

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)**

LAC Case No: DA 4/2012

In the matter between:

**FIRST NATIONAL BANK, A DIVISION OF
FIRSTSTRAND BANK LIMITED**

Appellant

and

**STEPHEN LANGUAGE
NICCI WHITEAR NEL N.O
COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

Second Respondent

Third Respondent

JUDGMENT:

DAVIS JA

Introduction

[1] This is an appeal against the order of Bhoola J of 08 December 2011 in which the learned judge dismissed the application of appellant, First National Bank ('FNB') to review and set aside the award of second respondent handed down in the dispute between the appellant and first respondent.

The factual matrix

[2] At the time of his dismissal, first respondent was employed as a relationship manager at FNB's Ladysmith branch. The position, which was a senior one, involved the management of branch relationships with customers; for example, a person in the position of second respondent was required to deal with credit applications and queries made by customers.

[3] In order to perform this role, the respondent was entrusted with special access codes that enabled him to make entries on the 'Hogan' system, on which customer transactions were recorded.

[4] Apart from being a relationship manager, first respondent was also a customer of FNB. Accordingly, he was liable for bank charges levied on transactions conducted on his account. It is common cause that he used his special access code to reverse a bank charge of R 63.00 which was levied for duplicate bank statements that were requested by him in respect of his personal account.

[5] In terms of two letters 'a staff defalcation letter' of 1 May 2005 and a second document entitled 'reversal of charges' of 7 February 2005, appellant warned bank employees not 'to reverse charges or fail to process facility fees and other charges on their

and other FNB staff members accounts'. In terms of the document of 7 February 2005, Mr Zweli Manyathi, Chief Executive Officer of appellant said:

"Should any staff member be found to be in breach of this instruction they will be dealt with strictly in terms of the Bank's Disciplinary Code and Procedure and could find themselves being faced with dismissal".

To the extent that there was any ambiguity in respect of the contents of this document, it had to be read together with another document generated by Mr Manyathi of 1 May 2005 of which the following appears:

"Unauthorized access of customer and employee accounts is viewed in a very serious light. Disciplinary action which may lead to dismissal will be taken against any employee that is guilty of accessing customer or employee accounts without a valid business reason to do so."

[6] Pursuant to this warning and what it considered to be a breach thereof by first respondent, appellant suspended respondent on 10 April 2007 and called him to a disciplinary enquiry scheduled for 26 April 2007.

[7] The charges against him read as follows:

"Theft, fraud, dishonesty in terms of paragraph 4.2.1 of the Bank's Disciplinary Code and Procedure in that ... whilst acting in the capacity as a Relationship Manager of

Ladysmith Branch, on 8 March 2007 you reversed charges on your personal account, without prior approval. ...and/or

Damage or loss suffered by the Bank through disregard of its rules and procedures in terms of paragraph 4.2.18 of the Bank's Disciplinary Code and Procedures in that ... whilst acting in the capacity of a Relationship Manager of the Ladysmith Branch on 8 March 2007 and did not follow the correct procedures with regard to obtaining authorization for the reversal of bank charges on your personal account. ...”

[8] At the disciplinary enquiry, first respondent was found guilty of misconduct. No reasons were given for this finding. It appears that reasons were only to be provided in terms of the disciplinary code, if specifically requested by the employee concerned. The chair of the enquiry suggested that the sanction in this case fall short of dismissal. This recommendation was rejected and a decision was communicated to respondent that he would be summarily dismissed in a letter of 22 May 2007.

[9] First respondent then lodged an appeal in terms of the appellant's disciplinary code. The appeal panel considered the application solely on the papers, as it deemed a further hearing to be unnecessary. The appeal was dismissed by the appeal body and first respondent was informed accordingly.

[10] First respondent then referred this unfair dismissal dispute to the third respondent. The dispute was unsuccessfully conciliated on 04 December 2007 and the consequent arbitration was finalised in January 2009, in which second respondent decided to reverse the decision to dismiss first respondent. Pursuant to this decision, appellant filed a review application on 13 May 2009, which application was dismissed by the court *a quo*. It is against this decision that an appeal has been lodged in this Court.

[11] It is therefore becomes necessary to examine the reasoning adopted both by the second respondent and by the court *a quo*.

The arbitration award

[12] Second respondent came to the conclusion that, on the evidence, first respondent had not displayed a dishonest intent in reversing the charges on his bank account. In second respondent's view, first respondent's 'conduct in reversing the charges fell outside the narrow scope of the prohibition on staff reversing charges due to the bank on their own accounts for personal gain.

[13] In the alternative, second respondent held that it had not been shown that first respondent contravened the prohibition contained in the letters generated by Mr

Manyathi, because there had been an inconsistent application of discipline, pursuant to breaches of the prohibition as set out in this letter.

[14] In a further finding, second respondent found that the sanction of dismissal imposed upon the first respondent was:

“Grossly disproportionate to the alleged offence given the unique circumstances of the applicant’s case (including his unblemished disciplinary record and some 34 – 5 years’ service to the respondent). It is fair to say that after hearing the evidence I felt shocked at the imposition of the sanction of dismissal in the applicants case. I believe that it was unfair.”

The decision of the court *a quo*

[15] In dismissing the application for review, Bhoola J held that, if the first charges had been formulated simply as a breach of a rule on transacting in respect of one’s personal account, first respondent might justifiably have been found guilty, for it could not then have been open to him to contend that he was simply recovering ‘his own money’, without a contravention of the rule. But, in the view of the learned judge, the issue before second respondent was whether first respondent was guilty of theft, fraud, dishonesty in reversing charges on his personal account and further, in terms of the second charge whether he had failed to follow the correct procedures

in obtaining authorization for the reversal of bank charges on a personal account which led to the appellant suffering a loss of R 63. 00. For the reason she held:

“The arbitrator cannot be faulted for reaching the conclusion that he was not guilty of the offence for which he had been charged as she was constrained by the manner in which the charges had been formulated.”

In dealing further with the second charge, the learned judge found that no finding of guilt could be justified because second respondent was entitled to find that there was no evidence of an applicable policy or procedure which, in the circumstances, had been contravened by first respondent.

The appeal

[16] In **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others** [2007] 12 BLLR 107 1097 (CC) par 268~~258~~ Ngcobo J (as he then was) said:

“Where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her ~~the applicant's~~ mandate. In so doing ... the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity ... And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity....”

[17] The question for consideration in this appeal turned on the extent to which second respondent and therefore by extension the court *a quo*, had taken proper account of the material evidence, which had been placed before second respondent and thus the court *a quo*. Failure to properly consider the relevant material facts placed before the second respondent invariably leads to a conclusion that the decision of the second respondent cannot be one which a reasonable decision maker would make in that proper account had not been taken of the relevant evidence.

[18] On a narrow construction of the first charge as to whether a theft, fraud or dishonesty had taken place, it may well have been that a reasonable decision maker would have concluded that, given that first respondent was doubly charged R 63.00 for the bank statements so provided, there was insufficient evidence to justify a guilty verdict on this charge. However, insofar as the second charge was concerned, there can be little doubt that the evidence showed that the first respondent was aware of the prohibition generated in the two letters to which reference has been made; that is a prohibition against employees of appellant using their access to the special code in order to alter their personal bank accounts. To the extent that there is any doubt about this conclusion, the email generated shortly after the act of reversing the charges by first respondent to his superior Mr Gary Ponting is definitive:

“Attached please see statements where fees were reversed and refunded. We [*sic* ‘I’] have overlooked the need to obtain your prior approval and kindly request that you condone our actions. The reason for re-printing statements is that these are not posted, but printed at the branch and it was to be delivered to me. It is believed that the last statements were printed, but not delivered to myself. ‘Possibly shredded by staff’. Total refund – R 63.00.”

[19] It is only after Mr Ponting had refused to condone first respondent’s action, that the latter changed his approach and claimed that he had a right to reverse the charges because the R 63.00 was not due to the bank and therefore Mr Manyathi’s letters were inapplicable. Condonation replaced by a claim of right. This latter approach is evident from a letter generated by first respondent on 13 May 2007 to the Manager Industrial Relations of appellant in which he claimed he was entitled to claim that which appellant owed him; R63.00.

[20] Even within the context of this argument, first respondent could not claim that he was unaware of the contents of Mr Manyathi’s letters. It was clearly as a result of these letters that he sought condonation for his action through the email he sent to Mr Ponting. No other reasonable inference can be drawn from the evidence than that first respondent was aware that there was a prohibition against accessing appellant’s computers to reverse charges on personal bank accounts and that he acted with reckless disregard thereto, together with the clear knowledge that he was

acting improperly. It was this realization which was the reason for his email to Mr Ponting.

[21] As Mr Brassey, who appeared together with Mr Cook on behalf of the appellant, submitted, first respondent could never have believed that he was entitled to act as he did. Mr Brassey submitted that it could hardly be contended nor was it by first respondent's representative Mr Bezuidenhout that, if "short changed" at an ATM, a bank employee would be entitled to open a teller's draw and simply take the shortfall.

[22] By resorting to self-help, first respondent acted in a manner which was inimical to a society in which the rule of law prevails. But that is exactly what first respondent did by way of his actions. He helped himself to R 63.00 through a reversal of the charge and did so in a flagrant violation of a clearly stated prohibition. To the argument that the second charge was not as precisely drafted as it should have been, this Court in **Woolworths (Pty) Ltd v CCMA and others** (2011) 32 ILJ 2455 (LAC) at paras 32 – 33 said:

"Unlike in criminal proceedings where it is said that 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient', the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the

appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences."

[23] This approach needs to be followed so as to avoid arbitrators utilizing the justification of inelegant drafting or semantic oversight to approach a charge in an overly formalistic test in disciplinary proceedings. See Coetzer "*Substance over form – the importance of disciplinary charges in determining the fairness of a dismissal for misconduct*" (2013) 34 ILJ 57 and the cases cited therein.

[24] In my view, a reasonable decision maker would have known that the conduct of first respondent, as is clear from the evidence, was not in compliance with the rule set out by Mr Manyathi. So much was clearly known to first respondent. By his unilateral action in breach of this rule and by the exercise of self-help, he had caused damage or loss to appellant.

[25] The charge and its application to these facts should and must have been clear to any reasonable decision maker. The fact that the second respondent adopted a different approach therefore justifies the conclusion that, on the **Sidumo**

test, the conclusion reached by the second respondent should have been set aside on review by the court *a quo*.

[26] Once the second respondent had come to the conclusion (as she should have) that first respondent was guilty of the second charge, the question as to the appropriate remedy then had to be considered. In this connection, second respondent considered that an employee, who had committed this act within the context of 34 years of unblemished service, should not have been dismissed. At the time that she came to this conclusion, the major factor which would have justified the dismissal would have been the breach of trust on the part of the employee in failing to comply with a regulation which, as has been set out, was formulated because of a deep concern for wrongful practices which had been perpetuated in the various branches of appellant. However in terms of the standard of a reasonable decision maker, it cannot, in my view, be considered to be in formulating the appropriate disciplinary steps unreasonable to have taken account of his record and what occurred to prompt his act including his manifest frustration in the failure of appellant to deal with his requests to reverse the charge of R 63.00.

[27] Hence, reinstatement may not, at an early stage have been regarded as an unreasonable exercise of a decision making function. As first respondent said in his answering affidavit,

“[w]hen I was eventually provided with statements and charged fees again I was livid and publically stated that I was sick and tired of this and since no one else was going to do their jobs, I will do so because the bank cannot simply repeatedly and continuously take my money.’

[28] However, the difficulty with regard to the appropriateness of an order of reinstatement is that first respondent exhibited an extraordinary, vexatious and ill-tempered attitude towards appellant and its staff during the course of these proceedings. Personally and through his legal representative, he accused appellant of falsifying documentation, stealing his money, a deliberate concealment of facts and documents, of lying of ‘people who are unscrupulous’ and of lacking *bona fides*. Although he stated in his answering affidavit that he was ‘livid’, at no stage throughout the entire duration of these proceedings did first respondent show any remorse or write any letter to appellant in which he explained his frustration, apologized for his conduct and thus sought some form of reconciliation with his employer. Reflective of this approach was the following passage in the answering affidavit:

“It does not point to dishonest intent. It points to a manager with 34 years and a clean disciplinary record whose money has repeatedly been stolen by this morally elevated bank which then refuses to attend to his complaints in this regard.”

When the court *a quo* treated this conduct as falling beyond the court’s consideration, this approach misconceived the law. An employee’s misconduct

following dismissal is relevant in determining whether the employer, though shown to be unfairly dismissed, should be reinstated. See **Zilwa Cleaning and Gardening Services CC v CCMA and others** (2010) 31 ILJ 780 (LC).

[29] Had first respondent acted in a fashion which exhibited some form of self-reflection and remorse, a decision to issue a final written warning and hence to reinstate, on whatever conditions might have appeared appropriate, could then have been a suitable and reasonable option.

[30] In the present case, whether because first respondent was poorly advised by his legal representatives or through his own violation, reinstatement is not a viable option. The trust between the parties would certainly have been significantly jeopardized by the initial conduct for which the first respondent was found guilty. It has now been shattered as a result of the acrimonious approach adopted by first respondent throughout these proceedings. A court, in terms of s 193 (1) of the Act, if it finds the dismissal to be unfair can order the employer to pay compensation. In my view, given the nature of the offence and his record, but taking account of the fundamental break in trust, the preferred approach at the time of the disciplinary proceedings would have been to have found the first respondent guilty as charged and to order the appellant to pay compensation in the amount of 12 months' salary.

[31] For these reasons therefore the following order is made:

1. The appeal succeeds.
2. The order of the court *a quo* is set aside and replaced with the following:
 - 2.1 The award made by the second respondent is set aside and replaced as follows:
 - 2.1.1 Respondent is found guilty of the second charge, that is of damage or loss suffered by the bank through disregard of its rules and procedures in terms of paragraph 4.2.18 of the Banks Disciplinary Code and Procedure, in that while acting in the capacity of relationship manager of the Ladysmith branch on 8 March 2008 he failed to follow the correct procedures with regard to obtaining authorization for the reversal of bank charges on his personal account.
 - 2.1.2 The employment relationship between the applicant and the respondent is terminated.
 - 2.1.3 The applicant is ordered to pay respondent 12 months compensation at the rate of compensation which was payable to the respondent as at March 2007.
3. There is no order as to costs.

DAVIS JA

MOLEMELA AJA

FRANCIS AJA

