



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case No D889/11

In the matter between:

INDAKA MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

NONHLANHLA DUBAZANE N O

Second Respondent

IMATU obo Z I MCHUNU

Third Respondent

Heard: 13 December 2013

Delivered: 8 October 2014

Summary:—Review of arbitration award. Commissioner committing misconduct in relation to her duties as arbitrator. The result was that award is rendered unreasonable. Her decision which is not that of a reasonable decision-maker, is therefore reviewed and set aside.

JUDGMENT

PATHER, AJ:-

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the Second Respondent, (“the Commissioner”) as a commissioner of the First Respondent. She had found that the dismissal of the applicant had been substantively and procedurally unfair.
- [2] The application is opposed.
- [3] The transcript of evidence being woefully inadequate, much reliance was placed on the Commissioner’s notes which are largely comprehensive. The handwritten notes were able to supplement the far too many blank spaces reflecting inaudible recordings and instances of mechanical non-recording of the proceedings. No reasons are discernible for this latter scenario.

Background facts

- [4] Mr Mchunu, represented by the Third Respondent was employed by the Applicant as a Sports and Gender Officer in 2005. Included in the key performance areas for the position were: (i) to assist with the organisation and monitoring of sports activities; and (ii) to perform other office activities as instructed by the immediate superior.
- [5] On 9 October 2009, the then acting Municipal Manager, Mr Maphanga, called Mr Mchunu to a management meeting (“the meeting”) being held at the time and requested him to provide a progress report on the preparations for the KwaNaloga games (“the games”). The games were an event scheduled to take place towards the end of that year. As Sports and Gender Officer, Mr Mchunu had been involved in the preparations for the games.
- [6] In terms of the hierarchy, Mr Mchunu reported to a manager in the office of the Mayor, at the time Mr M V Khumalo, which manager in turn reported to the Municipal Manager, at the time Mr Maphanga, who was acting in that position.
- [7] It was alleged that Mr Mchunu had previously prepared a report which he had submitted to his supervisor Mr M V Khumalo during August 2009. At the time of the meeting on 9 October 2009 however, Mr Khumalo was not at work. Mr

Mchunu did not present any report to the meeting as had been requested. He was subsequently charged with and found guilty of insubordination, sabotage, failure to disclose information and insolence. The Applicant dismissed him on 21 April 2010.

- [8] Aggrieved with the outcome, Mr Mchunu referred an unfair dismissal dispute together with an application for condonation of the late referral, to the First Respondent. After an unsuccessful attempt to conciliate the dispute, the matter was eventually set down for arbitration before the Commissioner.
- [9] At the arbitration hearing, Mr Maphanga testified that Mr Mchunu had declared to the meeting that he would not give any report as he did not regard the structure as genuine. Not only was he unwilling to give a report, he also did not want to participate in the meeting. After requesting to be excused Mr Mchunu left. According to Mr Maphanga, the reason for Mr Mchunu's not regarding the structure as genuine may have been the recent suspension of the Municipal Manager and his ("Mr Maphanga's") appointment as Acting Municipal Manager. A report of the games was at the time being sought from Mr Mchunu in the absence of Mr Khumalo who ordinarily would have been responsible to provide the meeting with it. Mr Khumalo as manager would have received the information from Mr Mchunu in his capacity as the Sports and Gender Officer and would have presented this to the meeting of managers. However, Mr Khumalo was not at the meeting. Another reason for the request was that Mr Mchunu in Mr Khumalo's absence was second in charge. The required information related to activities which he, Mr Mchunu performed on a daily basis, as, although the games were a once-off event, sporting activities were held almost on a weekly basis. However, the report which he was requested to give to the meeting had to do with the games and could easily have been given, even verbally. He had been called to the meeting as the Sports and Gender Officer. He did not indicate to the meeting that he had needed more time to prepare a report. The members of management who were present were left with the impression that although in possession of the information, Mr Mchunu would not accede to the request for a report on the games for the reason that he did not recognise the structure

after the suspension of the Municipal Manager. He also did not inform the meeting that he had previously handed to Mr Khumalo a report which he had compiled.

[10] Mr Maphanga testified further that as Acting Municipal Manager, he had requested another official, Mr Sithole to attend the meeting to give information pertaining to his department. In the same way, the request to Mr Mchunu to provide information to the meeting on the games was made. He denied that he had been untruthful in testifying that Mr Mchunu had said that he did not recognise the structure. The structure had changed due to the suspension of the Municipal Manager and the appointment of Mr Maphanga as Acting Municipal Manager. He had then reported this to the Executive Council ("Committee"), where it was decided that officials who refused to co-operate would have to be disciplined. It was put to Mr Maphanga that Mr Mchunu cannot be said to have sabotaged the games as he had eventually worked as instructed with an official from another department Mr K S Khumalo ("Mr K S") whom the Municipality had appointed to organise the games. Mr Maphanga replied that if this were the case, it had not been on his, Mr Maphanga's instruction. He denied that there had been no sabotage on the part of Mr Mchunu. The Applicant eventually had to pay more and put in more effort to making the games a success. Also, Mr K S had had to put his responsibilities in his own department aside and attend to another department, namely, the sports department.

[11] As to what other attempts the Applicant had made to obtain the progress report on the games, Mr Maphanga stated that he had tried unsuccessfully to telephone Mr Khumalo when it became known that he was not at work. As the responsible manager, such as Mr Khumalo was, would have compiled his reports on the basis of information provided by his subordinate, the person to provide the required information in the manager's absence would therefore be the subordinate, Mr Mchunu. It sometimes happened that subordinates themselves would be called to explain some aspects of which they are more familiar, relating to a particular manager's department. Although Mr Mchunu

was capable of presenting technical reports, in this case no technical report was needed, only a progress report.

- [12] Mr Mchunu had behaved irresponsibly at the meeting by responding negatively to the request for the report, according to Mr Maphanga. After the incident at the meeting, Mr Khumalo who was Mr Mchunu's supervisor had not returned to work. Mr Maphanga had then noticed that Mr Mchunu would arrive late at work. Mr Khumalo's duties were being performed by a director from another department on the request of Mr Maphanga; Mr Mchunu did not report to anyone as his supervisor, Mr Khumalo had disappeared; and he, Mr Mchunu was signing his own timesheets. There was general disorder. Mr Mchunu was not reporting to him, Mr Maphanga, but had only approached him for approval of the former's leave application as there was no one else who could have done this. As for any prospects of Mr Mchunu's continued employment by the Applicant, Mr Maphanga was adamant that this had been established as not being possible during the period when he had misbehaved and had displayed a bad attitude in the workplace towards his work even as at the date of the arbitration hearings. He denied that he had had a personal vendetta against Mr Mchunu and some other employees. Mr Mchunu had himself to blame for the dismissal because he and others like him were not serious about their work and were constantly absent.
- [13] The Applicant's Chief Financial Officer, Mr M B Dlamini testified that he was present at the meeting when Mr Mchunu had been called to report on the progress of the games. Mr Mchunu's actual words were 'I do not recognise the structure'. Mr Dlamini believed this to be a reference to the management structure, as after the suspension of the previous municipal manager, Mr Maphanga had been appointed to act in the position. Like Mr Maphanga, Mr Dlamini confirmed that the minutes of the meeting were an accurate reflection of what had taken place. However, a page was missing as, contrary to what was put to him in cross-examination, there had indeed been a closure of the meeting. The matter of Mr Mchunu's attitude had been reported to the committee. The committee's view was that if Mr Mchunu did not recognise a

structure established by it, he did not recognise it, the committee. He must therefore be dealt with accordingly.

- [14] According to Mr Dlamini, as second in charge and in the absence of his manager, it became Mr Mchunu's duty to provide a report on the games to the meeting. Other Heads of Departments were also subsequently allocated some duties. He agreed that Mr Mchunu was not the relief person for Mr Khumalo and had at no stage assumed his duties. Mr Dlamini could not recall Mr Mchunu's having participated in the organisation of the games. In his opinion, the meeting on 9 October 2009 was a meeting of a new management structure as it consisted of a 'new' Municipal Manager and unlike before, there was no manager from the Mayor's Office, at the time, Mr Khumalo.
- [15] Questioned about Mr Mchunu's utterances at the meeting, Mr Dlamini was of the opinion that as Mr Mchunu had been directly involved in the organising of the games until then he would have been in possession of information pertaining to it. However, he had simply said that he would not give the information to the structure for the reason outlined above. The meeting had then resolved to refer the matter to the committee and to report that management did not know what was happening in respect of the games. Mr Dlamini further testified that the committee had resolved that Mr K S would take over the organising of the games, although Mr Dlamini was not aware of whom he had worked with in this regard. Mr Maphanga had informed him of a number of attempts that he had made to get hold of Mr Khumalo, but this had not been in relation to the meeting.
- [16] Mr Mchunu, the former employee testified that his manager at the time, Mr Khumalo, had instructed him to, among other matters, make bookings for the games, travel to and arrange accommodation in Pietermaritzburg, ascertain the number of people who would attend the games, get tracksuits, tee shirts, and attend to other such matters. After attending to the list of duties, he had compiled a report of these activities which he had then submitted to Mr Khumalo sometime in August 2009. He had requested a copy of the report, but as Mr Khumalo was in a hurry at the time, he undertook to give him the copy on his return to the office. The photocopier was in Mr Khumalo's office.

On the day in question, he had been called to the meeting, invited by Mr Maphanga, the acting municipal manager to take a seat and was requested to give a report pertaining to the games. He responded that he had given a detailed report to Mr Khumalo and that the report contained everything pertaining to the games. Mr Maphanga had asked for a copy; Mr Mchunu said that he did not have a copy at the time. He was then released from the meeting. He disputed the minutes of the meeting. He had not said anything that was unacceptable to the meeting and he was very polite to the management. No query had been raised about his conduct. He did not sabotage the Applicant and it is not in his nature to do any such thing. All his activities had been in the interests of the Applicant. Mr Maphanga had instructed him to assist Mr K S as he Mr Mchunu, had been involved in the games from the outset. His relationship with Mr Maphanga was cordial until he had been charged. He realised then that Mr Maphanga was determined to get rid of him and other people. Mr Maphanga and other managers believed that he and some other employees were on the side of the suspended municipal manager. Mr Mchunu felt strongly that Mr Maphanga and the other managers regarded him as a threat to his Mr Maphanga's, being the acting municipal manager.

- [17] Mr Maphanga had rejected his appeal without a reason. As a result, he had been prejudiced by the failure to consider his appeal. He had been under the impression that his charges would be reconsidered and that he would be given a fair trial. Under cross-examination, it was pointed out that on the one hand he said Mr Maphanga had wanted to get rid of him, yet on the other hand, he expected to be given a fair hearing on appeal to the very same person. He replied that the procedure was to have lodged the appeal to the municipal manager. The report which he had handed to Mr Khumalo had been prepared on the computer. He had not offered to retrieve a copy when requested to give a report to the meeting as this had not been asked of him. Management had been satisfied with his response therefore he could not retrieve a copy. He disputed the evidence of Mr Maphanga and Mr Dlamini in regard to his response at the meeting. They had given false evidence because he was in the other faction. His dismissal was a victory for them

following the suspension of the Municipal Manager. The factions had been in existence but after 28 September 2009, tensions between the factions heightened. And when he received the charge sheet on 10 December 2009, he realised that Mr Maphanga was at war with him and others (presumably in their faction). As he had not committed any wrongdoing, he did not believe that he should have been charged. He did not have the report with him at the arbitration hearing, as it was in Mr Khumalo's possession. This was despite Mr Khumalo no longer being in the Applicant's employ. According to Mr Mchunu, it would have been easy for him to have obtained the report and provided the information to the meeting. He denied that Mr K S had been put in charge of organising the games as he and Mr Khumalo had not co-operated. In this regard he referred to Mr Dlamini's evidence that he, Mr Mchunu, had been called to the meeting to brief management on the progress of the games to enable Mr K S to take over the organising.

- [18] His former manager, Mr Khumalo then testified in support of the Third Respondent. He confirmed Mr Mchunu's evidence that the latter had handed him the report of the games during August 2009. At the time, Mr Khumalo was on his way home and had taken the report with him. He would have brought it back to the office the next day. He did not give a copy to Mr Mchunu neither did he recall his asking for a copy. He denied that Mr Maphanga as acting municipal manager had tried to call him.

The Award

- [19] Under the sub-heading Analysis of evidence and argument, the Commissioner, dealing with the substantive aspect, made a finding that the dismissal was unfair for two reasons namely that, the instruction to Mr Mchunu that he provide a report on the games was "unlawful" and therefore did not constitute insubordination; and she accepted Mr Mchunu's version that he did not refuse to provide a report but had informed the meeting that he had given a report of the games to Mr Khumalo. This second reason was based on her weighing the probabilities of the two conflicting versions and deciding that Mr Mchunu's version that he was not insubordinate as charged was more probable; that the Applicant had failed to discharge the onus of proof. In

finding that Mr Mchunu had not committed insubordination the Commissioner determined that it was unnecessary for her to deal with the remaining three charges, namely those of sabotage, failure to disclose information and insolence, as these flowed from the charge of insubordination.

[20] The grounds for review are that the Commissioner:-

20.1 committed misconduct in relation to her duties as Commissioner/arbitrator in finding that the instruction given to Mr Mchunu had been unlawful; and

20.2 exceeded her powers as Commissioner/arbitrator by making a finding on one of the four charges only.

[21] I will deal only with the salient points of the respective arguments. The arguments are fully set out in the papers. I have considered the Commissioner's finding that the dismissal was also procedurally unfair and the evidence in this regard. However, save to say that Mr Mchunu was not prejudiced by the lack of an internal appeal. I do not consider it necessary to deal with the issue any further. The Commissioner cannot be faulted in respect of her approach to the arbitration proceedings which was conducted properly and fairly.

[22] Mr Luthuli, who appeared for the Applicant, argued that the evidence was clear that the issuing of the instruction was reasonable and lawful. Referring to the case of *Johannes v Polyoak (Pty) Ltd*¹, he stated that the test is whether the instruction by a person in authority was reasonable and lawful. The Commissioner's findings would mean that Mr Mchunu was not obliged to perform his duty. There was nothing unlawful about the instruction given to him, Mr Luthuli argued. He submitted that the Commissioner's analysis of the evidence was unreasonable. Furthermore, her preference for Mr Mchunu's evidence was inexplicable. Those who were present at the meeting had testified that Mr Mchunu was decisive at the time. A situation in which an employee dictates terms to management could not be allowed, argued Mr

¹ [1998] 1 BLLR 18 (LAC).

Luthuli. It was a dismissable offence. Mr Luthuli submitted that Mr Mchunu had refused to provide a report. Therefore, this act constituted sabotage. This charge had been proved at the disciplinary hearing, but the Commissioner had considered it unnecessary for her to deal with it. It was Mr Luthuli's submission that the sabotage aspect had to be dealt with as, together with the charge of insubordination, if proved would result in the sanction of dismissal being found to be fair.

- [23] On behalf of Mr Mchunu, Ms Geldenhuys submitted that it was common cause that only one incident of insubordination had taken place. In respect of the request for Mr Mchunu to provide a report, he had not been given any prior notice nor warning that this was expected, neither had he been given an opportunity to prepare. Referring to the attack on the award, Ms Geldenhuys argued that the Commissioner's finding was that it was not Mr Mchunu's duty to provide the meeting with a report of the games. She argued further that the Commissioner's finding that the instruction was unlawful would only have been relevant if Mr Mchunu had refused to obey the instruction, which he did not do. Furthermore submitted Ms Geldenhuys, during the closing argument at the arbitration, Mr Mchunu's representative had drawn the Commissioner's attention to his positive demeanour. The Commissioner had also summarised the witnesses' evidence comprehensively. It was Ms Geldenhuys' submission that even if this court finds that the Commissioner had erred in finding that the instruction to Mr Mchunu was unlawful, he had never refused to carry it out. Therefore her finding, argued Ms Geldenhuys, was not relevant to the charge of insubordination, as a refusal to obey the instruction is essential for a finding of insubordination. She submitted that on the material before the Commissioner, on the Applicant's version Mr Mchunu had continued to work. And Mr Maphanga had conceded that Mr Mchunu had been called to the meeting after it had commenced. The minutes of the meeting had been challenged; Mr Dlamini's evidence contradicted that of Mr Maphanga's. Therefore, the only inference to be drawn from Mr Dlamini's evidence was that he had wanted to secure the case for the Applicant. Mr Mchunu had been called to the meeting in October 2009 and was asked about a report that he had prepared two months previously, submitted Ms Geldenhuys. Despite this,

he was polite and calm, and as a result, management had been satisfied with his response. Ms Geldenhuys argued that the test for reviewing an award was that the Commissioner's error of law or misconduct must have an impact on the final result. Therefore, even if the Commissioner had made an error of law on the validity of the instruction, the dismissal for a single incident for which no outrage had been expressed was not appropriate. Finally, Ms Geldenhuys submitted that if this Court finds in favour of the Applicant that the dismissal was fair, the matter ought to be remitted to the First Respondent for a rehearing before another Commissioner.

[24] In response Mr Luthuli argued that the type of instruction that had been issued to Mr Mchunu was not relevant as the issue was the Commissioner's Award. Her analysis he submitted, had been clearly incorrect and this was tantamount to gross misconduct on her part. Furthermore, there had been no indication that there had been a misunderstanding of the nature of the instruction. The facts were that an instruction had been issued to Mr Mchunu who had responded in the form of a challenge to authority. The Commissioner had not understood the issues; otherwise she would have concluded that there had been insubordination by Mr Mchunu. She would then have dealt with the remaining charges.

[25] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*², the threshold test for the reasonableness of an Award or Ruling was set as being: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?' This test was further expounded by Waglay JP in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³. At paragraph [14], the learned Judge held that:

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in

² (2007) 28 ILJ 2405 (CC) see also [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

³ (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC)

terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.’

- [26] I agree with Ms Geldenhuys that the Commissioner captured the evidence of the witnesses comprehensively. Despite this, her analysis of that evidence is found to be irrational. As argued by Mr Luthuli, there was nothing unlawful about the instruction to provide the meeting with a report, be it a technical report or a simple progress report. For the Commissioner to have pronounced the Acting Municipal Manager’s instruction to an employee to provide a report pertaining to the latter’s everyday duties as being unlawful indicates that she did not understand the law. The instruction was lawful and reasonable. Furthermore, the Commissioner’s reference to it not being Mr Mchunu’s duty to provide a report is without substance. As Mr Luthuli argued, this would give rise to an unacceptable situation in which employees can dictate terms to their superiors. It was common cause in any event, that one of the key performance areas of the Sports and Gender Officer was to perform other office activities as instructed by the immediate superior. While it could be argued that the Acting Municipal Manager was not his immediate superior, in the absence of his own manager, the Municipal Manager would surely have had authority to request that Mr Mchunu perform any activity as determined by him, the Municipal Manager. However, this argument was not raised on behalf of Mr Mchunu, namely that the Municipal Manager was not his immediate superior. I do not consider it necessary to deal with the elements of insubordination. Suffice is to say that for the present purposes, insubordination is the failure to carry out a work-related instruction. Even on

his own version, namely that in response to the request to provide a report of the games, he told the meeting that he had already provided a report to his manager who was not present, in my view, Mr Mchunu was skating on thin ice. As the person who had been integrally involved in the organising of the games until then, the instruction was clearly work-related, particularly in the case of the Sports and Gender Officer. Once she had erroneously pronounced the instruction to have been unlawful, the Commissioner's approach to the remaining charges, namely that they were rendered superfluous was clearly based on a misconception of the legal position. She may well have found that there had been a failure to disclose information. In this regard, the Commissioner is found to have exceeded her powers as arbitrator when she decided that the remaining charges had fallen away in the light of her finding, erroneous as it was.

[27] In finding that Mr Mchunu's version was more probable than that given by the Applicant's witnesses, the Commissioner's reasoning once again is irrational. The only reason she provides is that faced with conflicting versions, the Applicant who bore the onus, had failed to discharge it and that therefore, Mr Mchunu's version was more probable. To say that such reasoning defies logic, is an understatement. An evaluation of the evidence reveals that the Applicant's witnesses substantially corroborated each other and were consistent under cross-examination. A contradiction in Mr Dlamini's evidence relating to whether Mr Maphanga had attempted to contact Mr Khumalo in regard to the report of the games is not found to be material.

[28] However, similar comments cannot be made of the quality of Mr Mchunu's evidence. His version is peppered with inconsistencies. He contradicted himself in a material respect regarding the availability of copy of the report: on the one hand he stated that when asked for a copy, he had replied that he did not possess one; on the other hand, he stated that it would have been easy to provide a copy to the meeting, except that he was not asked to do so. His evidence is further contradictory in respect of the copy he requested from Mr Khumalo. Whereas during examination, he stated that he was unable to obtain a copy because Mr Khumalo was rushing off at the time, and because

the photocopier was in Mr Khumalo's office, during cross-examination, he stated that the report had been prepared on computer and that it would have been easy to retrieve a copy if asked by the meeting. Was he asked or not? The question then arises as to why he would require a copy of the report from Mr Khumalo in the first place if the document was already stored on computer and he could easily have retrieved it at any time in the future? The inference is overwhelming that no such report had been submitted to Mr Khumalo. Mr Mchunu also stated that his relationship with Mr Maphanga had been cordial until December 2009, when he received the charges against him. However, under cross-examination, he referred to a previous unsuccessful attempt by Mr Maphanga's faction to have him dismissed. Mr Mchunu's evidence in regard to the minutes of the meeting was also contradictory in that he disputed sections of it but quoted liberally from others. Similarly, while dismissing Dlamini's testimony as a fabrication designed to get rid of him, he quoted from Dlamini's evidence when it suited his case. He referred to Mr Dlamini having testified that a report had been requested so as to hand over the organising of the games to Mr K S. Therefore, even on his own version, Mr Mchunu's not providing a report to the meeting effectively prejudiced the Applicant in the matter of the games. It would not be remiss to conclude that he did not intend this act of not providing a report to have certain consequences, such as that the games be sabotaged. The evidence is that efforts had had to be redoubled in order to salvage the games. On the whole, Mr Mchunu's evidence was most unsatisfactory, despite his polite demeanour. It is therefore inconceivable how the Commissioner came to the conclusion that his was the more probable of the versions, especially as she had comprehensively captured all the witnesses' evidence. As stated, no material contradictions were found in the Applicant's witnesses' testimonies. Mr Khumalo's evidence was clearly an attempt to support Mr Mchunu's version that a report was prepared and submitted previously. However, his disputing that Mr Maphanga had tried to contact him cannot be relied upon: he cannot attest to any attempt by another to have contacted him. The evidence was that Mr Maphanga had tried to contact him. It is not possible that Mr Khumalo could have confirmed or denied that any *attempt* was made. Therefore, on a balance of probabilities, the Applicant's version as put forward by Mr

Maphanga and Mr Dlamini is found to be more probable, namely that Mr Mchunu refused to carry out an instruction that was not only work-related, but was also reasonable and lawful in the circumstances. In my view, Mr Mchunu as the Sports and Gender Officer had a duty to comply with the Municipal Manager's request. As he had been involved in the games, it would have required no effort on his part to have provided the meeting with a progress report. Furthermore, his statement that he did not recognise the structure which had recently undergone some changes is found to have been an unwarranted and unacceptable challenge to the authority of the Applicant's management committee. In this regard, Mr Mchunu was without doubt, insolent. A municipality cannot be expected to fulfil its mandate in terms of service delivery to citizens if it is held to ransom by employees who are resentful because of changes in the management structure. In the circumstances, I find that Mr Mchunu was insubordinate, attempted to sabotage the games, failed to provide information and was insolent to the Applicant's management. The effect of the Commissioner's misconception of the legal position and her failing to properly evaluate the evidence is that the final result is found to be unreasonable. Based on the material before her, a reasonable decision-maker would not have reached the conclusion that she did.

- [29] In view of the length of time that has passed since the date of dismissal, a referral back to the First Respondent would result in further delays in the finalisation of the matter. It is therefore in the interests of justice that it be decided now.
- [30] I do agree with Ms Geldenhuys' submission that as the charges arose from a single incident of insubordination for which there had been no outrage, dismissal was not the appropriate sanction. I am persuaded by Mr Luthuli's submission that read together, insubordination and sabotage committed by an employee are dismissable offences. A large employer such as a Municipality must adopt a firm approach to issues of insubordination. As Mr Luthuli submitted, an aggravation in the present case was that Mr Mchunu had committed the offences in a management meeting. As an officer in the employ

of the Applicant, Mr Mchunu's conduct had rendered the employment relationship intolerable and warrants the sanction of dismissal.

Order

[31] For these reasons, the application for review succeeds and the award is reviewed and set aside;

31.1 The dismissal of Mr Mchunu who was represented by the Third Respondent is found to be fair; and

31.2 There is no order as to costs.

Pather AJ

Acting judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Luthuli (A P Shangase & Associates)

For the Third Respondent: Ms Geldenhuys (IMATU)