

SOUTH AFRICA / JUDGMENT

Pienaar v Manzana NO and Others (JR2907/12) [2016] ZALCJHB 169 (20 April 2016) [2016] ZALCJHB 169

COURT

Labour Court Johannesburg

BEFORE

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CASE / FILE NUMBER

JR2907/12

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Not

Reportable

CASE

No: JR2907/12

In

the matter between:-

RODNEY

DAVID

PIENAAR

Applicant

and

DAISEY

MANZANA N.O.

First Respondent

METAL AND ENGINEERING

INDUSTRIES

BARGAINING

COUNCIL

Second Respondent

MURRAY

AND ROBERTS PROJECTS (PTY) LTD

Third Respondent

Heard:	26 November 2015
Delivered:	20 April 2016
Summary:	Review of a pre-dismissal award – dismissal for misconduct relating to carelessness or failure to exercise due care or attention by senior manager – a repeated failure to comply with instructions by a senior person is serious misconduct – award not shown to be unreasonable.

JUDGMENT

Introduction

[1] The Applicant has launched review proceedings in terms of section 145 (2) of the Labour Relations Act (the Act)[1] against the award of the First Respondent in concluding that the Applicant was guilty of failing to exercise due care or attention in the performance of required tasks. A pre-dismissal arbitration in terms of section 188A of the Act was held by the Second Respondent to determine whether or not the

Applicant was guilty of an offence and if so, determine the appropriate relief in terms of the Project Labour Agreement in existence between the parties. The Third Respondent opposed the review application.

[2] The Court grants the Applicant condonation for the late filing of the notice in terms of Rule 7A (8) (a) which was filed some five months late, the late filing of his heads of argument, only filed on 19 June 2014, some 48 days late and the Third Respondent is granted condonation for the late filing of its opposing affidavit.

The Factual Background

[3] The Applicant entered into a 5 years fixed term contract with the Third Respondent during March 2009. He was appointed as a Project Control Manager in respect of the role played by the Third Respondent in the erection of the Kusile Power Station in Mpumalanga. The Third Respondent was sub-contracted by Hitachi Power Africa (Pty) Limited, “HPA” or “the Client” to perform

certain functions in the erection of the Kusile Power Construction Project (“KPCP”) on behalf of Eskom. This erection of a power station was of national strategic importance to ensure that the country’s power requirements are sustainable into the future. Sometime in April 2012 Mr Don Jakins also joined the employment of the Third Respondent, holding the position of a Commercial Executive at the Head Office in Bedfordview.

- [4] The Applicant was responsible inter alia, for change management, forecasting, document control, Information Technology and cash forecast relating to the site and overall responsibilities relating to the business needs of the KPCP. Once Mr Jakins joined the Respondent he acquainted himself with the personnel, the project, the project teams, and what he called the frustrations and the concerns of the individuals there were at the time. According to him the Applicant's name came up many times, in terms of complications, he was of the view that the Applicant had a reputation of being very good at presenting glossy covered documents, lots of paper, but very little value, leading to much frustration from predominantly people in the head office, people in the functional sector. To him, on site where the Applicant worked, these issues or concerns, were not really apparent, in other words, these operational reporting lines were so busy dealing with trying to get the job done, they did not really have time to deal with the Applicant's commercial cost reporting time issues, in other words, pure reliance on the Applicant's experience and capability in looking after those projects, risks and opportunities.
- [5] In the first few months, Mr Jakins formulated an opinion that the Applicant was not delivering what he needed to deliver, he was not looking after many of the basic cost control type issues that were required, particularly the projects of this size, a mega project. As a consequence of that, he arranged for a performance review on 25 July 2012, which was part of the company's standard performance review processes. He clarified with Applicant's Operational Manager, Mr Ged Evette, through that process, what his concerns were. According to him Mr Evetts became very aware through that process, of the shortcomings and that he was largely unaware until that time.
- [6] Mr Jakins regarded the performance of the Applicant as a significant failure in the work he was to perform and on 15 August 2012 he issued a first written warning for him. On 4 September 2012 when Mr Jakins regarded the work of the Applicant as short responses to sometimes complicated issues, having huge credibility consequences in the business he issued the Applicant with a final written warning. He did not challenge the warnings issued against him even though Mr Jakins did not elicit the help of the human resources personnel, as he ought to have. The Applicant was subsequently charged with acts of misconduct relating to carelessness/failure to exercise due care or attention in the performance of his task, disregarding specifications or instructions relating to his work and repeatedly failing to submit numerous tasks in line with set deadlines. At that pre-dismissal arbitration in terms of section 188A of the Act he was found guilty and was dismissed.

Evidence led at arbitration

1. Third Respondent's version

- [7] The dismissal of the Applicant was common cause. The Third Respondent had to prove the fairness thereof and it called and led the evidence of only one witness, Mr Jakins. He said that he regarded the performance of the Applicant as a significant failure in the work he was supposed to perform. As a consequence of that he met and agreed with the Applicant on the

actions necessary to mitigate their issues of concern. He said that he drafted a document which clearly set out what issues he had and broke them up into several categories. Under each category, he listed several points as to what the concerns were. He listed the actions which he believed were necessary, very long low hanging actions, the immediate actions necessary to be put in place; controls and procedures in managing the shortcomings. There were 11 such actions, some of them in his mind, very simple, others were long outstanding type issues, which included basic cost reporting. On any construction project, particularly important on a big project like this, he said that it was necessary to report on cost and revenue on a continuous basis, managed through a monthly review process, which provided management with an understanding of where they are making money, or where they are losing money. And that was essentially the primary function of the project control department, and therefore the Applicant's managing responsibility.

- [8] So, the first four tasks of those 11 were related to resolving the cost reporting issue, the set deadlines, some of them to be reported on a week or two. He then wrote many emails, exchanged emails, discussed meetings, had another colleague, have him try and assist, and they agreed on the deadline. When that deadline was, according to him not met, they set another deadline, and again that deadline was not met. He had another colleague come down to try and understand what was going on, eventually they concluded that the set target had not been met. The Applicant asked for an explanation why it had not been met. He was told that nothing was forthcoming in what they expected. As a consequence of that significant failure, Mr Jakins issued the first written warning, for the Applicant. His evidence was that he sat down with the Applicant, discussed in great detail what was his frustration and how important it was to get that correct. He said that the implication of not having cost reports on a project of that nature was in the magnitude of tens of million rands.
- [9] He said that they then agreed at that point to stock the cost reporting system that they were doing, and to try to implement a simpler cost reporting process. They continued to proceed with the remaining tasks as agreed in the performance review process. There were then seven tasks to be done, He highlighted in emails, reminding the Applicant what needed to be done within each task, yet none of those tasks were, according to him, met.
- [10] He said that probably two weeks after the final deadline had transpired he then received seven emails, short paragraphed emails

from the Applicant. The Applicant was briefly addressing each one of the tasks which Mr Jakins assumed was the Applicant's

suggestion that by virtue of those email reports, the problems had then gone away. It was not. He called the Applicant to the office,

sat him down, and told him that it was not what he had hoped to be achieved as it was not what they discussed in their various

discussions. He described what the Applicant had done as short responses to sometimes complicated issues, having huge credibility

consequences in the business. He was not going to solve the problem for the Applicant and he issued him a final written warning on 4 September 2012. It was issued for a misconduct described as:

“Misconduct in that you failed to follow a specific, reasonable and lawful instructions, and for the general dereliction of your duties...”

[11] Evidence is that the Applicant and Mr Jakins sat down, after that final written warning, through a six hour discussion, going through every single issue. They went through every single one of the 11 points that had been raised. Mr Jakins explained what he believed was incorrect and what they needed to do to improve the situation. From what was asked then by the Applicant, made Mr Jakins feel that the Applicant left that meeting content that he knew exactly what he needed to do, and that things would change.

[12] He said that in the month of September 2012, they had two primary deliverables, one was the cost to be forecast, it was a quarterly

business forecast for Murray & Roberts as a company, part of which came from Kusile, and the monthly standard project review

process. The quarterly forecast was scheduled to be delivered on Friday 21 September 2012. In preparation for that, he said that he called the Applicant, and his financial manager, to the head office in Woodmead, in Bedfordview, and the people from the Maduki Project, and they set together from, 15:00 in the afternoon until 21:00 at night, going through every single point in detail, understanding what was required in terms of delivering that forecast.

[13] His evidence was that he repeated several times that it was imperative that he was given the information by the Friday, and the purpose of the Monday meeting was to ensure that there were no problems in the delivery. He averred that he insisted that on the next Friday the Applicant was to provide him with what the Applicant had such that he could at least work on the weekend and ensure that by the following week, either on Monday or Tuesday, he could deliver to the financial department, and they in turn could deliver to Murray & Roberts Holdings. Neither on that Friday nor on Monday did he receive anything from the Applicant until on Tuesday when he received information through the Applicant's subordinate, Teddy that the Applicant was not going to deliver as planned. It was only on the follow Thursday that he received something from the Applicant. By then significant complications in terms of managing Murray & Roberts obligations had been caused.

[14] Mr Jakins said that on 27 September 2012 he received some report but it did not come from the Applicant. It did not come with an explanation through either a phone call, or an email. He then arranged a meeting for the next day with the gentlemen who sent the report to him to try to establish what was going on. Thereafter he communicated with them on a continuous basis. He said that there was no way the Applicant could have misunderstood the

instruction that he needed to make his submissions on Friday, and at the latest, by Monday. He said that he had given a clear and reasonable instruction. as he went through the trouble of arranging that Monday meeting, to sit for several hours going through details such that there could be no misunderstanding. All the issues that could possibly complicate the process were discussed. It was a reasonable request with timeframe allowing for enough information available.

- [15] The only real change, he said, was a presentation which had a few assumptions and changes that were discussed on the Monday. The other point of reasonableness he described was that he specifically asked that no matter what state the report was, it had to be transferred to him. In other words, if there was a complication in dealing with any particular aspect, that had to be highlighted as something to be dealt with later, allowing him to make a decision if needs be, not necessarily the final version of the quarterly report. The report had to be submitted to the holding company. The second issue was the monthly report, which formed part of the standard monthly project review which took place on 20 September 2012. That review required the Applicant to prepare a monthly report, part of which was the monthly cost report, as a standard monthly exercise done in all project.
- [16] The biggest concern or failure that the project had suffered as a consequence was the lack of cost reporting which led to the first written warning, and then which required or necessitated changes in the cost reporting philosophy. He said that they simplified it, such that it became easier to do and understand, and although it did not provide quite as much information, would at least mitigate the risk. The cost report was initially to be presented in the August 2012 meeting. It was then decided to delay the next monthly meeting of 20 September 2012 by a week or two, to provide the Applicant with ample time to manage the requirements as part of many discussions, many reviews, many repetitions, and the exchange of many emails, many of which were sitting in the file for reference. He said that what was finally submitted was not accurate, had errors and it could not be presented to the management team, such that informed decisions could not be made and the report could certainly not be presented to the company's client. It was the same cost report that should have been provided on day one of the project, and was still not being provided 18 months or two years into the project. So, the same cost report that has been in discussion for 18 months led to the first written warning.
- [17] He averred that the final written warning was for continued failure to correctly follow instructions, and incidences with the frustration here being that the issues had become simplified which suggested that the Applicant could not have even looked at them, never mind taking the trouble to ensure that they were correct, which they needed to be, as part of a cost report. As the Cost Control Manager the Applicant was in senior management position. In that position it would be logical to reason that the company would require from him, accurate reports on time.

- [18] During the cross-examination the Applicant put it to Mr Jakins that his reporting relationship had never been officially communicated to the Applicant, namely that he would report to Mr Jakins. The Applicant put it to Mr Jakins that there were two projects which had to be run completely independently as decentralised units, and that there was a Project Director for each one of those projects and he reported directly to that Project Director. On the job specification, it specifically stated that the Project Control Manager reported to the Project Director. Mr Jakins agreed with the proposal. The Applicant again put it that there had been a reporting function to a corporate, and that had been fulfilled over the years, before Mr Jakins joined the project, and there was no issue about that. After Mr Jakins joined the project, the Applicant could not recall any one saying that he had to report to Mr Jakins and what he had to report for.
- [19] Mr Jakins then said that he could not comment on whether there was any formal communication that was sent out. He said that as the Applicant said that Mr Jakins replaced somebody else, through their seven months of working together, it was abundantly clear what Mr Jakins' role was, as he had explained that role many times, what his functional role was and did explain many times what his expectations regarding the Applicant were. He said that he had been through many discussions with the Applicant and those were written down. If there was any concern as to his position and why he was asking for reports the Applicant could have asked at any point in time to clear any confusion. The Applicant put to Mr Jakins that he reported to the Project Director, and that monthly reports that Mr Jakins referred to, were presented by the Project Director in terms of all sorts of aspects to corporate management. He said that it was never, had never been and would never be his report. Mr Jakins answered by saying that in theory, the Applicant reported to the Project Director but in practice the Applicant was required to report to him because the Project Director in this particular case, was not familiar with the commercial side of business, and he relied solely on the Applicant to report on it, and to manage it.
- [20] The Applicant put it to Mr Jakins that as an Operations Manager he would sit down and review those reports so that the Operations

Directors were aware of what was in the report as far as costing and other aspects of concern before they were presented. Mr Jakins

retorted by saying that the Operations Directors had never reported on the cost control aspect of this job. Instead, they relied on the Applicant. Mr Jakins said that even if the Operations Directors were aware of the costing reports they might not express the same dissatisfaction as him because they did not understand it, and his job was to make sure that the skill that they were not supposed to have as Operational Engineers, was managed through the Applicant. So he made sure that their risk was protected. He said that in that particular case the Applicant was looking at the Operations Directors and he was suggesting that they were happy with him, but they did not have the skill or the understanding of the project control environment, to be able to comment thereon.

- [21] The Applicant contended in cross-examination that the Project Director was very aware of the aspect of cost control and was more than capable of presenting that report. Mr Jakins said that the point was that the Applicant was responsible for the elements within that report associated with cost control, whether or not Mr Evetts or Ged, as Operations Directors, accepted the reports. He said that he told the Applicant repeatedly that he was not accept the report and had explained to the Applicant what he did not accept and had asked the Applicant to correct it. What he said was the issue was why they had failed to manage that process, whether or not Mr Evetts or Ged accepted it. By way of example he told the Applicant to manage basic deadlines.
- [22] In the last cost report, Mr Jakins included, in the document read by the Applicant, by way of illustration, a table on the top of page 11 of the bundle. Those were cost reports. He said that one of their primary functions was to provide an estimate of the cost to completion of this project. In April 2012, the cost to completion was valued at R6.248 billion. In June 2012, it came down to R4.5 billion. In July 2012 it went back up to R5.27 billion. Then in August 2012, the most important deadline of the lot, where additional two weeks were done, a simplified cost report was put in place to manage it, suddenly the budget went up to R6.6 billion. He said that he suggested in that cost report meeting that the report was completely unacceptable for many reasons not only the fact that the numbers seem to be incorrect, and that the Applicant was quickly to review and send the corrective report, which he then did, and the figure came down to R5.13 billion. The difference between the numbers was R1.5 billion, R1.4 billion and R700 million; Those figures, he said, were such outrageous that they rendered the whole exercise completely futile, and that the company's credibility on the project, as a consequence, had suffered enormously, and continued to suffer. As he testified he said that there was not a cost report that he could read which provided any confidence. Whether Joe or Ged accepted that, which they obviously had, was just an illustration of the fact that they were not having the time to go into the details, and as consequence, were solely reliant on the Applicant. He said that the business was reliant on him to make sure that those discrepancies were corrected. He said that the relationship between management and the Applicant had irretrievably broken down.

2. Applicant's version

- [23] He held the title of a Project Controls Manager and reported to the Project Director who was part of the project and specifically for the development and implementation of project controls systems, processes and procedures in line with client's needs. At the time there was very little existing for the project and the objective of the position was to put in place and manage the whole project controls' function which was laid out in various parts of the documents filed for arbitration. The KPCP Project Labour Agreement (PLA) envisaged that as he was appointed on limited duration contract in a specialist position, it would be until those services were no longer required on the project, which would basically be until the end of the project, so his expectation was always to provide the full services for the duration of the Eskom contract. Then as this project started off, there was very little and he was

engaged to establish all the systems, that was exactly what he started doing back in 2009 when they were still at Head Office, before they relocated to the site in February or March 2011, so they were about two years in the head office before they relocated to the site.

- [24] There were no Murray and Roberts projects at that stage as they were still in the process of being formed. He then made a presentation

that went right up to senior executive level in Murray and Roberts. He referred to what he called a JDE integration system, saying it was a financial control system, the change management system, which at that stage had not been developed, an estimating system which had been partially developed and what was commonly called CCS which was the estimating database control system and all of those integrated into the project management system which was a .proprietary system called "Prism", All of those systems had to be integrated. At that stage, there was no integration, the usage and the setting up of those systems had to be totally developed and integrated into the Prism costing system that interfaced with financial areas, procurement areas, warehousing, time-management, external actions which happened and measurement of progress and others. What ever services were provided, he said, had to be of use to the supervision which worked at the sub-system level, that then rolled up to the construction level where they provided services to the construction managers at the system level.

- [25] He said that, that then escalated to project management which was Project Director. Directors were the senior people on the project and that was done to Project Manager at boiler level and then that information all escalated into a corporate reporting function which reported to project level. So there was a total integration of all of these functions, together with the requirement to report at those different levels, the corporate reporting responsibility which was a couple of pages inside the project report which goes to corporate. There was a requirement to report for supervisory level on the project, so that the supervisors could know what was happening so they could control their work better, and the system that was introduced here was an activity card system which was a unique system that they came up with for this project. He dealt with various reporting levels and the data relating to such levels. He showed where all the information that came from the field progress measurement system, was collated onto a performance indicator, KPI sheet, and all of that information filled in and the earnings percentage going from that system into the cost control system, the prism system that he earlier referred to, saying those were actual real-live pieces of paper, and not theoretical pieces of paper, what he said was happening on a day by day basis on the project.

- [26] He said that as Murray and Roberts, were a sub-contractor for Hitachi, they had a certain obligation to let Hitachi know about

certain things and there were various dates on which to make such reports. That started off with an event which was identified. The one became claims and the other, variations as an overview of the early warning procedure, the claim notices and the various things that were contractually necessary to be tracked so that change management could actually be effected on the project.

- [27] On reporting lines his evidence was that he was appointed as project controls manager and the various aspects reporting to him were a Lead Planner, a Project Systems Person, a Lead Cost Controller, a Lead Documents Controller and an Estimator. He referred to an organogram showing people that were reporting directly to the Project Manager as he was called then, Director later on and he said that he was reporting as Project Controls Manager at that level directly to the Project Director or Project Manager, in accordance with the job description that they had earlier on, all the various functions were laid out in that manpower, as they were at that stage. He said that all of those people reporting to the Project Director produced the report which was submitted to corporate. According to him there was a document they had which showed how the project services relate back to management and referred to an organogram with the first line, in the grey in the management structure, where we there were the project financial, project commercial, project operational, project management and the left-hand side, project services with all the information flowing through to each of those levels of responsibility and that all went, at project management level, into the monthly reports which were then reported up at corporate level. Later there was a slight change.
- [28] Yet again, there was another change on site, because they then came up with the Operations Director and the Commercial Director reporting to the Project Director and they decided that project services would report to the Commercial Director who was Mr Tim Howard at that stage. He then reported to the Commercial Director who reported to the Project Director, who went up to commercial level. That changed a little bit again and they had another one where that structure got out of the equation and the Operations Manager or Director was then Jeff with the total structure reporting to him. He referred to his performance reviews starting with the one for June 2010 where he was rated as “full” and “G” is growth. The next one was for June 2011 where the performance changed to “exceptional” with the rationale thereof commenting about the department he was a Manager of saying:
- “The Department had an exceptional six months in productivity, professionalism, creativity and performance. This is in no small measure due to its manager.”*
- [29] For the period June 2012 he said that he was rated as “full and mastery” with an exception in one of the named aspects. Now for the period from June 2012, despite that review done, his performance bonus was withheld. He said that there was an email document on 10 September 2012 which was addressed to Messrs Kas Teddie Rasnavalla, Ben van der Merwe, who worked with him and copied to the Project Construction Operations Director, to Mr Jakins, to Mr Adrian Plantemaar who was the Financial Director and to him. It set out the requirements of corporate which said that they needed to submit the first assessment on 1 October 2012 to include costs forecasts. He said that the email was clearly addressed specifically to people who were responsible for the drawing of the report. Another email before that one read:

“Hi guys, when can we meet to discuss this and Rodney,

please set up a meeting to tell us how you intend undertaking this exercise.”

[30] He said that Jeff was then the person who had to review the documentation before they were submitted to corporate by 1 October

2012. He denied that the impact of this failure to comply with the corporate procedures and deadlines was of substantial effect to the potential impact in respect of the company's business and group. He conceded that there were instructions issued by Mr Jakins that he complied with from May 2012 when Mr Jakins joined the respondent. Such instructions, he said were however not to conflict with those issued by his line manager otherwise it would be something for Mr Jakins to resolve with his line manager. He disputed any suggestion that he was to have rendered a report to Mr Jakins even if such was incomplete by 1 October 2012, saying that the instruction he had from his line manager, Mr Evetts was one reading:

“We need to submit the first assessment at the beginning of October, please can you send me your forecast by 1 October so that we have enough time to review and submit.”

[31] He maintained that he could not send things through to Mr Jakins that Mr Evetts was still busy with because he was his line manager. While conceding that he followed instructions from Mr Jacobs as the predecessor to Mr Jakins, he referred to such as requests, saying there is a subtle difference between instructions and requests. He concluded by saying that requests from a corporate office were always permissible and would be done in the spirit of co-operation while formal instructions came through line management.

Chief findings of the First Respondent and grounds for review

[32] The grounds for review indicate the chief findings sought to be assailed by the Applicant. The Applicant identified ten factual bases in terms of which the award should be reviewed and set aside. A number of these grounds are inter-related and can be grouped together as correctly done by the third Respondent. The submission was that the First Respondent committed a gross irregularity and thus reached an unreasonable decision in the following circumstances:

Grounds 1 and 6

She considered the alleged 11 activities as indicative of the applicant's failure to perform.

Grounds 2 and 10

The First Respondent dismissed the Applicant's reference to his previous assessment by his immediate superior, Mr Hickson, on the grounds that the Applicant conceded that Mr Hickson did not have the required skill to assess performance in relation to the needs of the client. There had been no complaint in regard to the applicant's interaction with the client. The Applicant's

direct reporting line was to the Project Director at the construction site. The First Respondent did not take this into consideration or that the Applicant's direct superior never expressed dissatisfaction with his level of performance. Mr Vorster, representing the Third Respondent, acknowledged that the Applicant had a "dotted reporting line" to Mr. Jakins.

Grounds 3, 7 and 8

When Mr. Jakins gave evidence about how the Applicant's contribution to the project review was deficient, he did not give detail and made sweeping statements that were not substantiated. The Applicant gave evidence referring to the contribution and he said that it was accurate and capable of substantiation and he referred to a voluminous file. The charges upon which the Applicant was dismissed were formulated in the vaguest of terms and the only real flesh given to the first charge, concerning a defective monthly review, in the evidence of Mr. Jakins, was the substantial variation in the overall cost of the project. The First Respondent stopped the Applicant going into detail when he attempted to show that the monthly report was not deficient.

Grounds 4 and 9

The essence of the charges and the findings against the Applicant emanating from the quarterly review was that it was delivered late and that the Applicant failed to notify Mr. Jakins of delays in the production. And yet, the emails concerning the delay in submitting the quarterly review which was before the First Respondent and referred to, disclosed that the Applicant's line superior needed to be apprised of the latest figures sent to Mr. Jakins before they were sent.

Ground 5

The First Respondent stated in her award that the Applicant conceded that he ignored the previous warnings given to him. The Applicant voiced reservations about the manner in which those warnings came into being, but it was never testified by the Applicant that he ignored it.

[33] In opposing this application the Third Respondent submitted that the Applicant adopted the piecemeal approach which was rejected by the Labour Appeal Court[2]. It then denied every factual and legal averment made by the Applicant in support of the review Application.

Evaluation.

[34] The legal principles regulating the reviewability of an arbitration award in terms of the Act have become trite. Where, as in the present matter, 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 whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could not come on the available material[3].

[35] A consideration of the grounds for review outlined by the Applicant brings to mind a reflection on the guide provided by schedule 8 of the Code of Good Practice – Dismissal which states in item 7 that:

“Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.”

[36] The Third Respondent charged and dismissed the Applicant for misconduct relating to carelessness or failure to exercise due care or attention in the performance of his task, disregarding specifications or instructions relating to his work and repeatedly failing to submit numerous tasks in line with set deadlines. In support of the allegations Mr Jakins said that the Applicant had a reputation of being very good at presenting glossy covered documents with lots of paper. The version of the Applicant was that he received no criticisms from his line manager who actually rated him highly. In respect of the high ratings given to the Applicant Mr Jakins said that the reports of the Applicant had little value, leading to much frustration from predominantly people in the head office and people in the functional sector. To him, on site where the Applicant worked, these issues or concerns were not really apparent because the operational reporting lines were so busy dealing with trying to get the job done, they did not really have time to deal with the Applicant's commercial cost reporting time issues (my emphasis). In other words, there was pure reliance on the Applicant's experience and capability in looking after those

projects, risks and opportunities. It was on these bases that Mr Jakins decided to intervene by dealing directly with the Applicant,

instead of allowing the status quo ante of the Applicant continuing to report to his line manager on commercial cost reporting.

[37] In terms of his contract of employment the Applicant had to report directly to his line manager. However, Mt Jakins, being a member of the Executive of the Third Respondent had the mandate or authority to change reporting lines. In any event the Applicant did not challenge this authority. On the contrary, his closing remarks recognised such authority. Clearly, the intervention was justifiable when the challenges of the Third Respondent and its client in the project are considered. Mr Jakins testified about those challenges. He is the one to know better about the challenges as he was based at the head office of the Third Respondent. The first Respondent accepted his evidence and there is no basis to disturb that finding. In the circumstances, the intervention is found to have been reasonable. The

intervention took the form of instructions given to the Applicant for compliance. Similarly, those instructions were reasonable. It was never contested that the Applicant was always aware of the instruction given to him by Mr Jakins. In fact, the Applicant was a party in various meetings convened by Mr Jakins. The rule of the incumbent complying with instructions of senior personnel appears to have consistently been applied at the workplace of the third Respondent. The Applicant has not challenged this aspect. The project was relatively new and Mr Jakins had joined the Third Respondent in the last seven months of the project. So the relations between the Applicant and Mr Jakins were still new. There had already been a continuous communication between them in those seven months or so.

- [38] Mr Jakins gave the Applicant various instructions on what to do, how to do it and when to comply for the period August 2012 to early October 2012. When the Applicant said that he complied with instructions and directives of his line manager he was in fact, conceding that he failed to heed to instructions of Mr Jakins. Stated in simple terms he was to collate relevant data and to make cost projections going forward on the project. He was excused from waiting until all of the information was readily available. Mr Jakins offered to assist through early interventions and discussions. While the Applicant was given a written warning and a final written warning for incidents of the period July 2012 to August 2012, to the extent that the reports for that period were still outstanding and were still necessary, the misconduct charges could include such period. Mr Jakins evidence covered wrong figures submitted by the Applicant and the consequences thereof. The averment that Mr Jakins did not give details and made sweeping statements that were not substantiated when he gave evidence about how the Applicant's contribution to the project review was deficient, is clearly devoid of the truth. Mr Jakins sat down with the Applicant and explained the details of what he wanted from him. If there was any doubt about this the Applicant would have produced emails in which clarity was sought. A further contention by the Applicant that the charges upon which he was dismissed were formulated in the vaguest of terms must be seen against his failure to exercise due care or attention in the performance of his task, disregarding specifications or instructions relating to his work and repeatedly failing to submit numerous tasks in line with set deadlines. He never denied that Mr Jakins gave him instructions. Nor was it an issue what those instructions were. When the Applicant challenged deadlines he confused them with those of his line manager when those given by Mr Jakins were clear and had not been contested.

- [39] A repeated failure to comply with instructions by a senior person is serious misconduct. Mr Jakins testified about frustrations

experienced by the executive and an embarrassment to its client. Hiding behind an inefficient senior line manager when clear instructions had been given to rescue the situation cannot assist the Applicant.

[40] Without having to deal with the grounds for review in a piecemeal process related approach, I am satisfied that the Applicant has not succeeded in demonstrating that any of the outlined grounds for review is meritorious. In this matter dismissal was an appropriate sanction for the contravention of the rule or standard. The decision reached by the First Respondent is therefore not one that a reasonable decision maker could not reach.

[41] Accordingly, the following order shall issue:

1. The review application is dismissed.
2. No costs order is however made.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: Mr R G Beaton

Instructed by Erasmus-Scheepers Attorneys.

2. For the third Respondent: Mr D O Pretorius

Instructed by Fluxmans Inc.

[1][1] Act Number 66 of 1995, hereafter referred to as the Act. The award was issued under the auspices of the Metal and Engineering

Industries Bargaining Council. The Application is strictly speaking in terms of section 158 (10 (g) of the Act.

- [2] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others (2014) 35 ILJ 943 (LAC).

- [3] Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) paragraph 110; Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others

(2014) 35 ILJ 943 (LAC) page 948.

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