



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Case no: D 416 / 09

In the matter between:

**FIRST NATIONAL BANK, A DIVISION**

**OF FIRST RAND BANK LIMITED**

**Applicant**

and

**STEPHEN LANGUAGE**

**First Respondent**

**NICCI WHITEAR NEL N.O**

**Second Respondent**

**THE COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**Third Respondent**

**Heard: 1 November 2011**

**Delivered: 8 December 2011**

**Summary : Review of decision reinstating senior bank manager – no misconduct proven – no basis on which award can be set aside.**

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**JUDGMENT**

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BHOOLA J

## Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (the Act) to review and set aside the award issued by the second respondent (the arbitrator) in March 2009 under case number KNPM22996-07 in a dispute referral arbitrated under the auspices of the third respondent. In her award the arbitrator found that the dismissal of the third respondent (the employee) was substantively and procedurally unfair, and granted him reinstatement as well as back pay of 22 months in the sum of R607 619, 54.

## Background facts

[2] The employee held the position of Relationship Manager of the Ladysmith branch of the applicant bank, and had 34 years' service at the time of his dismissal on 22 May 2007. He also held a personal bank account with the applicant.

[3] Prior to 2001 the applicant operated staff accounts with specific benefits such as reduced bank charges and interest rates for staff. From 2001 onwards this practice was discontinued and staff accounts were treated on exactly the same basis as non-staff customer accounts, with staff being given a salary increase to compensate for the normal bank charges on their accounts.

[4] In a letter dated 7 February 2005 the Chief Executive Officer of the applicant, Zweli Manyathi, informed staff that reversal of charges on their personal accounts was prohibited. They were instructed that they "may not abuse their position within the bank to reverse these charges or fail to process fees due on their accounts". The letter stated that breach of the prohibition would be dealt with strictly in terms of the bank's Disciplinary Code and Procedure and employees could find themselves faced with dismissal.

[5] The employee was aggrieved by bank charges automatically debited to his account for copies of his bank statements. He paid a service charge for bank statements but had not received them despite repeated complaints over a period of about six months. After his complaints on the issue had no effect, he used his staff access code to transact on his account and reversed bank

charges for copies of bank statements made at his request when he did not receive the originals. The reversed charges were in the total sum of R63.00. He did not reverse amounts (i.e. an amount of R50.00) which he felt had been legitimately debited. A few days later (when he heard that there might be repercussions for his conduct) he sent an email to the Area Sales Manager, Gary Ponting in which he stated that he had overlooked the need to obtain approval and sought condonation for his actions. Ponting refused to condone the reversal of R63.00.

[6] The employee was suspended pending an investigation and was thereafter charged with contravening paragraphs 4.2.1 and 4.2.18 of the bank's Disciplinary Code and Procedure in the following terms :

"Theft, fraud, dishonesty in that it is alleged that whilst acting in the capacity as a relationship manager of the Ladysmith Branch on 8 March 2007, you reversed charges on your personal account, without prior approval. It is further alleged that you were aware of communication that was sent out and dated the 7<sup>th</sup> February 2005 on the "reversal of bank charges on staff accounts", as you had signed and confirmed on a quarterly basis that you understood and acknowledge that no bank charges may be reversed due to the bank for their personal gain.

And/or

Damage or loss suffered by the bank through disregard of its rules and procedures in that it is alleged that whilst acting in the capacity of a relationship manager of Ladysmith branch on 8 March 2007 you did not follow the correct procedures with regard to obtaining authorisation for the reversal of bank charges on your personal account. It is further alleged that as a result of your disregard of procedures the bank has now suffered a loss of R63.00".

[7] In his disciplinary enquiry on 26 April 2007 the employee admitted knowledge of the rule prohibiting reversals as communicated by Manyathi, and admitted having reversed the R63.00 charge for copies of his statements. He explained his conduct by alleging that the charges were not actually due to the bank as he had never received the original bank statements, and that there was no procedure or guideline requiring him to obtain prior approval. In essence his defence was that he did not act dishonestly.

[8] He was found guilty of "breaching the instruction given by Zweli Manyathi dated 7 February 2007", and the recommendation issued by the chairperson of

the disciplinary enquiry, the late Patsy Kippen, was that he should be issued with a final written warning. The chairperson found that the charges had not been proven and expressed doubts about whether the first charge was correctly set out in the first place. On the second charge she found that if there was a previous incident where a staff member had been dismissed for R63,00 he should be similarly dismissed, but otherwise he should be given a final written warning.

[9] The employee received a notice dismissing him on 22 May 2007 issued by his branch manager, Zaayman, which informed him that the sanction of dismissal for contravening paragraph 4.2.1 and 4.2.18 of the Disciplinary Code had been confirmed by a review panel. He lodged an internal appeal and this was dismissed. The notice informing him of the dismissal of his appeal stated that the “aspects he raised” were found to have been “insufficient to set aside the dismissal” and therefore there were no grounds for upholding the appeal. His evidence was that he had no reasons on which to base his appeal and as a layperson may not have properly dealt with the issue of sanction.

[10] He referred a dispute to the third respondent alleging that his dismissal was substantively and procedurally unfair, following which the dispute was arbitrated. The award that forms the subject of this review was issued in his favour in March 2009.

### The award

[11] The arbitrator found that the dismissal of the employee was substantively unfair for the following reasons :

“5.7.1 This is because I am not satisfied that the applicant was indeed guilty of the offence for which he was charged, found guilty and dismissed. It was accepted by all witnesses that the applicant did not display dishonest intent<sup>1</sup> in reversing the charges on his account. I accept the applicant’s argument that his 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 their personal gain. This is on the basis of the unique facts pertaining to the applicant’s case. The respondent did not challenge

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<sup>1</sup> My underlining.

the applicant on whether or not he was telling the truth regarding not having received his statements, having complained about this, and not having been attended to within a reasonable time. The applicant made notes on his computer records explaining the reversals and the reasons behind them. There was no dishonest intent.

5.7.2 In any event, even if I am wrong on this point, and the applicant did contravene the prohibition contained in Mr Manyathi's letter, the evidence shows that the respondent was not consistent in its application of discipline. The evidence shows that the respondent had been much more lenient with other staff members who were charged with different but comparable misconduct; and that the applicant could reasonably have reached the conclusion that the respondent would condone his conduct given that he had executed similar reversals in 2006 for which he had not been disciplined.

5.7.3 Even if I am wrong on one or both of the previous findings, I am also satisfied that the sanction of dismissal imposed by the respondent in the applicant's case 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 applicant's case. I believe it was unfair."

[12] The arbitrator states that given her findings on substantive fairness it is not strictly necessary to make a finding on procedural unfairness as it will not impact on the remedy provided for by law. She however makes the following findings on procedural unfairness:

"5.7.4.1 It was unfair for Mr Gielink to have drafted the charge sheet without investigating the matter. Had the investigation been done it is likely in my view that different charges would have been preferred against the applicant and the matter may not have reached the level of seriousness it did.

5.7.4.2 It seems to me that the different and distinct charges against the applicant arose out of the identical facts. This also compounded the seriousness of the matter in a manner which was unfair.

5.7.4.3 It was unfair of the Review panel to make findings of fact inconsistent with Mrs Kippen's findings, and it was also unfair of the panel not to make those reasons available to the applicant in order for him to prepare for his appeal.

5.7.4.4 The applicant's right to appeal as provided for in the disciplinary procedure was not given effect to because he did not have the benefit of the reasons for the finding of

his guilt and the reasons for the imposition of the sanction of dismissal. He was thus unable to give full and detailed reasons for the appeal as required by the procedure.”

### Grounds of review

[13] The applicant in its pleadings raised three grounds of review i.e.:

13.1 The commissioner committed gross irregularity in the conduct of the arbitration proceedings by excluding and/or disregarding and/or failing properly to record relevant evidence when arriving at her decision.

13.2 The commissioner committed misconduct and/or gross irregularity in the proceedings by failing to properly apply her mind to the material before her;

13.3 The commissioner in arriving at her factual and legal conclusions reached conclusions which are not rationally justifiable and reached conclusions which no reasonable decision maker would have.

[14] The primary ground of review relied upon by the applicant is that the arbitrator fundamentally misconstrued the nature of the employee’s misconduct and failed to apply her mind properly to the real issues before her.

### *Substantive fairness*

[15] In regard to the arbitrator’s main conclusion that the employee was not guilty of the misconduct with which he was charged, the applicant submits that the crux of charge against the employee relates to a breach of the distinction between his relationship as a customer of the bank on the one hand and an employee on the other, a distinction which the arbitrator failed to appreciate. Mr Brassey, appearing for the applicant, conceded that the arbitrator may otherwise have been conscientious, but she fundamentally misdirected herself to the issues for determination, producing a result that “makes one whistle”. The outcome is therefore eminently reviewable particularly in the context of the employee’s deliberate breach of bank rules, dishonesty, intemperate conduct and lack of contrition. Mr Brassey submitted that although the loss suffered by the applicant was a paltry sum of R63.00, the principle of enforcing a fiduciary duty owed by a senior manager with long and exemplary service to the bank is critical. The arbitrator lost sight of this in focusing exclusively on the small sum

involved, and was obviously influenced by profound sympathy for the employee as a result of which she exonerated him from any blame whatsoever for his misconduct.

[16] In support of the review Mr Brassey submitted that the arbitrator concluded that the employee lacked dishonest intent despite his open defiance of the bank's policy. In so doing she failed to have regard to the fact that his conduct in abusing the privileges attached to his position as a senior manager of the bank in order to reverse charges on his personal account amounted to self help. Evidence was led that the entire banking system could collapse into chaos if customers were to resort to self help at each instance to address their grievances. Regardless of whether he received the original statements or not, and whether bank charges for issuing duplicate copies of his statements were correctly levied against his account, his conduct constituted a serious breach of his fiduciary duties towards his employer. He was entitled to all of the remedies ordinarily available to customers of the bank and should have adhered to these. He could also have approached the banking Ombudsman for assistance. Instead, other than raising his complaints informally, he failed to follow any legitimate steps to address them and resorted instead to unilaterally effecting the changes to his account. Prior to dealing with his own account he should have obtained the necessary authority to do so. In the circumstances no reasonable arbitrator could have concluded that the employee was not guilty of misconduct on the grounds that he did not display dishonest intent.

[17] The evidence moreover confirmed that there was a clear prohibition on the conduct he was charged with and that he was aware of this. An employee could not act as judge, jury and executioner in respect of his private account. All staff are required to comply with the prohibition and the bank's attitude was one of zero tolerance for non-compliance. The evidence (of Armstrong and Bierbaum) was that despite the employee being aware of the rule he conspicuously failed to comply. His explanation that it was not money due to the bank was pure sophistry. It was common cause that he had signed the memorandum from Manyathi confirming the prohibition against reversals, but in his testimony he displayed complete indifference saying that the document did not stand out in his mind and that having read it (subsequent to being charged) it would not have made any difference to his conduct. Apart from this obvious

display of contempt for the prohibition, he was unrepentant and made various vitriolic statements about his employer and his colleagues. In these circumstances it is immaterial whether he received the bank statements or not or whether his request for copies was justified and should have been paid for. His conduct had clearly breached the relationship of trust. Moreover, he was a longstanding manager of some seniority. It is common cause that on a previous occasion he extended his overdraft facility for which he had received a written warning. This was acknowledged by the arbitrator. His conduct could not have been held to have been anything other than deliberate and repeated dishonesty and his transgression of the prohibition on a previous occasion cannot be said to have been condoned by the bank.

[18] The arbitrator further ignored evidence that the employee sought approval for his conduct after the fact when he learnt that discipline was being considered against him. Had this been a genuine effort in recognition of real wrongdoing on his part it may very well have served as a mitigating circumstance when considering the appropriate penalty. However, his act of reversing the charges was done in a devious manner with no indication that he acknowledged his wrongdoing. He persists with his lack of remorse and it is likely that he will repeat this conduct if given the opportunity in the future.

[19] The applicant submitted therefore that the arbitrator's finding that no offence was committed is not a finding which a reasonable arbitrator properly applying her mind to the matter could have reached. Furthermore, her attempts to bolster the finding by making findings in the alternative simply indicates her failure to grasp the issues before her. It renders the award fundamentally flawed. The employee deliberately flaunted the bank's rules, took money which was not his and which can be considered nothing other than theft, and therefore committed serious misconduct. Mr Brassey submitted that in the circumstances it is inconceivable that the arbitrator could conclude that he is not guilty of serious misconduct and that reinstatement was appropriate. There was moreover nothing unique about the facts, nor can lack of dishonesty be conclusive of his lack of guilt on the charges against him.

*Inconsistency*



[20] The arbitrator's conclusion, in the alternative, that the bank acted inconsistently in the application of discipline for similar offences is not supported by the evidence presented at the arbitration. In fact the evidence showed that a strong line is taken against such misconduct, and the reason why the employee was not disciplined for similar conduct in July 2006 was not a result of a conscious decision not to discipline him, but because the misconduct had not been reported to management, and the employee who failed to report it was disciplined. The arbitrator's flawed reasoning amounts to concluding that because he escaped discipline in the past it was not appropriate to discipline him in this instance for his repeated misconduct. In addition on the inconsistency point, the arbitrator's conclusion that the employee's conduct was comparable to that of Mabata and Zaayman cannot be sustained on the evidence. These matters are distinguishable on the facts - Mabata was not acting in breach of an instruction and was found to have made a genuine mistake, and Zaayman was also found to have made a genuine mistake in using the bank's credit card instead of his personal card. Neither of them was found to have committed an act of deception or dishonesty.

*Sanction of dismissal grossly disproportionate*

[21] The conclusion that even if the employee had been guilty of the misconduct, dismissal was shockingly inappropriate Mr Brassey submitted, is extraordinary, to say the least.

[22] The disciplinary enquiry chairperson did not find that dismissal was not appropriate. In fact, she stated that if his dismissal would be inconsistent with the bank's approach to other employees then he should be issued with a final warning. The arbitrator's finding that the dismissal was "shockingly inappropriate" because of his long service and the unique circumstances of the case is unjustified. Firstly, length of service does not automatically militate against a sanction of dismissal in circumstances of aggravated, repeated misconduct and lack of contrition. It leads to a risk of repeated misconduct. Secondly, it is disputed that there were material facts unique to the employee's case. Many customers take exception to charges levied on their accounts and follow the normal complaints channel to resolve their grievances. A customer who is overcharged by the bank is not entitled to simply take money from the

vault to remedy the error. In this regard the conduct of the employee was no different, irrespective of whether his assertion that he was taking his money was correct.

[23] The remedy of reinstatement indicates that the arbitrator clearly failed to apply her mind to the facts before her. Where an employee seeks reinstatement but remains unrepentant for his flagrant transgression of workplace rules and dishonesty, Mr Brassey submitted that the arbitrator was required to have applied her mind to this factor. The employee's attitude throughout the proceedings was one of contempt for the bank's rules, and he suggested that latitude should have been extended towards him. He suggested that the fact that he was disciplined was somewhat reprehensible and persists with his denial that he had committed any misconduct. The principle that the lack of remorse for serious misconduct renders progressive discipline pointless was established in *Timothy v Nampak Corrugated Containers (Pty) Ltd*<sup>2</sup> when the Labour Appeal Court held that the purpose of progressive discipline was to reintegrate the employee into employment where the employment relationship can be restored to that which pertained prior to the misconduct. In the context of his blatant dishonesty and lack of contrition, which destroyed the trust relationship, reinstatement is hardly an appropriate remedy.

#### *Procedural unfairness*

[24] Mr Brassey submitted that, in regard to procedural fairness, the arbitrator's views are clouded by her sympathy for the employee and the conclusion that he did nothing wrong. It is not apparent that she applied the appropriate test in determining procedural fairness as set out in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others*<sup>3</sup>. The employee contended initially that no investigation had been conducted. However, evidence was led that an investigation had been conducted by Gielink as contemplated in the Disciplinary Code and that the disciplinary procedure which was followed complied with the Code. The Disciplinary Code constituted a collective agreement with the finance union, SASBO. The employee had indicated at the end of the disciplinary enquiry that he was satisfied with the

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<sup>2</sup> (2010) 31 ILJ 1844 (LAC).

<sup>3</sup> (2006) 27 ILJ 1644 (LC).

fairness of the process, although at the arbitration he alleged unfairness in terms which Mr Brassey referred to as “intemperate and unrestrained impertinence.’ Furthermore, notwithstanding the arbitrator’s conclusion, the charges do not exhibit unwarranted splitting but are clearly framed in the alternative as well as cumulatively. In regard to reasons for his dismissal, the Disciplinary Code does not provide for reasons to be issued unless the employee requests them and he failed to do so.

[25] For these reasons Mr Brassey submitted that the award should be set aside as misdirection on the merits as well as the appropriate sanction.

#### Opposing submissions

[26] Mr Bezuidenhout, appearing for the employee, submitted that it was common cause that the memorandum containing the prohibition did not specify a procedure for dealing with reversals, which the arbitrator correctly found to have been the case. Naidoo, the Administration manager to whom the employee complained about his frustration at not receiving his bank statements despite being charged a service fee for them, admitted as much. He further admitted that the prevailing practice in regard to bank charges was for a dissatisfied customer to complain to a branch manager. The employee’s evidence was that he had complained to both Zaayman (the Branch manager) and Naidoo over a period of time and his complaints had gone unheeded. He had also complained to various administrative staff who could have rectified the situation but they did not do so. He stated publicly that he was “sick and tired of the issue not being addressed” and he was going to rectify the situation himself. Naidoo relied on the standard clause contained in bank statements which refers customers to their bank manager in respect of any queries within 30 days. In addition to his evidence that there was no other applicable procedure he was unable to confirm that prior authority for the reversal was a requirement or indeed how and from whom this was to be obtained.

[27] Mr Bezuidenhout submitted that evidence was led that the memorandum containing the prohibition arose in response to an incident at the Bloemfontein branch, where a supervisor had regularly reversed charges due to the bank on both her and her husband’s account and had allowed her staff to do the same.

Unlike the employee, they had blatantly stolen the bank's money. The supervisor was dismissed but her staff members were issued with final warnings. The applicant was unable to explain the inconsistency in these sanctions imposed, and the arbitrator had clearly applied her mind to this issue. The memorandum was therefore drafted in this context and refers to "*abuse of procedure*" for "*personal gain*". It does not apply to a situation where an employee feels that the charges were incorrectly levied, and it is unclear what procedure he was said to have abused as well as what his personal gain was other than having his own money returned to him.

[28] Despite these obvious gaps the employee was charged and convicted of both offences. The bank appears to have accepted furthermore that the R63.00 did not belong to it and that he did not act for personal gain. This was pleaded but does not appear to form part of its case on review. It now submits that it is irrelevant whether the money belonged to the employee or the bank since the record is unclear on this issue. If the employee's version is accepted, then it is clear that his conduct falls outside the ambit of the prohibition, which is what the arbitrator found. This does render his situation unique in that he was not reversing charges that were due to the bank but money that was due to him.

[29] There was furthermore no evidence led of any of the previous strict warnings he had allegedly been issued with. In regard to his reversal of bank charges in 2006 no disciplinary action was taken against him. The bank failed to produce documentary evidence that those reversals had been approved, either prior to him effecting them or thereafter. On the second occasion he reduced his credit facility but the administration charges were not reduced proportionately. Romy Govender testified about this being condoned and in response to which she reduced the bank charges. Neither Govender nor the employee were disciplined for this incident although Govender appears to have been reprimanded by her manager Estelle Bierbaum for this oversight. In regard to the implications of resorting to self-help, Gielink testified that there was a culture of condonation in the bank without which it will not be possible to perform its daily functions. Both Bierbaum and Govender confirmed that the employee's previous use of his staff access code (LDA authority) to renew his overdraft was condoned.

[30] There was no evidence led that he had breached the prohibition or another procedure or had acted with dishonest intent. The references made to dishonest conduct by the applicant's witnesses were in the terms, for instance of Bierbaum, that (in reply to the question whether breach of Manyathi's instruction was dishonest) : *"[i]t is dishonest because you had an instruction that you had no authority to reverse"*. Gielink's evidence, when it was put to him that disobedience of the Manyathi letter was not *per se* dishonest, was as follows : *"Dishonesty what is dishonesty? Dishonesty is when you do something that is not right. I mean, you are being dishonest. I tell you, I give you an instruction, 'please do not do that', and you do it anyway, you are being dishonest"*. He testified further that the fact that the employee did not get authority was an act of dishonesty.

[31] No other evidence was led of the applicable procedure except the defalcation letters, but these related to misappropriation of the bank's money and were not relevant to the employee's conduct. No evidence was led that he required prior authority to make the reversal. The arbitrator therefore duly considered all the material facts and found on the evidence before her that the offence with which he was charged had not been proven and that the employee had not acted with dishonest intent.

[32] Mr Bezuidenhout submitted that the arbitrator's conclusions on procedural fairness were based on common cause facts, and cannot therefore be said to have arisen from a failure to apply her mind. These facts were as follows:

32.1 Gielink had a duty to investigate the complaint against the employee so as to ensure that the charges brought were appropriate to the offence committed. He failed to do so and drafted the wrong charges against the employee. He admitted that he formulated the charge based only on documentation he received from the Administration manager including the transaction history, the reversal of the charges, the operator ID, Manyathi's letter and the staff defalcation letter.

32.2 Gielink failed to call material witnesses at the disciplinary enquiry with the result that the material facts were never placed before the enquiry, the review panel and the appeal hearing;

- 32.3 As early as the disciplinary enquiry Kippen noted that the wrong charges had been brought. She did not find the employee guilty of the charges or of dishonesty and recommended a final written warning;
- 32.4 The employee was not provided with reasons for the finding and sanction of dismissal since there is no right to this in terms of the Disciplinary Code;
- 32.5 At the second level decision taken by the review panel Mgwenya did not know that the matter had not been investigated and that the material witnesses had not been called. He overturned the recommendation of the disciplinary enquiry for unknown reasons;
- 32.6 Mgwenya sent the matter to the third level where Armstrong and Khoza sat without the benefit of any reasons why the recommendation of Kippen had been overturned, but he nevertheless confirmed the finding and sanction;
- 32.7 At the third level Armstrong did not know that the matter had not been investigated and that all material witnesses had not been called, but he proceeded to confirm Mgwenya's decision despite the employee not having had the benefit of reasons prior at any stage of the process.

[33] Mr Bezuidenhout submitted that these procedural flaws were so defective that even if a fair appeal procedure had been followed this would not have led to a result that was reasonable and fair. The arbitrator was justified in finding that there had in fact been no appeal.

[34] Mr Bezuidenhout challenged the applicant's description of the crux of the charges as being his failure to respect the distinction between his relationship to the bank *qua* employee and *qua* customer, and to conduct himself appropriately in this context. This was not the charge he faced. He submitted that instead, the crux of the review is that the employee was charged, found guilty and dismissed for the following:

- That he reversed charges on his own bank account;
- Without obtaining prior approval;
- That this act was in contravention of an instruction of the erstwhile CEO dated 7 February 2005;

- That he did so in respect of monies due to the bank;
- That he did so for his own personal gain;
- That as a result of the contravention of the instruction the bank suffered a loss of R63.00;

And/or (count 2):

- That he did all of the above deliberately and with dishonest intent.

[35] In essence what the arbitrator found, and which was justified on the material before her, was *inter alia* that:

- There was no procedure regulating the reversal of charges on a personal bank account;
- There was no requirement to obtain prior approval;
- The employee's conduct fell outside the ambit of the instruction issued by the erstwhile CEO;
- The R63.00 was due to him and not to the bank;
- The employee did not act for personal gain;

And/or (count 2) :

- The bank suffered no loss as the monies were not due to it.
- The employee did not act dishonestly.

[36] He submitted that in applying the *Sidumo* test the reviewing court will undoubtedly confirm the award as being one that did not fall out of the bounds of reasonableness. He referred to the test as encapsulated by Molahlehi J in *Lynx Geosystems SA (Pty) Ltd v CCMA and others* (unreported JR 1935/05) in which the Court held :

"[24] In determining whether or not the arbitration award of the commissioner should be interfered with and in applying the reasonable decision maker test, consideration is to be given to the reasons proffered by the commissioner in arriving at the conclusion that the dismissals of the applicants were unfair. See *Sidumo v Rustenburg Platinum Mines* 2007 (12) BLLR 1027 (CC). In applying the reasonable decision maker test

which has been held to be very stringent, the court is to be cautioned not to impose and apply its own reasonableness standard. See *Fidelity Cash Management Services v Commission for Conciliation, Mediation & Arbitration & others* [2008] 3 BLLR 197(LAC).

[25] The commissioner exercises the power by answering the question: is the dismissal in the circumstances fair? In arbitration proceedings it is only the commissioner who has to answer this question. See *Engen Petroleum Ltd v CCMA & others* (2007) 8 BLLR 707 (LAC). In answering the question the commissioner has to take into account the material properly before him or her including the totality of the circumstances of the given case."

[37] In *Sidumo* (supra) Navsa J held:

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances".<sup>4</sup>

### Evaluation

[38] In considering whether the arbitrator relinquished her responsibilities in terms of her responsibilities as set out in *Sidumo* and the judgments cited above, I am required to consider the charges against which she evaluated the

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<sup>4</sup> *Sidumo* supra at paras 78-79.



evidence, and whether she took all relevant facts and circumstances into account. Not all the factors she would have taken into account appear from the award although this *per se* does not render it unreasonable.<sup>5</sup> The issue before the arbitrator was whether the employee was guilty of theft, fraud or dishonesty in reversing charges on his personal account. The second charge related to failure to follow the “correct procedures” in obtaining authorisation for the reversal of bank charges on a personal account, which led to the applicant suffering a loss of R63.00. 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. Had the charges been formulated as a breach of the Manyathi memorandum the employee might have justifiably been found guilty. He breached the prohibition by reversing charges using his staff authority to access his personal account and the issue of whether it was his money or the bank’s is in that context as, Mr Brassey submitted, pure sophistry. He conceded that he simply got frustrated about the issue not being addressed and resorted to self-help. However, this was not the charge he faced. In regard to the second charge the arbitrator cannot be faulted for finding that the no procedure had been breached, although the loss of R63.00, albeit minimal, might have been established had he been charged with transgressing the prohibition (if he was proven to have abused his staff access code). There was simply no evidence as to what the “correct” policy or procedure is in such circumstances and the arbitrator’s conclusion on this charge cannot be said to be unreasonable or to emanate from misdirection or have resulted in a gross irregularity in the process.

[39] Having regard to the conclusion in the light of the evidence led I am of the view that the arbitrator appears to have duly applied her mind to the issue, and in considering the material evidence before her concluded that the employee was not guilty of the misconduct with which he had been charged. In these circumstances not having established guilt, reinstatement would follow a *fortiori* if that was what the employee sought. The arbitrator’s conclusion on the lack of guilt therefore cannot be said to have been one that could not have been

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<sup>5</sup> See in this regard *County Fair Foods (Pty) Ltd v CCMA* [1999] 11 BLLR 1117.

made by a reasonable decision maker, nor can it be said to be tainted by gross irregularity in that it arises from the failure to apply her mind to the material issues.

[40] If the employee had been found guilty this would then raise the question whether, given his fiduciary duties in the context of a banking operation, the employee was justified in his conduct. In the arbitrator's view the applicant had acted inconsistently towards other employees, although at least three of the examples cited by the employee do not appear to support his version. There were in total five incidents referred to in relation to this issue, and it was clearly on this basis that the arbitrator concluded that because there had been leniency displayed towards others and towards him in similar circumstances, the same should have applied in the present instance. I agree with Mr Brassey that the arbitrator simply states this conclusion without indicating the evidence on which she relies. However, having found that her award on the main finding must stand I am not required to determine whether it was in addition justifiable and reasonable on the alternative finding of inconsistency.

[41] In relation to the further alternative conclusion reached by the arbitrator i.e. that the sanction of dismissal was grossly disproportionate, even if he had been found to be guilty of the offence with which he was charged, having reached the conclusions above I am not required to determine this issue save to state that the issue of whether reinstatement is appropriate in the light of mitigating and aggravating factors becomes relevant. The considerations then of remorse and his lack of contrition (which has been held by the LAC to apply when determining the appropriateness of sanction for misconduct in *inter alia Toyota South Africa Motors (Pty) Ltd v Radebe and Others*<sup>6</sup>) would arise in determining whether the arbitrator applied her mind to the totality of facts and circumstances before concluding that reinstatement was appropriate. If the employee had been found guilty of the misconduct and the arbitrator was required to determine whether the sanction of dismissal was appropriate, his conduct and attitude to the proceedings, to his employer and his colleagues would undoubtedly have become relevant. In this regard Mr Brassey made much of the applicant's vitriolic and intemperate remarks made during the

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<sup>6</sup> [2000] 3 BLLR 243 (LAC) at para 44.

course of the proceedings. The fact that his outrage was justified in the context of allegations that the outcome of the disciplinary enquiry had been deliberately withheld and that there had been an attempt to falsify documents in order to set him up, as submitted by his counsel, would not entirely justify it. Its impact on the trust relationship would have become material had he been found guilty.

[42] In my view therefore, in reaching her main conclusion that the employee was not guilty of misconduct, the arbitrator cannot have said to have failed to comply with the duties and responsibilities required of commissioners as set out in *Sidumo*. Indeed, as Mr Brassey stated, she was undoubtedly conscientious but the question is whether she misdirected herself and therefore abrogated her responsibilities as a commissioner. For the reasons set out above I am of the view that this has not been established in relation to her primary finding of procedural and substantive unfairness.

[43] The award therefore stands. Counsel agreed at the outset that neither party would persist with any of the *in limine* points or with seeking costs in respect of the previous proceedings, and that they were in agreement that in order to proceed with the merits, costs should follow the cause. Condonation is therefore deemed to have been granted insofar as it may be necessary for the late filing of the review and pleadings. I do not however consider it to be in the interests of fairness and justice to make an order as to costs.

#### Order

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

The application is dismissed. There is no order as to costs.

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Bhoola J  
Judge of the Labour Court

APPEARANCES

APPLICANT: Advocate M Brassey SC with G Fourie instructed  
by Cowan – Harper Attorneys

FIRST RESPONDENT: Advocate W Bezuidenhout instructed by Pretorius  
Attorneys

Labour Court