



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 10/16

In the matter between:

BARRY JORGENSEN

Appellant

and

I KAT COMPUTING (PTY) LTD

First respondent

COMMISSIONER RICHARD LYSTER

Second respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third respondent

Heard: 23 February 2017

Delivered: 21 November 2017

Summary: Commissioner did not deal with alleged poor work performance because disciplinary inquiry did not recommend dismissal. But commissioner - awarding compensation for dismissal for alleged misconduct. Labour Court - remitting both disputes to CCMA. Held that as the employer had dismissed the employee for poor work performance this dispute should have been arbitrated. Appeal upheld in part. Issue of poor work performance remitted for arbitration on certain conditions.

Majority – the remittance order in the first judgment incompetent in that it would amount to subjecting the employee to double jeopardy as he was never found guilty of poor work performance at the internal disciplinary hearing – such order giving the employer the opportunity, through the back door to appeal the finding of the chairperson in arbitration proceedings – held further that the appellant who is granted the option, was in fact appealing the very decision sending the matter back to the CCMA for arbitration- appeal upheld and cross-appeal dismissed – Labour Court’s judgment set aside and award reasonable.

Coram: Tlaletsi DJP, Landman JA, and Phatshoane AJA

Neutral citation: **Jorgensen I Kat Computing (Pty) Ltd** (LAC DA10/16)

JUDGMENT

LANDMAN JA

[1] Mr Barry Jorgensen, the appellant, appeals against part of the judgment and order delivered by the Labour court (Witcher J) on 3 February 2016 reviewing an award of Commissioner Lyster of the Commission for Mediation, Conciliation and Arbitration (the CCMA), the second and third respondents respectively, concerning the dismissal of the appellant by I Kat Computing (Pty) Ltd, the first respondent (hereafter referred to as the company). The company in turn lodged a cross-appeal against the above-mentioned order. The cross-appeal was lodged out of time and an application for condonation for the late lodging of the cross-appeal has been delivered. The appeal is with leave of the court *a quo*.

First respondent’s application for condonation

[2] The explanation for the delay is acceptable, the application was not opposed and condonation was granted.

The facts

- [3] The appellant was employed by the company in 2005 as a product integration specialist which is an occupation involved with computer software. The appellant and the managing director Mr Smith (Smith) got on well together and shared several extramural interests. Sometime in 2011, the appellant handed in his resignation to Smith because he was relocating, for family reasons, to Durban. Smith thought highly of him and did not wish to lose his services. Smith offered the appellant the opportunity to grow the company's business in the Durban area where it already maintained an office. The appellant was to be the manager of the branch and was entitled to recruit whatever employees he required. His principal function was to sell billing software products to the medical practitioners and to provide the necessary support.
- [4] The appellant was assisted at the branch by Smith's son-in-law and other staff that he had appointed. The business was not a success. The expenses of the business exceed the income earned by the branch. Smith was unhappy about the situation. In January 2013 Smith instructed the appellant to send him monthly reports. Smith did not receive any reports in respect of February and March and, on 6 April 2013, Smith and others came to Umhlanga and spoke to the staff. He told them he would not pay them until they began to make a profit. However, he later relented and paid them half their salaries.
- [5] In May, Smith sent a letter to the appellant explaining why he had halved their salaries and stated that the appellant had not complied with any of his performance targets. The appellant was requested to fly to Johannesburg to attend a disciplinary enquiry on 4 June 2013. The appellant sought legal advice and did not attend the disciplinary enquiry. This resulted in two disciplinary enquiries being convened in Durban chaired by an independent chairperson.

- [6] The first enquiry was to consider a charge of misconduct being gross insubordination. The second was to consider the appellant's alleged poor work performance. Neither Smith nor the appellant gave oral evidence. Instead, written statements were handed in. The chairperson found the appellant guilty of gross insubordination for failing to attend a disciplinary hearing on 4 June 2013 and recommended his dismissal. The disciplinary chair did not recommend his dismissal for poor work performance because his performance could not be satisfactorily evaluated. Nevertheless, the company dismissed the appellant, *inter alia*, for poor work performance.

The arbitration

- [7] The commissioner heard the evidence of the appellant and Smith. The appellant discussed the way in which he handled the Durban office. He testified that he did not attend the disciplinary enquiry set for 4 June 2013 as he believed he was being set up for dismissal and his employer had not performed its contractual obligations towards him. The appellant acknowledged that he had seen the letter of 3 June 2013, which explained that the enquiry was to be an informal meeting and that if he failed to attend it would be regarded as gross insubordination. The appellant also testified about the commission that had been paid to him in respect of work done by the company in Johannesburg. This commission had continued to be paid to him by the company even though he was managing the Durban office. The payment of the commission was halted at a certain stage. His attorney communicated his stance on the non-payment and appellant's fear that he would not be dealt with fairly at the disciplinary hearing arranged for 4 June 2013. Smith testified about the disciplinary enquiry and the appellant's alleged poor work performance.

The award

- [8] The commissioner considered that as the disciplinary chairperson had not made a finding in regard to the alleged poor work performance and had not recommended that the appellant be dismissed on that account, therefore it was

not competent for him to arbitrate this aspect of the dispute. Accordingly, the commissioner restricted himself to dealing with the question whether the appellant committed misconduct, i.e. gross insubordination and, if so, whether dismissal was an appropriate sanction.

- [9] The commissioner was satisfied that the failure by the company to fulfil its contractual obligations meant that the appellant was not obliged to attend the disciplinary enquiry. The commissioner had no doubt that the enquiry scheduled for 4 June 2013 was intended to be a disciplinary enquiry. The commissioner found that the weight of the evidence supported the appellant's version that he was told nothing other than that he was to report to Johannesburg to attend a disciplinary enquiry. The commissioner was not impressed by the evidence of Smith.
- [10] The Commissioner relied on *CEPPWAWU and Others v Metrofile (Pty) Limited*¹ at para 55 where this Court held that it is an employee's choice to attend a disciplinary enquiry or not.
- [11] In conclusion, the commissioner found that the dismissal was substantively unfair. As the appellant did not wish to be reinstated, the commissioner awarded him compensation in the sum of R 165 735. No order was made as to costs.

The review

- [12] The company sought to review and set aside the arbitration award. The court *quo* held that:
- (a) The appellant had purportedly been dismissed for gross insubordination and poor work performance;
 - (b) The commissioner had erred in finding that he was not required to arbitrate the dismissal dispute in so far as it related to poor work performance;

¹ (JA37/01) [2003] ZALAC 22 (19 December 2003).

- (c) The notice to attend a disciplinary hearing on 4 June 2013 was issued for such a purpose and that the commissioner's finding that the appellant could elect to attend or not, was a reasonable decision and therefore the appellant was not guilty of gross insubordination.

[13] Accordingly, the Court made the following order:

- '1. The findings of the second respondent in relation to all the charges pertaining to insubordination/gross insubordination and the charges related thereto are upheld.
2. The award of the second respondent (KNDB 9865-13, DATED 17 March 2014) is reviewed and set aside.
3. The matter is referred back to the CCMA to determine whether the dismissal of the first respondent (the applicant in the arbitration proceedings) for allegedly "causing financial loss to the company as a result of (his) inactivity, actions and mismanagement of the Branch", was procedurally and substantively fair.
4. The matter must be arbitrated by a commissioner other than the second respondent.
5. There is no order as to costs.'

Evaluation

Alleged poor work performance

- [14] The court *a quo* correctly found that the commissioner failed to appreciate the grounds on which the appellant was dismissed. The fact that the company dismissed the appellant for poor work performance, even though an independent disciplinary enquiry did not reach a finding on this issue (and on the issue of causing a financial loss), may well give rise to a finding that the appellant's right to a fair process was violated (and possibly impact on substantive fairness of the dismissal) but poor work performance was explicitly put in issue by means of the notice of dismissal and should have been examined.

- [15] As cross-examination of the appellant as regards poor work performance, was disallowed by the commissioner, it means that this issue, as submitted by Mr Robin Pillemer, who appeared for the respondent, was incapable of being determined by the court *a quo* and by this Court. Mr Prior's (for the appellant) submission that this should be done cannot be sustained.

Gross insubordination

- [16] The instruction to attend a disciplinary is to be evaluated against the events which preceded it but it does not require an adverse credibility finding against Smith. On 6 April 2013, Smith met with the appellant and his staff and told them that if sales did not improve he would not pay them their salaries. The suggestion that they had agreed to this need can be confidently rejected. On 1 May 2013, the company paid the appellant and his staff half their salaries. This caused the appellant to instruct an attorney to take up the matter with the company on his behalf. The result of this is that the company instructed the appellant to attend a disciplinary hearing in Johannesburg on 4 June 2013. The appellant sought legal advice in regard to his obligation to attend a disciplinary hearing. He was advised not to do so, as the company was in breach of its obligations towards him. The attorney's letter to the company recorded the appellant's concern about whether he would receive a fair hearing at the enquiry.

- [17] After the instruction to attend the disciplinary hearing had been issued on 28 May 2013, the Human Resources manager wrote to the appellant on 3 June 2013, stating that the meeting to be held on 4 June was to be an informal meeting and that the non-payment of commission would be discussed at that meeting. The appellant was warned that should he fail to attend the meeting, it would be regarded as gross insubordination. The letter concluded by saying: "Furthermore, it is most presumptuous to assume that the outcome of the meeting has been predetermined."

- [18] The author of the letter also contacted the appellant telephonically and told him that "depending on the outcome" it might be necessary for him to stay for a

couple of days. She said to him words to the effect that: "You need to come for the disciplinary hearing". The appellant admitted that she might have told him that he was to stay and train other people. But the main aim was to secure his attendance at a disciplinary hearing.

[19] It is clear that in spite of a reference to an informal meeting, the intention was to hold a disciplinary hearing and, depending on that outcome, the appellant would have been required to train other people. Smith himself said that he hoped that the appellant would resign from his employment. Had the meeting been called to discuss only work place issues then of course the appellant would have been obliged to attend it and his failure to do so would have constituted gross insubordination. But for the reasons set out above it was not intended to be such a meeting; it was intended to be a disciplinary hearing.

[20] Taking all the circumstances into account, including the fact that the payment of the commission may have been ambiguous, the holding of a disciplinary enquiry after the company had breached its duties towards the appellant is hardly fair. The appellant feared that he would not be treated impartially. His fears were not fanciful as is demonstrated by the fact that although an independent disciplinary enquiry found that it could not make a finding on his alleged poor work performance, the company went ahead and dismissed him on this ground. In addition, there is the jurisprudence set out in the award of the commissioner and the court a quo that an employee is at liberty to attend or not to attend a disciplinary enquiry.

[21] I should mention that the appellant's alleged insubordination at the Durban disciplinary enquiry regarding his alleged poor work performance did not feature in the letter dismissing him.

[22] In the result, I am satisfied that the decision by the commissioner, even though he overlooked the appellant's testimony of his conversation with the HR manager, that the dismissal for gross insubordination was substantively unfair, was a reasonable conclusion. I must also point out that the appellant was not

charged with making the employment relationship unworkable. It may be related to the alleged poor work performance. It would have been relevant had the appellant sought reinstatement but he did not seek that relief.

- [23] The compensation awarded to the appellant overlooked the fact that the appellant was on a fixed term contract that had five months to run at the time of his dismissal. There was no cause to award compensation more than his actual loss of income. The award of compensation was not one that a reasonable commissioner would have made and to that extent the compensation should be reduced to an amount of R92 075 being 5 (five) times the difference between what the applicant earned and what he would have earned while employed by the respondent.

The order setting aside the award

- [24] It is necessary to return to the order of the court *a quo*. The court *a quo* had found that the dismissal for gross insubordination was unfair and sought to uphold this finding in the order which it made. However, as the further order set aside the award, the finding fell away with the setting aside of the award. In my view, it would be more sensible to uphold the award but enable the CCMA to arbitrate the ground relating to the alleged poor work performance and causing the company financial loss. Of course, any compensation which may be awarded must take into account amended compensation award as the total amount of compensation is restricted to an amount equal to 12 months' remuneration.
- [25] However, the employment relationship between the parties is at an end and the appellant has been awarded some compensation. If the appellant wishes to pursue these claims, then he must be enabled to do so. If the appellant does not wish to do so, the prolongation of the dispute is not warranted. An enabling order will suffice. A time limit should be placed on the period within which the appellant should be entitled to prosecute the arbitration.

Costs

[26] Although the respondent has achieved a small measure of success, it will be fair to make no order as to the costs of the appeal.

[27] In the premises, I make the following order:

Order

1. The late filing of the cross-appeal is condoned.

2. The appeal is dismissed.

3. The cross-appeal is partly upheld.

4. The order of the Labour court is amended to read:

'(1) The application to review the award (KNDB 9865-13, dated 17 March 2014) succeeds in part.

(2) The matter is remitted to the Commission for Conciliation Mediation and Arbitration (the CCMA) for the arbitration *de novo* before a different commissioner other than the second respondent on the question whether the dismissal of Mr Barry Lionel Jorgensen, the applicant, for allegedly "causing financial loss to the company as a result of (his) inactivity, actions and mismanagement of the Branch", was procedurally and substantively fair.

(3) In the event that the applicant wishes to enforce his right in terms of this order, he is directed to file a Notice, within 14 days from date of this order, informing the CCMA that he requires the arbitration of this issue.

(4) Should the arbitration be requested, any award shall take into account the amended compensation awarded to the applicant.

(5) The award is confirmed save that the amount of compensation is replaced with an amount of R92 075 being 5 (five) times the difference between what the applicant earned and what he would have earned while employed by the respondent.

(6) There is no order as to costs.'

5. The 14-day period set out in the amended order of the Labour Court is to run from the date of delivery of this order.
6. There is no order as to the costs of the appeal.

Landman JA

TLALETSI DJP

[28] I have read the judgment prepared by my brother Landman AJA, hereinafter referred to as the first judgment. I am unable, with respect, to agree with some of the orders proposed by him. The order that I would propose is that the appeal should succeed and the cross-appeal be dismissed. I would set the orders of the Labour Court aside and substitute same with the orders to be indicated in the course of my judgment.

[29] The factual background has been set out in some detail in the first judgment. It shall therefore not be necessary for the purpose of my reasoning to repeat what has been set out already except in so far as is necessary. I shall, however, refer to some of the factual matrix not necessarily reflected in the first judgment which, in my view, are relevant for my reasons.

[30] Landman AJA found that the decision by the commissioner that the dismissal of the appellant for gross insubordination was substantively unfair is a reasonable conclusion. I agree with this conclusion. I also agree that the compensation awarded to the appellant for unfair dismissal in respect of gross insubordination by the commissioner overlooked the fact that the appellant was on a fixed term contract that had five months to run at the time of his dismissal. The compensation awarded to him is, therefore, more than his actual loss of income. Furthermore, the appellant in his evidence testified that he wanted compensation in the amount equivalent to six months' remuneration. By awarding him an

amount of compensation equivalent to nine months' remuneration amounted to awarding the appellant what he did not ask for. I therefore concur with paragraph 5 of the order proposed by Landman AJA.

[31] My disagreement with the first judgment relates to the reasoning and the order as regards the charge of poor work performance. My reasons for disagreement are set out in the paragraphs that follow.

[32] Two separate inquiries were held by the chairperson, appointed by the respondent. The first was an "Incapacity Investigation Due to Poor Work Performance". With regard to the inquiry for poor work performance the Chairperson recorded that a *"disciplinary inquiry/poor performance consultation was held on 26 March 2013."* The nature of the investigation is recorded as:

'2.6.1 Poor work performance in relation to your duties as a Branch Manager, in that you failed to perform your duties to acceptable company standards.'

The appellant appeared in person. He, together with the representative of the respondent, presented written statements which were read out loud during the proceedings.

[33] The submission on behalf of the respondent was that the appellant and his team were under-performing; **that he failed to perform his basic duties according to company standards; as branch manager, he failed to ensure that his three fellow employees perform their duties according to company process and procedures; he failed to submit any documentation recording the knowledge and experience that he has gained whilst in the employ of the respondent which could have assisted any replacement;** his actions were an attempt to make himself indispensable; **he failed to recover money from new clients who reneged on their payments despite numerous requests for him to do so, which was said to be a clear obstruction and failure to carry out his duties.**

[34] The following is recorded by the chairperson in his ruling on the poor work performance proceedings:

'34.2 Upon questioning, the employee/accused explained that he didn't really receive any training and/or counselling, but never requested more training and/or counselling from the company. He added that he is well aware of his duties and what is expected of him from the company's point of view, and does not know whether the company can do anything else to assist him with his performance. When asked whether anything is keeping him from performing his duties according to company standards the employee refused to answer the question. He added that he did not follow a grievance procedure and also declined to answer whether he had any information to prove that he had been victimised. He added that, according to him, he did nothing wrong, and that he is still employed by the company.

4. **Finding:**

Having regard to the evidence presented by parties concerned the following is my finding:

4.1 The accused stated that he knew how to do his work, and was aware what the company expected of him with regards to his daily duties but did not request more training, evaluation or guidance.

4.2 The accused explained that he did receive the necessary tools of for him to perform his duties according to company standards.

5. **Recommendation:**

5.1 The process for the investigation based on the accused's poor work performance could not be satisfactorily evaluated, due to the uncooperative and unresponsive manner of the accused in failing to answer certain questions put to him by myself. This in itself could be regarded as an act of insubordination and the Judgment of the insubordination hearing will have to prevail in this instance.'

[35] It is clear from the recommendation that the chairperson did not make any finding that the appellant made himself guilty of poor work performance as alleged by the respondent.

[36] The second inquiry was disciplinary proceedings in which the appellant was charged with the following misconduct charges as per the “Notice to Attend Disciplinary Inquiry” served on the appellant:

- ‘a Gross insubordination in that you failed to obey lawful and reasonable instructions from your superior.
- b Causing a potential and/or loss to the company as a result of your actions above.
- c Failure to follow company policies and procedures with regards to your actions above’.

[37] It is important to note that there is no reference to “*mismanagement of this Branch*” at charge (b) or any other charge. The disciplinary inquiry centred on the failure or refusal by the appellant to attend the enquiry in Johannesburg. He was acting on the advice of his attorney that he was not obliged to attend because, *inter alia*, the respondent has, in breach of the contract of employment, not paid his salary in full. A flight was arranged for him and he failed to attend despite being notified of the flight details.

[38] The appellant was as a result charged for **insubordination by refusing to go to Johannesburg, failure to obey lawful instructions as he was still an employee of the respondent at the time, and causing the respondent financial loss to the tune of R680.00 being the cost of the air ticket**. His defence and version of the events were contained in part D of his written submission as well as the explanation he gave in response to some of the questions at the disciplinary enquiry.

[39] In a nutshell, he reiterated that he was not in law obliged to obey instructions from the employer until such time that the employer performs his obligations under the employment contract. He declined to answer questions regarding the reasonableness of the instructions, whether he followed the grievance procedure which he was well aware of and whether the respondent had authority over him.

[40] At the conclusion of the hearing, the chairperson ruled that:

'The chairperson, after reviewing the evidence submitted by the complainant and the accused's own version of events, and a balance of probability, subsequently found the accused guilty of the charges listed in 2.8.1-2.8.3.

I find the accused guilty of the above-mentioned charges, because it was a reasonable instruction given to him by his superior, the Managing Director of the Company, but failed to follow the reasonable instructions, which forms part of his daily duties, and therefore his behaviour has led to financial losses to the company.'

[41] The respondent issued a notice of dismissal on 08 June 2013 in which it indicated that:

'You are hereby informed that as a result of a disciplinary inquiry conducted on 14 June 2013, your services with the company have been terminated. Your dismissal is without notice and you may collect any outstanding monies, which are due to you within seven (7) days of the date of this notice.

The employer's reason(s) for terminating your employment are in brief, described below.

1. Gross insubordination in that you failed to obey lawful and reasonable instructions from your superior.
2. Causing a financial loss to the company as a result of your inactivity, actions and mismanagement of the Branch.
3. Failure to follow company policies and procedures with regards to your actions above.'

The appellant was further advised that he is entitled to appeal the decision as per the company disciplinary policy or refer the matter to the CCMA or relevant bargaining council.

[42] It is important to emphasise that the dismissal notice made no reference whatsoever to the incapacity investigation or for that matter to poor work

performance. It stated in no uncertain terms that the appellant's dismissal **is as a result of the disciplinary enquiry held on 4 June 2013** and referred to specific charges of misconduct that the chairperson found to have been proved. The confusion was in my view caused by an incorrect finding by the Labour Court that:

"Right, my thinking is as follows, although the [appellant] was not charged and was not found guilty of poor performance and no finding was made of it he was nevertheless dismissed for poor work performance which is evidenced by the dismissal notice."

The dismissal notice makes no reference to any poor work performance.

- [43] The Commissioner was correct in finding that even from the respondent's own version, the chairperson of the enquiry only found the appellant guilty of the second set of charges, namely, insubordination for not attending the enquiry of 4 June and two other related charges. She was correct in limiting herself to the charges that formed the basis for dismissal and not deal with matters which were not the true reason for the dismissal. The fact that the second charge relating to financial loss had the words "mismanagement of the Branch" added to it in the chairperson's findings and in the dismissal notice contrary to what the notice to attend the disciplinary enquiry stated does not change the true reason for the dismissal. The financial loss to the respondent was only limited to his failure to attend the enquiry in Johannesburg as instructed. That was the only evidence tendered at the disciplinary enquiry in support of the financial loss. There was no mention of any other cause and nature of financial loss to the respondent. It would be opportunistic of the respondent to suggest otherwise.

- [44] The Labour Court upheld the commissioner's findings and award as regards the insubordination and its related charges. That is also the finding in the first judgment. These findings bring the matter to an end. There is therefore nothing left to be referred back to the CCMA for determination by another arbitrator.

- [45] The respondent sought to review the award on the basis that the decision reached by the commissioner is a decision that no reasonable decision-maker could reach. Such a contention is not supported by the evidence on record and falls to be dismissed. The respondent never sought to review the award on the basis that the commissioner misconstrued the nature of the enquiry before her as the Labour Court found.
- [46] In any case, the Commissioner, by refusing to entertain the poor work performance as a true reason for the dismissal, did not in my view misconstrue the nature of the enquiry before him. On the contrary, the commissioner appreciated the nature of the proceedings as well as the true grounds on which the appellant was dismissed.
- [47] I have a further difficulty with an order for the referral of the proceedings back to the CCMA for arbitration. Firstly, the dismissal which is in effect a termination of a contract of employment between the appellant and respondent, has been found to have been substantively unfair already and compensation has been awarded. A finding by the subsequent commissioner that the dismissal for poor work performance was not fair would only be of academic relevance because the compensation awarded covers the appellant's remuneration for the remainder of his employment contract which was prematurely and wrongfully terminated. Furthermore, a finding that the dismissal for poor work performance was fair would not make a dismissal already found to be substantively unfair on the basis of insubordination fair. A referral back to the CCMA for the determination of only one alleged reason for dismissal would therefore make no sense.
- [48] Secondly, and of fundamental importance, the appellant is appealing against the order of the Labour Court referring the poor work performance to the CCMA for arbitration. He contends, *inter alia* that the referral would be subjecting him to double jeopardy as he was never found guilty of poor work performance at the internal disciplinary hearing, which is unfair and consequently wrong. However, the order proposed in the first judgment is directing the same appellant, if he so

wishes, to request that the dispute be arbitrated and to file a "Notice" within 14 days from the date of the order informing the CCMA that he requires the arbitration of the said issue. Interestingly, the respondent is not granted the same or similar option in terms of the order. As I see it this may be so because in terms of the Labour Relations Act, 66 of 1995, it is an employee and or its trade union that can refer an unfair dismissal dispute for conciliation and arbitration and not the employer. The order is therefore in my view, impractical to implement because an employee cannot be compelled to refer an unfair dismissal dispute to the CCMA if he or she does not want to do so.

[49] Thirdly, the appellant has long left the employ of the respondent and it would not make practical sense to subject him to discipline by the respondent. Fourthly, the referral would mean that it is the respondent who is aggrieved by the decision of its own chairperson of the disciplinary enquiry and is now given an opportunity, through the backdoor, to appeal the decision through arbitration proceedings. A referral that was made to the commission was an unfair dismissal dispute based on misconduct and not incapacity. The referral was made at the instance of the appellant and not the respondent.

[50] For the above reasons, I would uphold the appeal and dismiss the cross-appeal with costs. The order that I would make is as follows:

Order

- a) The appeal is upheld and the cross-appeal is dismissed.
- b) The order of the Labour Court is set aside and replaced with the following:
 - i) The Dismissal of the Applicant by the Respondent is found to have been substantively unfair.
 - ii) The Respondent is to pay the Appellant an amount of R92 075 being 5 (five) times the difference between what the appellant earned and what he would have earned while employed by the Respondent.

- c) No order is made as to costs in the Labour Court.
- d) The Respondent is to pay costs of the appeal.

Tlaletsi DJP

PHATSHOANE AJA

[51] I agree with the reasoning by Landman JA and Tlaletsi DJP that poor work performance was somewhat introduced by means of the Notice of dismissal even though the chairperson of the disciplinary enquiry did not recommend the appellant's dismissal on the basis of his purported poor work performance. However, I do not agree with the enabling order proposed by Landman JA in paras 24 and 25 of the judgment because it effectively empowers the commissioner to reconsider the appellant's alleged poor work performance. On the view I take of this matter, nothing turns on the fact that the Notice of dismissal shows that the appellant was dismissed *inter alia*, for "causing financial loss to the company as a result of [his] inactivity, actions and mismanagement of the branch." This is so because the appellant made his choice. Put differently, he does not wish to have the dispute concerning his alleged poor work performance arbitrated. This much is apparent from his grounds of appeal and heads of argument. Therefore, I concur with the order suggested by Tlaletsi DJP.

Phatshoane AJA

Phatshoane AJA concur in the Judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT: Attorney A J Prior of Prior and Prior Attorneys.

FOR THE RESPONDENT: Adv Robin Pillemer
Instructed by Barkers Attorneys

LABOUR APPEAL COURT