

SOUTH AFRICA / JUDGMENT

Vodacom (Pty) Ltd v Jivan and Others (JR 2149/19) [2023] ZALCJHB 211 (20 July 2023)

[2023] ZALCJHB 211

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

JR 2149/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: JR 2149/19

In

the matter between:

VODACOM
(PTY) LTD
Applicant
and
MANISH
JIVAN
First
Respondent
LERATO
SIKWANE N.O. Second
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
Third
Respondent

Heard:

31 January 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 20 July 2023

JUDGMENT

TLHOTLHALEMAJE, J

Introduction

and background:

- [1] The first respondent (Mr Jivan) was in the employ of the applicant with effect from 8 December 2008 and occupied the position of Regional Sales Manager. On 5 June 2018, allegations of misconduct^[1] were levelled against Jivan related to events arising from a request for proposal meeting with the applicant's customer held on 17 April 2018. He was dismissed by the applicant on 23 July 2018.
- [2] Aggrieved with his dismissal, Jivan referred an alleged unfair dismissal dispute to the third respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). Attempts at conciliation having failed, the dispute came before the Commissioner for arbitration, who had found that Jivan's dismissal was procedurally fair but however substantively. The applicant launched a review application which Jivan opposed.

Arbitration proceedings:

- [3] The applicant led the evidence of three witnesses, viz its Managing Director in the direct sales for large enterprises, Mr Nkululeko Magadla; its KwaZulu-Natal (KZN) Executive Head, Ms Elaine Kwinina; and its KZN Solution Manager, Mr Viresh Moonasar. Jivan testified in support of his case.
- [4] The applicant is a well-known enterprise in the business of selling telecommunication products and providing services to consumers. Its Large Enterprises division is responsible for the sale of services and products to large customers, and is divided into the Head Office and various regions with each having its own executive head and dedicated sales teams with accounting managers. Jivan occupied a fairly high position of Regional Sales Manager and reported to Magadla. Jivan was based at the applicant's Midrand office, and had an overlay role, acting as a conduit and support between the various regional direct sales teams that reported to him and the head office. The Large Enterprise division of the applicant consisted of teams which had direct and indirect relationships with clients. Jivan formed part of the direct sales team. The direct sales team sells services directly to customers, whilst with the indirect client system, the applicant sold services to user customers through a business partner, which in turn received a percentage of profit from the applicant.

- [5] The applicant's indirect sales team of the KZN region had a pre-existing relationship with an entity known as Hirt & Carter (H & C), which relationship was sourced through the applicant's business partner, viz, Chat Cellular in September 2017. This meant that the applicant through its KZN indirect sales team would support Chat Cellular in selling solutions to the end-user, being H & C. The applicant's contention was that the direct sales team did not ordinarily involve itself in indirect sales.
- [6] Magadla's evidence was that on 16 April 2018 he became aware of independent discussions between the applicant's Eastern Cape direct sales team with its customer, Tiso Black Star (Tiso), for the purposes of selling telecommunication solutions to the said company, that were to take place on 17 April 2018. That meeting was facilitated or arranged by a Mr Gert Botha of Tiso and was to be held at H & C's offices in KZN. Tiso at the time was in the process of becoming a shareholder of H & C.
- [7] Jivan was assisting the Eastern Cape direct sales team in its discussions with Tiso on account of his role as a support system of the regional sales teams. Prior to the meeting of 17 April 2018, Kwinana had brought to the attention of Magadla that the KZN region already had a pre-existing deal with H & C, which obliged the applicant to pay to Chat Cellular a certain percentage for sourcing that relationship. Kwinana had raised concerns about the scheduled meeting with Tiso which Jivan was due to attend, and the reason the applicant would have wanted to sell the same solution to the same customer. She had raised her concerns about the negative effect of that meeting on the existing deal with H & C.
- [8] Kwinana's concerns arose from a discussion that she previously had with Moonasar, who had received an email from the Eastern Cape's Solution Architect (Elton Poole), informing him that he would be coming to the KZN region for a request for a proposal meeting with Tiso. Moonasar in his reply had pointed out that the KZN region already had a pre-existing relationship in respect of telecommunication solutions with H & C, and had raised concerns about Jivan's involvement in the sale of the same solutions to the same customer.
- [9] Kwinana had in turn contacted Jivan enquiring about the basis of the request for information, since she was aware that he was the person assisting the Eastern Cape region. Jivan replied that the meeting was arranged by Tiso to discuss the changes to the requirements on an existing request for a proposal, which changes pertained to certain of Tiso's sites in KZN, and not H & C. The understanding of the KZN region from Jivan's response was therefore that Tiso was considering solutions for its own requirements outside of the H & C deal. Moonasar also testified that on 16 April 2018, Jivan in their informal meeting had assured him that the scheduled meeting was not in respect of any component of the pre-existing relationship with H & C, but that it was in fact a request for a proposal in respect of the entire Tiso organisation, and therefore not in conflict with the KZN deal with H & C.

- [10] Kwinana had then made a request to Magadla that Moonasar should be present in the meeting and further that Jivan should attend as a 'silent observer', unless their input was necessary to protect the applicant's reputation. It was subsequent to the concerns raised by Kwinana that Magadla had again contacted Jivan prior to the meeting, and specifically instructed him to hold a 'listening brief' in that meeting with Tiso. Magadla also instructed Moonasar to attend the meeting as an observer together with the Eastern Cape team.
- [11] During the meeting on 17 April 2018, Moonasar had realised that the proposal that was being made was identical to that which was previously presented to H & C. The Eastern Cape team further stated that their support solution was superior to the pre-existing solution provided by the KZN region. Moonasar however testified that Jivan was an observer in that meeting and did not make any contributions to the proposals that were made by others. He confirmed that the solution was presented regarding the H & C deal, and that it was not the overall larger solution for Tiso as he was led to believe by Jivan.
- [12] Subsequent to the meeting and upon it being apparent that an offer at a cheaper price to H & C was made and accepted for the same solutions which were provided in terms of the pre-existing contract, Magadla questioned Jivan about the events at the meeting. His response was that he was not aware that the account manager for Eastern Cape, Mr Elton Poole and the Solution Architect, Mizikayifani Mthombeni ('Mzi'), would present the proposal, and that he only became aware in the morning when Poole had requested him to print the presentation he had prepared prior to the meeting. Magadla however held the view that Jivan as the most senior person in that meeting, ought to have informed the team that it merely had a listening brief and should have stopped Poole from making the presentation.
- [13] As a consequence of the offer and acceptance, Chatz Cellular informed Magadla that Tiso had communicated its decision to terminate the contractual relationship between itself and H & C on the basis that Tiso had secured a deal for the same service at a cheaper price. This meant that Chatz Cellular was deprived of an income, and as a result of the termination, the applicant remained liable for the payment of the 10% commission fee to Chat Cellular, and thus further obliged to continue with the Tiso arrangement and had suffered a loss of revenue. Further consequences of the presentation made by Poole meant that the existing deal between the applicant's KZN's indirect sales team and H & C was compromised, leading to the loss of revenue to the applicant.
- [14] Magadla insisted that Jivan had no authority to enter into any arrangements with Tiso given their short duration as compared to those with H & C. The consequences of the deal with Tiso were that Chats Cellular formed the view that the applicant went behind its back and directly concluded a deal with its client H & C. Tiso on the other hand was of the view that Chats Cellular sought to defraud H & C, whilst the applicant's KZN region was aggrieved as it held the view that Jivan had deliberately sabotaged its deal with H & C. Madlaga further held the view that Jiven's conduct was motivated by a commission he would have earned from the Tiso deal. The applicant's executive however took a decision that no such commission should be due to him resulting from the deal.

- [15] Jivan's case was that he had acted in accordance with the instruction to hold a listening brief in the meeting of 17 April 2018. He contended that he never set up that meeting nor did he instruct Poole and Mzi to make a presentation at that meeting.
- [16] Under cross-examination, he testified that he did not know anything about Poole's presentation, which he had circulated five minutes prior to the meeting. He conceded that he had asked another person, Len, to make copies of the presentation for people attending the meeting, but contended that he was not a party to its preparation with either Mzi or Poole. He denied that he was aware of the H & C pre-existing deal.

Arbitration award:

- [17] To the extent that Jivan was dismissed for insubordination, the Commissioner held the view that the issue for consideration was whether an instruction was issued to Jivan by Magadla, which he refused to obey. The Commissioner took into account the events of the meeting held on 16 April 2018 between Jivan and Magadla, where Jivan was instructed to attend a meeting together with the applicant's Eastern Cape direct sales team in KZN and Tiso. The Commissioner accepted that Jivan was instructed to hold a listening brief in that meeting, which meant that he was merely required to listen to the customer and provide clarity, and not to discuss any existing offers or to commit the applicant to any other offers. In that meeting, the Eastern Cape direct sales team had made a presentation which contained a proposal to the customer and it had stated that the proposal was superior than that previously made by the KZN indirect sales team. This had prompted Moonasar to respond to those comments.
- [18] The Commissioner held that Jivan had acted in accordance with the instruction and had remained silent in the meeting, and was therefore not involved in the proposal as it was presented by the Eastern Cape team (Poole and Mzi) at the meeting. The Commissioner further held that there was no evidence demonstrating that Jivan had concluded a commercial deal with Tiso which was detrimental to the applicant's revenue and reputation. This was so according to the Commissioner, on the grounds that it was undisputed that the proposal was made by the Eastern Cape team; that Jivan had not participated in that proposal; and that the meeting of 17 April 2018 was in fact arranged and organised by the Eastern Cape team together with Tiso.
- [19] The Commissioner further rejected Magadla's contentions that Jivan was motivated by gaining a commission in concluding a deal with Tiso. He concluded that there was no evidence indicating that the deal concluded with Tiso affected any existing relationship with H & C which led to a financial loss to the applicant. He concluded that blame for any wrongfulness ought to be apportioned to Poole and Mzi, since they were responsible for the meeting and presentation. There was therefore no basis for a conclusion to be made that Jivan had acted negligently in the meeting, and in the absence of evidence supporting the allegations of misconduct against him, there could be no basis for concluding that the trust relationship between the parties had broken down. It was against these conclusions that the

Commissioner had found an order of reinstatement appropriate in the circumstances.

The grounds of review and evaluation:

[20] The applicant seeks a review of the award on various grounds, including that no rational connection existed between his conclusions

and the evidence before him or his reasoning; that he failed to take regard of the relevant evidence and instead had regard to irrelevant evidence thus committing a gross irregularity and/or misconduct; that he misconstrued the nature of the complaint against Jivan and therefore asked wrong questions; and that he adopted an overtly technical approach to the wording used in the instruction issued to Jivan, and thus misconstrued the main issue for determination.

[21] Jivan in opposing the review application contended that the Commissioner having had regard to the relevant authorities demonstrated that he was alive to the issues in dispute and had correctly applied his mind to the facts and the law applicable. He disputed any contention that the Commissioner misdirected himself by ignoring material facts.

[22] The test on review is well established. It is whether the decision under review is one that a reasonable decision-maker could not reach based on the evidential material available[2]. Central to the determination of the dispute before the Commissioner was whether the applicant had discharged its onus of proving that Jivan committed misconduct consisting of insubordination, in the alternative, gross negligence, by allowing Poole to present an alternative proposal to H & C despite being instructed to hold a listening brief in the meeting in question.

[23] The offence of insubordination in the workplace has been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction, or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. It was further held that a failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. The sanction of dismissal should be reserved for instances of gross insubordination[3]. The Labour Appeal Court (LAC) has further acknowledged that the enquiry into the gravity of the specific insubordination considers

three aspects, viz, the action of the employer prior to the deed, the reasonableness of the instruction, and the presence of wilfulness by the employee[4].

[24] In applying the above principles to the facts of this case, it was not in dispute that Jivan was issued with an instruction by Magadla to hold a listening brief at the meeting in question. That instruction was based on the concerns raised by Kwinina and Moonasar about the purpose of that meeting and Jivan's role at it in the light of the KZN's team's pre-existing deals with H & C. There can be no doubt that the instruction in question was reasonable in the light of its purpose, which was to protect the interests of the applicant and the relationships it had with the parties concerned.

- [25] At the core of Jivan's defence was that he did exactly what was required of him in that meeting, which was to say and do nothing. He had further contended that it was odd that Magadla and Kwinina had agreed to the meeting despite knowing the risks involved. He had also contended that had he stopped the presentation by Mzi and Poole, this would have created further reputational damage to the applicant in front of all its clients. He had submitted that his role was merely to offer support to the regions, and not to interfere when the presentation was made. To this end, it was submitted that there was no evidence to suggest that he had deliberately (wilfully) and seriously refused to obey an instruction.
- [26] The issue that arises however as correctly pointed out by the applicant is not what the Jivan had done in that meeting but what he did not do prior to, and during that meeting in the light of the specific instruction he had received from Magadla. It is in respect of this evidence that the applicant had contended that the Commissioner had misdirected himself and committed reviewable

irregularities.

- [27] There is no doubt that in the light of the reasonableness of the instruction, the Commissioner however as correctly pointed out on behalf of the applicant, adopted a narrow and simplistic approach to the nature and purport of that instruction. Other than holding a listening brief, Jivan by virtue of his position in that meeting, was instructed to ensure that no alternative proposal/deal was to be presented to Tiso or to commit the applicant to it. The contention that Jivan had understood the instruction to be that he should not say or do anything in that meeting, which is exactly what he did, is clearly incorrect and a deliberate misinterpretation of the instruction. As the outcome of the meeting had demonstrated a solution was presented by Mzi and Poole, which was not an overall larger solution for Tiso as Magadla, Kwinina and Moonasar were made to believe by Jivan prior to the meeting. That presentation of a proposal to Tiso had according to the applicant compromised the existing deal concluded between the KZN indirect sales team with H & C as it directly affected it.
- [28] Jivan's wilfulness in relation to the specific instruction to hold a listening brief and not to allow a discussion about the deal or to commit the applicant further needs to be considered within the context of his conduct and events prior to the meeting. It was not in dispute that Jivan became aware of Poole's intention to make a presentation to Tiso prior to the meeting. It was not in dispute that Poole had sent him the presentation via email prior to the meeting, and had in turn, facilitated the printing of copies thereof to be presented at the meeting. It is clearly improbable that Jivan could not have known about Poole's intentions. He was in a position of authority to stop the presentation in the light of the applicant's specific instruction, and yet failed or refused to do so.

[29] As the presentation was being made by Poole, it had become apparent that the content and nature thereof was contrary to the assurances that Jivan had made to Magadla, Kwinina and Moonasar. Jivan's contention therefore that he followed the instruction by simply sitting in the meeting and said nothing even if the presentation made by Poole was contrary to the instruction and mandate of the applicant, in my view misses the point and purpose of that instruction, which in similar vein applies to the indefensible

approach adopted by the Commissioner in that regard.

[30] The alternative charge of gross negligence on the part of Jivan also comes to light in view of his failure to act either prior to or even during the meeting. Gross negligence involves a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme, and is demonstrated by a total failure to take care[5]. In this case, as the presentation was being made by Poole, Jivan being the senior employee in that meeting with specific instructions, ought to have intervened, especially in view of Moonasar's view that the entire delegation of the applicant during the meeting did not appear to be in unison in regards to what the purpose of that meeting should be, and further since the discussions were in conflict with not only the interests of the KZN region, but also of its relationship with H & C.

[31] I therefore agree with the submissions made on behalf of the applicant that in allowing Poole and Mzi to continue with the

presentation that resulted in the existing deal with H & C being compromised, and further in view of his full knowledge of the applicant's mandate, the applicant's conduct in particular was not only wilful, but also grossly negligent. He

foresaw the reasonable possibility that his conduct of not preventing the presentation in the light of the specific instruction from Magadla would cause harm to the applicant, and notwithstanding, he failed to take reasonable steps to prevent such harm occurring. In a nutshell, he acted recklessly and equally indifferently as to whether the harm ensued or not. Ultimately, it was irrelevant whether Jivan was a party to that presentation either in its design or tabling in that meeting. It was equally irrelevant that he was not responsible for setting up the meeting with Tiso. Nothing stopped him from intervening.

[32] In Goldfields, it was held that the approach in review applications was to ask amongst other things, whether the commissioner properly identified

the dispute he was required to arbitrate, and whether he understood the nature of the dispute he or she was required to arbitrate[6]. In this case, I am persuaded to conclude that the Commissioner clearly misconstrued the nature and purpose of the instruction issued to Jivan, and approached that instruction in the most simplistic and overtly technical manner, and thus committed an irregularity. I am further persuaded that ultimately, the Commissioner disregarded material evidence that was before him in concluding that Jivan had complied with the instruction, which irregularity had a distorting effect on the ultimate outcome he had reached.

[33] Inasmuch as Poole and Mzi had acted contrary to the instructions issued by Magadla which Jivan ought to have passed down on them as junior employees, there can however be no substance in the contention that the applicant applied discipline inconsistently. It is accepted that consistency in the application of discipline in the workplace is an important element of substantive fairness, but it is equally acknowledged that it is not an absolute in all instances without qualification. All that the principle prevents is unjustified selective punishment. But it is not cast in stone that in every given instance where multiple employees commit the same or similar offence, they ought to be similarly punished[7]. Thus, each case has to be dealt with on the basis of each employee's personal circumstances. The threshold in all instances is that discipline should be applied in a fair, reliable and consistent manner. Thus, a claim of inconsistency in the application of discipline will not succeed in circumstances where an employer demonstrates that an employee and his comparator's personal

circumstances and severity of misconduct in question are different[8].

[34] The circumstances of Jivan as compared to those of Mzi and Poole are completely different as correctly pointed out on behalf of the applicant. This is so in that Jivan was the most senior employee who was expected to guide and support Mzi and Poole who were junior employees. A second consideration is that the instruction was issued to Jivan and he ought to have made Mzi and Poole of it prior to the meeting. A third consideration is that with the full appreciation of that instruction, Jivan ought not to have either allowed the printing of the presentation or stopped Mzi and Poole from making it to Tiso. A fourth consideration is that he made assurances to Magadla and others that the interests of the applicant would not be compromised, knowing fully well that he would not act in accordance with those assurances. Again as correctly pointed out on behalf of the applicant, the failure to discipline Mzi and Poole did not in any manner imply that Jivan ought to similarly escape the consequences of his conduct.

[35] In the light of the nature of the gross nature of Jivan's misconduct and its consequences, it was the applicant's

contention that the sanction of dismissal was appropriate, and that the Commissioner failed to appreciate the breakdown of a trust

relationship resulting from Jivan's conduct. As already indicated elsewhere in this judgment, the conduct of Jivan viewed

within the context of the events prior to and after the meeting in question, evinced not only wilfulness not to obey the instruction

issued by Magadla, but also gross negligence in that regard. His conduct on its own without more[9], was sufficient to irretrievably break down a trust relationship between him and the applicant, more particularly with Magadla,

Moonasar and Kwinina. Contrary to the submissions made on behalf of Jivan, it is irrelevant that Jivan did not report to Kwinina and Moonasar. The two are employees of the applicant and thus its representatives in their dealings with Jivan or any other persons

within the scope of their duties. In his position and overall role in providing a support structure for the regions, clearly Jivan arising from his conduct, cannot be expected to be trusted to fulfil that role. He had further demonstrated that he cannot be trusted to follow instructions issued to him despite his assurances that he will do so.

[36] It is against all of the above conclusions that it is found that the Commissioner's award is characterized by irregularities and misdirected assessment of the evidence that was presented at the arbitration, which had a distorting effect on the enquiry he was enjoined to undertake, and the ultimate decision arrived at. The award therefore falls outside the band of reasonableness and is thus susceptible to a review.

[37] I have further had regard to the requirements of law and fairness regarding an award of costs, and clearly there is no basis for such an order as Jivan was entitled to defend an arbitration award that was in his favour.

[38] In the premises, the following order is made:

Order:

1. The arbitration award under case number GATW 11263 – 18 dated 2 September 2019 issued by the second respondent is reviewed, set aside and substituted with an order that;

‘The dismissal of the first respondent (Mr Manish Jivan) was substantively fair.’

2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: R.

Itzkin, instructed by Edward

Nathan Sonnenbergs Incorporated.

For the First Respondent: W.B. Ndlovu, instructed V.B Ndlovu

Attorneys.

- [1] The allegations of misconduct read as follows: ‘Misconduct consisting of insubordination, in the alternative gross negligence in that on 17 April 2018, you allowed and were party to Elton Poole presenting an alternative proposal to Hirt & Carter, an existing Vodacom customer that had already committed to Vodacom on the same solution notwithstanding that you were instructed to hold a listing brief in the meeting thereby placing Vodacom's name in disrepute

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[2] See *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 ILJ 1766 (LAC); [2017] 9 BLLR 892 (LAC), where the review test was summarised as follows; “[10] The test that the Labour Court is required to apply in a review of an arbitrator’s award was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (Sidumo). It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited* (Congress of South African Trade Unions as amicus curiae) as follows: ‘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, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’ [11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*

(Gold Fields), this Court refined the Sidumo test by introducing two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one’s mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result.”

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- [3] See *Masscash (PTY) Ltd T/A Jumbo Cash and Carry v Mtsotsoyi and Others*

- [2022] ZALAC 117; (2023) 44 ILJ 162 (LAC) at para 27; *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC). See also *Sylvania Metals (Pty) Ltd v Mello N.O. and Others* [2016] ZALAC 52 (22 November 2016), where it was held that; “[17] Insubordination in the workplace context generally refers to the disregard of an employer’s authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer’s lawful authority. It includes a

wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given. [18] This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*, discussed the "fine line" between insubordination and insolence, with the latter being conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous. While the Court noted that insolence may become insubordination where there is an outright challenge to the employer's authority, "acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful". The sanction of dismissal is reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer".

(footnotes and citations omitted)

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(footnotes and citations omitted)

[4] *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*

[2018] ZALAC 36; (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC) at para 4.

[5] *Transnet Ltd t/a Portnet v MV 'Stella Tingas*

[2002] ZASCA 145; [2003] 1 All SA 286 (SCA) at para 7.

[6] At para 20.

[7] See SACCAWU & others v Irvin & Johnson [1999] 8 BLLR 741 (LAC); Absa Bank Limited v Naidu and Others

[2015] 1 BLLR 1 (LAC); Nyathikazi v Public Health & Social Development Sectoral Bargaining Council & Others

(2021) 42 ILJ 1686 (LAC).

[8] Early Bird Farms (Pty) Ltd v Mlambo Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC).

[9] See Woolworths (Pty) Ltd v Mabija & Others (2016) 37 ILJ 1380 (LAC), where the Labour Appeal Court found that in some cases gross misconduct would warrant an inference that the trust relationship

has been destroyed, and that it is not necessary for the employer to lead evidence to the breakdown of the trust relationship; Autozone v Dispute Resolution Centre of Motor Industry and Others

[2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC); Impala Platinum Limited v Zirk Bernardus Jansen & Others

[2017] 4 BLLR 325 (LAC).

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Prepared on 12 October 2026 · Esheria