



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA**

**JUDGMENT**

Reportable

Case no: JR122/13

In the matter between:

**JAMAFO obo THOMAS MTHEMBU**

**Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**K. DRISCOLL N.O.**

**Second Respondent**

**PICK 'N PAY (Pty) Ltd**

**Third Respondent**

**Heard: 16 January 2014**

**Delivered: 15 October 2014**

**Summary: Dismissal fair- senior managerial employee leaving subordinate in charge workplace in breach of company policy.**

**Practice and procedure – applicant not transcribing witness testimony failing to discharge onus where allegations relied upon placed in issue.**

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**JUDGMENT**

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RAM AJ

Introduction

- [1] This is an application in terms of which the applicant seeks to review and set aside the arbitration award dated 12 November 2012 (“the award”) of the second respondent, namely, K Driscoll (“the commissioner”) in arbitration proceedings conducted under the auspices of the first respondent, namely, the Commission for Conciliation, Mediation and Arbitration (“the Commission”).
- [2] The applicant seeks to review and set aside the award in terms of section 145 of the Labour Relations Act, No.66 of 1995, as amended (“the Act”).
- [3] The applicant also sought condonation for the late filing of his review application. I condone the late filing of his review application.

The evidence before the commissioner

- [4] The following evidence is apparent from the transcript of the arbitration proceedings (“the transcript”).
- [5] The applicant was approximately 27 years in the employment of the third respondent when he was dismissed. At the time of his dismissal, he occupied the position of an Assistant Store Manager in the third respondent’s Lonehill Store (“the Lonehill Store”). He occupied this position from 2006. He was charged for dereliction of duty in that he left the Lonehill Store

unattended on Tuesday 20 December 2011, refusal to obey a reasonable instruction by not waiting for a “relief” first key carrier to be present, before leaving on 20 December 2011 and breach of the third respondent’s policy in that he left the Lonehill Store without a first key carrier being present. He was found guilty of all the charges and dismissed.

- [6] The third respondent’s version at the arbitration proceedings was given by its Corporate Line Regional Manager, namely, Mr Hugo van Niekerk (“Mr van Niekerk”) and its Fourway Store’s Assistant Store Manager, namely, Mr Archie Mashele (“Mr Mashele”).<sup>1</sup>
- [7] Mr van Niekerk testified in chief that the Store Manager, namely, Mr Ryan Clark (“Mr Clark”)<sup>2</sup> of the third respondent’s Lonehill Store was on leave. He received a call from the applicant on Monday 19 December 2011<sup>3</sup> stating to him that he had a problem with his motor vehicle, did not have transport and could not fulfil his duties as a manager and needed to leave early. He told the applicant that it was not possible because Mr Clark was on leave. He also told the applicant that he was the most senior employee in the store, the store was under his control and there was no one else to run the store. The applicant started arguing with him. He told the applicant because transport was the problem, he would provide transport or a taxi to take him home that night and bring him back in the morning but he could not leave early.
- [8] Mr van Niekerk also testified in chief that the applicant could not leave unless he could get a manager on the same level of the applicant from one of the third respondent’s other stores to relieve him. From his evidence, it is apparent that the applicant was a first key carrier or duty key holder (“first key carrier”). He explained a first key carrier to be the third respondent’s choice of who was in control of the store. A first key carrier was either the Store Manager or the Assistant Store Manager and under unforeseen

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<sup>1</sup> Mr Mashele was referred to throughout the arbitration by his first name, Archie.

<sup>2</sup> Mr Clark was referred to throughout the arbitration by his first name, Ryan or the Store Manager.

circumstances the Floor Manager subject to obtaining permission from the General Manager. This he explained with reference to the 'Key Control Policy' ("the Key Control Policy") as stipulated in the third respondent's standard operating procedure.

- [9] Mr van Niekerk also testified in chief that on Tuesday morning 20 December 2011,<sup>4</sup> he received a telephone call from the applicant saying that his problem with his vehicle was not solved. He told the applicant that Mr Clark was still on leave. A plan to assist the applicant was to get another Assistant Store Manager from another store to relieve him. However, because it was the week of Christmas, Store Managers were reluctant to let their Assistant Store Managers assist other stores. He told the applicant that he could not leave until a reliever arrived. He made a few telephone calls. Two Store Managers wanted to assist but it turned out that one of the Assistant Store Manager's of the third respondent's Cedar Road Store, namely, Roche<sup>5</sup> had a doctor's or dentist appointment so he had to look for someone else.<sup>6</sup> Eventually the Store Manager of the third respondent's Fourways Store told him that he would release his Assistant Store Manager, namely, Mr Mashele so that he could relieve the applicant. Mr Mashele went to relieve the applicant, phoned him and told him that when he arrived at the store the applicant was not there and had left three hours before he arrived.
- [10] Mr van Niekerk confirmed under cross-examination that transport was arranged to assist the applicant. He could not exactly remember whether it was before 12 o' clock that he found out whether Roche could not relieve the applicant but contended that it was in the morning and that he tried his level best to get a reliever by 12 o' clock to relieve the applicant but Store Managers were reluctant to let their Assistant Store Managers leave and he

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<sup>3</sup> It appears from Mr van Niekerk's testimony that he confused the dates on which the applicant committed the misconduct. However, this was clarified under cross-examination.

<sup>4</sup> This date was divulged to Mr van Niekerk when he was under cross-examination.

<sup>5</sup> Roche was identified by name only when Mr van Niekerk was under cross-examination. He is also referred to Rocha or Rochel in the transcript.

<sup>6</sup> Under cross-examination Mr van Niekerk admitted that he could not exactly remember the reason why Roche could not relieve the applicant.

told the applicant to wait for a reliever to arrive.

- [11] Under cross-examination with reference to Mr van Niekerk's evidence at the disciplinary hearing that the reliever he was referring to that would arrive at 12 o'clock to relieve the applicant was Roche and not Mr Mashele, he answered that he pointed out relentlessly that the applicant must wait for a reliever to arrive. Again with reference to the disciplinary hearing minutes it was put to him that Mr Mashele testified that it was around 3 o'clock that he was asked to relieve the applicant, he answered that he told the applicant that he would try his very best to get someone there at 12 o'clock and instructed him to wait until a reliever arrive which did not mean that someone would be there at 12 o'clock. With reference to the initiator's summary of the disciplinary hearing that it was clear that Roche was arranged as the applicant's reliever, he answered that the applicant did not obey his instruction in that he left on Tuesday without informing him that he had done so and when the reliever arrived he had already left.
- [12] Mr van Niekerk also contended under cross-examination that the store was in a mess and there were queues which he attributed to the applicant because Mr Clark was on leave. He admitted that the applicant was not charged for the store being in a mess.
- [13] The following parts of Mr van Niekerk's cross-examination bear special mention. The first relates to the applicant's reliance on a practice of leaving the Perishables Manager, namely Thabo ("Thabo") in charge when either he or Mr Clark was absent. To this, he maintained that Thabo was the Perishables Manager and not a Floor Manager although he performed some duties of a Floor Manager. This, he also contended did not make Thabo a Floor Manager. He could not provide an answer to an extract of Thabo's evidence at the disciplinary hearing which read:

*'Has Ryan [with reference to the store manager] at some stage in the absence of Mthembo [with reference to the applicant] left you with the store?*

*and the response there was for a few minutes yes.’ [My emphasis].<sup>7</sup>*

- [14] The second part of Mr van Niekerk’s cross-examination which bears special mention also relates to applicant’s reliance on a practice of leaving Thabo in charge when either he or Mr Clark was absent. To this, he confirmed that he gave permission for Thabo to be left in charge of the store when Mr Mashele went to assist the Cedar Road Store. This, he also contended was based on a business decision. Mr Mashele had to override the computer generated system which controlled the lights and other equipment at the Cedar Park Store so that it could trade late. Mr Mashele did so in approximately 50 minutes and still went back to the Lonehill Store to lock it whereas the applicant did not return to do so.
- [15] The third part of Mr van Niekerk’s cross-examination which bears special mention relates to the applicant’s reliance on his answer that there was no policy that he knew of which at all the times required a first key carrier to be in the store and that the Key Control Policy does not stipulate so. The applicant has placed reliance on his answer to bolster one of his grounds of review.<sup>8</sup>
- [16] Mr Mashele testified in chief that he was an Assistant Store Manager at the third respondent’s Victory Park Store. At the time that he relieved the applicant, he was the Assistant Store Manager at the third respondent’s Fourways Store. When he arrived to relieve the applicant at the store, he expected to find him there so that he could handover it to him.
- [17] Mr Mashele also testified in chief that on a previous occasion the third respondent’s Cedar Road Store Manager, namely, Busi, requested his assistance to reset the computer generated system so that her store could trade late. Mr van Niekerk gave him permission to assist her.

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<sup>7</sup> This answer of Thabo is nevertheless important in that it has a bearing on whether the applicant has made out a case that there was a practice or not.

<sup>8</sup> I deal with the weight of Mr van Niekerk answer in my evaluation of the evidence and the applicant’s grounds of review below.

- [18] Mr Mashele confirmed under cross-examination that when he assisted the third respondent's Cedar Road Store, he left Thabo in charge of the store with Mr van Niekerk's permission. Thabo was not a first key carrier. He left Thabo in charge of the Lonehill Store for 42 minutes without a first key carrier.
- [19] The applicant testified in chief that on 18 December 2011, he was involved in an accident with his motor vehicle. He pushed his motor vehicle to a garage. The Garage Manager allowed him to leave his motor vehicle there on condition that he collected it the next morning. Around 09:00 am the next morning, he phoned Mr van Niekerk and explained that he was involved in an accident the previous night and needed to fetch his motor vehicle. At first Mr van Niekerk did not grant him permission but eventually agreed that he would organise another manager to relieve him on 20 December 2011.
- [20] The applicant also testified in chief that around 09:00 Tuesday 20 December 2011, he phoned Mr van Niekerk again reminding him to organise a reliever. Mr van Niekerk responded that "Roche will be coming to the store at 12:00 and you can leave at 12:00."<sup>9</sup> At 12:00, no one relieved him. He was placed under pressure by the driver who he organised to tow his vehicle. He left Thabo in charge of the store. Thabo had previously looked after the store in his or Mr Clark's absence. He called Thabo between 16:30 and 16:45 and was surprised to find that Mr Mashele had come to relieve him and not Roche. He denied that he left the store unattended without a first key carrier and relied on the store having a team of managers available who were capable of running the store such as those in the bakery, fruit and vegetable departments and even contended the supervisors could do so. He contended that Mr van Niekerk's main concern was who was going to lock the store, that Roche carried a first key and that 'when it comes to the first key carrier the concern is who is going to lock store.'

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<sup>9</sup> The transcript records the applicant referring to Roche as Rochel.

- [21] The applicant agreed under cross-examination that there was uncontested evidence that a Store Manager or Assistant Store Manager could only 'assist' in certain functions in the store. He agreed that Thabo had no status at that point in time to perform any of the duties of a Store Manager or Assistant Store Manager but contended that there was a practice at the Lonehill Store of leaving Thabo to perform his or Mr Clark's duties in their absence. Insofar as Mr Clark was not asked to confirm such practice when he testified, he answered after some time that when he or Mr Clark was not there, then Thabo was in charge. It appears from this part of the transcript that Mr Clark was subpoenaed as his witness and did not confirm his version. I asked his representative why Mr Clark's evidence was not in the transcript. He told me Mr Clark's evidence was not relevant.<sup>10</sup>
- [22] The applicant disagreed under cross-examination that there were exceptional circumstances why Thabo was left in charge of the Lonehill Store when Mr Mashele assisted the Cedar Road Store to reset the computer generated system so that it could trade late. He was asked 'if Thabo was appointed and authorised to lock the store, why then the need to have a reliever?' He answered when he learned from Mr van Niekerk that Thabo had no authority to lock the store, he did not leave. Insofar as he in fact left the store, he answered that he had permission to leave the store. In respect of Mr Clark's evidence that he could only leave the store when a reliever arrived, he answered that his representative indicated that he will testify 'differently'.
- [23] The applicant also under cross-examination agreed that Mr van Niekerk had authority to make business decisions in order to limit damage insofar as the Cedar Road Store was concerned and later disagreed that could be done. As for long queues at the store, he answered that it was every manager and supervisors duty to deal with such problems only to agree that when a departmental manager was not performing his duty, it was the Assistant

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<sup>10</sup> I deal with this aspect further in my evaluation of the evidence and applicant's grounds of review.



Store Manager or Store Manager's duty to see that it was done. The applicant went on to contend that because he was given permission to leave he could not answer for what happened in his absence. Insofar as the reason why he was not allowed to leave the store being to deal with such problems and that was why a reliever was required to take over those duties, he reiterated the whole concern was about the first key carrier and locking the store and that it was also obvious that other managers could also attend to whatever other issues there were on the shop floor.

- [24] The applicant also contended under cross-examination that he did not phone Mr van Niekerk to enquire when the reliever was going to arrive because he was not told to wait for a reliever and the time frame given to him to leave was 12 o' clock.

#### Evaluation of the evidence and applicant's grounds of review

- [25] Mr van Niekerk's evidence was satisfactory and I accept that he confused the dates on which the incident occurred. This was in any event cleared by the applicant's representative during Mr van Niekerk's cross-examination. Throughout his evidence he emphasised that he told the applicant to wait for a reliever to arrive who had to be a first key carrier. He contended that the applicant just left disobeying his instruction to wait for a reliever to arrive without informing him when he left. Mr Mashele corroborated Mr van Niekerk's evidence. I found the applicant's testimony unsatisfactory in many respects. In my view, he attempted to avoid answering questions, this he did even when the simplest answers were required. Some of the applicant's answers under cross-examination suggest to me that he did not take his position seriously. I deal with their evidence further below.

- [26] For purposes of providing a judgment in this matter, it is important for me to highlight that Thabo was not called as a witness to corroborate any of the parties' evidence at the arbitration proceedings. However, from the questions put to Mr van Niekerk under cross-examination, it appeared that he was left

in charge of the store on his own without a first key carrier on two occasions. On one occasion, with reference to the disciplinary hearing minutes, it was apparent that Thabo testified at the disciplinary hearing that he was left in charge of the store in the absence of Mr Clark for only a few minutes. On the other occasion, Thabo relieved Mr Mashele when he went to reset the computer generated system at the Cedar Road Store so that it could trade late. It is also apparent from the transcript that Thabo was the Perishables Manager and not a first key carrier who was either a Store Manager, an Assistant Manager or under unforeseen circumstances a Floor Manager subject to obtaining permission from the General Manager as stipulated in the Key Control Policy. This is apparent from the evidence of the applicant, Mr van Niekerk and Mr Mashele and even those portions of Mr Clark's evidence which was put to the applicant under cross-examination.

- [27] It is also important for me to highlight that from the transcript and the Key Control Policy that the first key carrier is a senior managerial employee who is entrusted with very important managerial, supervisory and control duties and functions over the store and its employees. Some of such employee's duties and functions is the opening and closing of the store, supervision and discipline of its employees and to see to it that the store is run properly.
- [28] The next aspect that I need to highlight is that I asked the applicant's representative why Mr Clark's evidence was not transcribed. He stated to me that it was not relevant. From this I can only conclude that Mr Clark's evidence was intentionally not transcribed. I draw an adverse inference that Mr Clark's evidence was not transcribed because it was not favourable to the applicant as apparent from the questions posed to him under his cross-examination. It has been held in the Supreme Court of Appeal decision of *SACCAWU v President, Industrial Tribunal*<sup>11</sup> that an applicant who fails to place before the court the record (which I also interpret to mean a part thereof such as witness testimony) risks not discharging the onus, especially

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<sup>11</sup> 2001 (2) SA 277 (SCA) at para 7.

where allegations are placed in issue.

[29] Taking into account the aspects I have highlighted above, I proceed to evaluate the applicant's ground of review by applying the reasonable decision-maker test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>12</sup> The applicant couched his grounds of review in his review application by contending that the commissioner committed, *inter alia*, latent and/or process related irregularities and third respondent has made reference in its heads of argument to the Labour Appeal Court decision of *Herholdt v Nedbank Ltd and Others*<sup>13</sup> regarding awards being reviewable on the basis of both substantive and dialectical unreasonableness and contended that he did not make out a case on such grounds. In the third respondent's supplementary heads of argument reference was made to the Supreme Court of Appeal Court of *Heroldt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*,<sup>14</sup> from which I note Cachalia JA dealt with this nomenclature as follows:

[25] in summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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 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.'

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<sup>12</sup> [2007] 12 BLLR 1098 (CC) at para 110.

<sup>13</sup> [2012] 9 BLLR 857 (LAC) at para 25.

<sup>14</sup> [2013] 11 BLLR 1074 (SCA).

- [30] The applicant's first ground of review is that the commissioner committed a gross irregularity in that she misconstrued the material evidence before her in that he testified that he was given 'clear permission' to leave at 12:00 on 20 December 2011. He also submitted under this ground of review that the only condition to him leaving early was that he could leave at 12:00 on 20 December 2011.
- [31] This ground of review must be measured against the third respondent's Key Control Policy and whether this policy was applied within its stores.
- [32] Of importance to me is that on the applicant's version, he attempted to get permission to attend to his motor vehicle from 19 December 2011. Also on his own version Mr van Niekerk told him that Roche would relieve him at 12:00 on 20 December 2011. On Mr van Niekerk's version, the applicant could only leave once a manager on his level was found to relieve him and he had to wait for the reliever to arrive.
- [33] I have difficulty accepting the applicant's version. On his version, it was only a time factor. I cannot accept his version because if it was true then nothing stopped Mr van Niekerk from already giving him permission to leave on 19 December 2011 as Thabo could have already relieved him on that date making a reliever on his level unnecessary. Also, on his own version why would it have been necessary for Mr van Niekerk to have told him that Roche would come to relieve him. Further on his own version he waited for Roche to relieve him who was a first key carrier. His version points towards Mr van Niekerk's version being true that he had to wait for a reliever to arrive and that he could only be relieved by a first key carrier. He also admitted that Mr van Niekerk told him that Thabo had no authority to lock the store.
- [34] The applicant has also submitted under this ground of review that it was neither an express nor implied term of the third respondent's Key Control Policy that prevented or restricted a first key carrier from leaving the store during business hours in the absence of another first key carrier. The Key

Control Policy does not stipulate so. I agree that Mr van Niekerk could not point out where it says so. However, in my view, it still did not mean that he proved that he could leave the store in the absence of a first key carrier as his own evidence as well as that of Mr van Niekerk, Mr Mashele and the extracts of Mr Clark's evidence put to him under cross-examination suggests he could not do so.

- [35] Further on the applicant's version in his or Mr Clark's absence, Thabo took charge of the store. On the third respondent's version, that would have meant that in terms of the Key Control Policy both he and Mr Clark had breached such policy. Mr Clark's evidence was not made available to the court to decide for itself whether there was such a practice that existed. The applicant chose not to transcribe Mr Clark's testimony. However, it was still apparent from the applicant's own evidence under cross-examination that his version was not corroborated by Mr Clark. It was also apparent from the disciplinary record minutes which the applicant's representative relied on to cross-examine Mr van Niekerk that Thabo testified in the disciplinary hearing that Mr Clark had left him alone for only a few minutes which also appears to be confined to only one occasion.
- [36] In so far as Mr Mashele assisting the Cedar Road Store to reset the computer generated system so that it could trade late leaving Thabo in charge, this, in my view, also cannot assist the applicant. I find that Mr Mashele did so for a short period of time with the permission of Mr van Niekerk. This was also a decision which Mr van Niekerk could make having regard to his seniority, powers and authority.
- [37] In my view, the commissioner correctly concluded there were certain functions that an Assistant Store Manager and a Store Manager could perform and that the applicant was at least aware by 19 December 2011 that Thabo did not have authority to perform such functions. To this, I would add that the applicant acknowledged under cross-examination that Mr van Niekerk told him that Thabo had no authority to lock the store. I would further

add that had Thabo had the requisite authority then the applicant could have simply been relieved by him on 19 December 2011. The applicant also admitted under cross-examination that Thabo had no status at that point in time to perform any of the duties of a Store Manager or Assistant Store Manager.

- [38] The applicant's second ground of review is that the commissioner exceeded her powers by not applying her mind to the merits of the matter in that she 'appeared to be predisposed to favour' the third respondent. He also submitted under this ground of review that the commissioner did not take into account that he was selectively disciplined and found that the third respondent was not inconsistent with its treatment of other employees.
- [39] In support of this ground of review, the applicant submitted that the video evidence which was presented to the commissioner showed that Mr Clark had left the store without another first key carrier relieving him. He also stated that the third respondent did not produce any video evidence showing when and after how long Mr Clark took to come back from Woolworths. Mr Clark's evidence was not transcribed but it was still apparent from the transcript that he testified that he went to Woolworths. In response thereto, the third respondent contended that the commissioner properly evaluated Mr Clark's reasons for leaving the store, the time he was away from the store and that the explanation for his return was not captured on the same video because he returned to the store through the service entrance.<sup>15</sup>
- [40] The applicant also under this ground of review once again relied on Mr Mashele leaving Thabo in charge in order to reset the computer generated system at the third respondent's Cedar Road Store so that it could trade late.
- [41] The commissioner agreed with the applicant that when Mr Mashele and Mr Clark left the store on both occasions which I have referred to above, they left the store in the absence of a first key carrier. The commissioner,

however, agreed with the third respondent that its business required a certain amount of flexibility in application of its policies and business needs. The commissioner went on to conclude that both those occasions were operationally justified and properly authorised which could not be said about the applicant who left the store for personal reasons and without proper authorisation. I agree with the commissioner's reasoning and add thereto that when the applicant on his version realised that the reliever had not arrived, he should have at least called Mr van Niekerk to inform him that he was leaving which he did not do. The applicant was tasked with the control and management of the store and I would have at least expected him to do so.

[42] I reiterate that Mr Clark's evidence was not transcribed by the applicant. However, I once again take into account that from the portions of Mr Clark's evidence which was put to him under cross-examination, Mr Clark did not support his testimony. In my view, but for relying on the third respondent not placing video evidence before the commissioner as to when Mr Clark returned from Woolworths, I find that the applicant could not refute that Mr Clark in fact went to Woolworth's or returned through the service entrance. In fact, the applicant has not placed any version before me contradicting the third respondent's version or for that matter denying that Mr Clark returned through the service entrance.<sup>16</sup>

[43] I reiterate that Thabo was not called as a witness at the arbitration proceedings but it was apparent from the disciplinary record minutes which the applicant's representative relied on to cross-examine Mr van Niekerk that he testified at the disciplinary hearing that he was left in charge of the store by Mr Clark for a few minutes which also appears to be confined to only one occasion. I also reiterate my view that when Mr Mashele left Thabo in charge of the store to reset the computer generated system at the Cedar Road Store so that it could trade late, he did so with the permission of Mr van Niekerk which I find was justifiable in terms of the third respondent's business needs.

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<sup>15</sup> This contention is apparent from the third respondent's answering affidavit.

Mr Mashele also took a very short period of time to do so.

- [44] In my view, the applicant did not make out a case that there was a practice of leaving Thabo in charge in either his or Mr Clark's absence and those occasions which he relied on cannot be construed as a practice. Those occasions fall short of what may be construed as a practice.
- [45] The applicant's third and fourth grounds of review are that the commissioner committed a gross irregularity by concluding that he was correctly found guilty of a refusal to obey a lawful and reasonable instruction and there were no grounds to find that he was guilty of gross insubordination, respectively.
- [46] The applicant's representative drew my attention to the Industrial Court decision of *Commercial Catering and Allied Workers Union of SA and Another v Wooltru t/a Woolworths (Randburg)*<sup>17</sup> where it was held that insubordination must be serious to warrant dismissal.
- [47] I cannot fault the commissioner for concluding that the applicant had not obeyed a lawful and reasonable instruction and that it constituted gross insubordination. In my view, the evidence which was before the commissioner suggests so. In particular, it is apparent from transcript that Mr Clark was on leave and in terms of the third respondent's Key Control Policy the applicant could only be relieved by an employee who was a first key carrier (that is, an employee who was on the same level as the applicant was on or for that matter a Store Manager and under unforeseen circumstances a Floor Manager). Mr van Niekerk's evidence was corroborated by Mr Mashele who testified that when he went to relieve the applicant he expected to find him there to handover the store to him. Further, from the applicant's cross-examination, he could not dispute that Mr Clark agreed with terms of the third respondent's Key Control Policy. In fact, the applicant admitted that Thabo had no status at that point in time to perform any of the duties of a

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<sup>16</sup> The applicant did not refute the third's respondent's allegations in his replying affidavit.

<sup>17</sup> (1989) 10 ILJ 311 (IC) at 315H.



Store Manager or Assistant Store Manager and that Mr van Niekerk told him that Thabo had no authority to lock the store. From this and taking into account the nature of his duties, functions and his seniority, I can only conclude that he refused to obey a lawful and reasonable instruction and was as such guilty of gross insubordination.

[48] For the reasons stated above, I find that the commissioner did not commit any reviewable irregularities in respect of the applicant's grounds of review. This conclusion, I have reached on the evidence (material) which was before the commissioner.

[49] In the circumstances, I cannot uphold the applicant's grounds of review.

#### Conclusion

[50] In the circumstances, I make the following orders:

50.1 The review application is dismissed.

50.2 There is no order as to costs.<sup>18</sup>

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Ram AJ

Acting Judge of the Labour Court of South Africa

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<sup>18</sup> I have decided not to grant costs against the applicant in view the third respondent continued relationship with the applicant's trade union, namely, JAMAFO.

Appearances:

For the applicant: Mr J Mphahlele of JAMAFO.

For the third respondent: Mr K Makapane of Bowman Gilfillan Inc.

Labour Court