondent failed to consider and determine material parts of the evidence, completely failed to determine what constituted the evidence properly before him on which he should have based his determination, and simply did not properly and rationally construe and apply the relevant legal principles. The second respondent certainly never dealt with the substantial merits of the dispute and the issues he was actually called on to determine. The award of the second respondent thus constitutes a reviewable irregularity and thus falls to be

reviewed and set aside.

[76] It is thus my conclusion that the applicant was entitled to dismiss the individual third respondent (J Raboroko), and such dismissal was substantively fair. The second respondent's conclusion to the contrary cannot be sustained, constitutes a reviewable irregularity, and falls to be reviewed and set aside.

[77] I have sufficient evidentiary material before me to finally determine this matter, and I do not consider it necessary to refer the matter back to the CCMA. I therefore shall substitute the award of the second respondent with an award that the dismissal of the individual third respondent (J Raboroko) by the applicant was substantively fair.

[78] As the matter is unopposed, I do not consider any costs award in favour of the applicant to be a consideration.

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

79.1 The applicant's review application is granted.

79.2 The arbitration award of the second respondent, being commissioner D K Nkadimeng dated 17 June 2012 in the arbitration proceedings between the applicant and the third respondent, under case number LP 6803 – 11, is reviewed and set aside.

79.3 The arbitration award of the second respondent, being commissioner D K Nkadimeng dated 17 June 2012 in the arbitration proceedings between the applicant and the third respondent, under case number LP 6803 – 11, is substituted and replaced with an award that the dismissal of the individual third respondent (J Raboroko) by the applicant was substantively fair.

79.4 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate D W de Villiers
Instructed by:	Thomas & Swanepoel Inc
For the Third Respondent:	None