IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS269/14

In the matter between:

GREGOR FRANKE **Applicant**

and

SIEMENS (PTY) LIMITED **Respondent**

Heard: **13 – 17 February 2017**

Delivered: **26 October 2017**

JUDGMENT

GUSH J.

<u>Introduction</u>

[1] In this matter, the applicant, who was dismissed by the respondent, his erstwhile employer, applies to have his dismissal declared unfair and that he be reinstated retrospectively to the date of his dismissal.

[2] The respondent is Siemens AG, a global company based in Germany, with offices across the world. One of them was in South Africa which was responsible for the Africa region as a whole. One of the offices in the Africa region was Nigeria. The Nigerian had a reporting line to the South African office.

[3] The applicant came to work in South Africa in January 2010 in the Johannesburg office. He was subsequently assigned or delegated to work in the Nigerian office in or about May of 2011. He initially went to Nigeria as a Project Manager and then subsequently became Country Sector Controller.

[4] The applicant began his employment with the respondent in 1986 as a Commercial Clerk and an Apprentice Industrial Trader. During the course of his employment, he was posted to Nigeria in 2004, Iran, Dubai and Indonesia in 2005, Morocco in 2007, Norway in 2008, Angola and finally South Africa in 2010. During this period, he essentially performed the role of Project Manager.

[5] When the applicant was sent to Nigeria on 1 June 2011, it was as the respondent’s Sector Country Controller to the energy sector in Nigeria and included certain project management tasks in Nigeria. Shortly after his appointment, with effect from 5 December 2011, the applicant was appointed Acting Chief Financial Officer for Nigeria. In that capacity as the Chief Financial Officer (CFO), certain responsibilities were imposed on him. These responsibilities included the responsibility for reporting on the respondent’s accounting programme called Finavigate.

[6] It was the appointment as acting CFO that led to the applicant being dismissed.

[7] Following his dismissal, the applicant appealed against the decision which appeal was dismissed.

[8] The applicant dissatisfied with his dismissal then referred a dispute concerning his dismissal to the Bargaining Council.

[9] The applicant followed this referral by an application in terms of section 191 of the Labour Relations Act[1] (LRA) for the dispute to be referred to the Labour Court for adjudication. As will become clear from the evidence, this application satisfied none of the criteria the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA) was required to consider. Despite this, the Director referred the dispute to this Court in terms of section 191(6) and (7) of the LRA.

[10] The respondent was complicit in having this referral granted by expressly not objecting to the applicant's application for the matter to be heard by this Court.

[11] All the applicant achieved by making such an application was to inordinately delay the hearing of the matter.

[12] The matter was further delayed when a dispute arose between the applicant and the respondent regarding the report on the investigation of the circumstances surrounding the issue the respondent had undertaken, dated 13 March 2013, some months before the disciplinary enquiry. This report had not been presented to the disciplinary enquiry and when discovered during the course of the exchange of pleadings before this Court, it had been offered to the applicant in a substantially redacted form. This led to an application being brought by the applicant for the unredacted form to be made available. The outcome of the application was an order that the report, unredacted, be made available to the applicant. This report is now part of the record.[2]

[13] In essence, those parts of the forensic report that the respondent was reluctant to reveal concerned the disciplinary action taken against those employees who were involved in the matter that had led to the applicant's dismissal, a relevant consideration given the fact that the applicant complained that the respondent had not been consistent in disciplining the

[1] Act 66 of 1995 as amended.
[2] Pages 167 of Respondent's bundle of documents.

employees involved in the matter. It is also relevant that the report contained recommendations regarding sanction.

Factual Background

[14] On 26 June 2013, the applicant was charged with certain acts of misconduct and following the disciplinary enquiry that took place on 28 June 2, 5, 8, 9, 10 July 2013, the applicant was dismissed.[3]

[15] The charges against the applicant were:

CHARGE 1

Breach of CF Circular No. 12/2008 alternatively gross dishonesty, alternatively dereliction of your duties as Acting CFO, Nigeria, during the period December 2011 to November 2012 in that you:

1.1 failed to ensure that bank account […] (Zenith USD account) as well as all information regarding the Zenith USD account, a list of persons with the power to release funds and other authorised signatories and contact persons in respect of the Zenith USD account were recorded in Finavigate;.

1.2. authorised the following two payments from the Zenith USD account in circumstances where this account was not registered with Finavitage:

‘31 August 2012 recipient Nigeria LMG Limited amount US$6 000,00 authorised by 1. Tunde Orija and 2. Gregor Franke;

17 September 2012 recipient Withholding Tax-Federal Government of Nigeria, amount US$131 262,00 authorised by 1. Tunde Orija and 2. Gregor Franke’;

1.3 attested on the three separate occasions, namely the 1st ,2nd and 3rd quarter of 2012 that all bank accounts are accurately and completely registered in Finavigate and that all payments are executed via Finavigate, unless technically not possible, legally or contractually

[3] Pages 125 of Respondent’s bundle of documents.

restricted, despite being aware during each of these quarters that the Zenith USD account, a list of persons with the power to release funds and other authorised signatories and contact persons in respect of the Zenith USD account were not recorded in Finavigate.

1.4 Breach of the Siemens Business Conduct Guidelines in that in respect of the Zenith USD account you failed to comply with Chapter E.1 (Records and Financial Integrity) in that you failed to maintain processes and controls so that transactions are executed in accordance with the company`s management authorisations.[4]

[16] At the conclusion of the disciplinary enquiry, the chairperson prepared a detailed judgment or record of the disciplinary enquiry.[5] The chairperson in her report makes specific mention of the following issues raised by the applicant in his defence:

> ‘1 Shortly put, [the applicant] admits to doing all the employer said he did regarding the attestations and the payments, but he wants me to take into account the range of circumstances and experiences and explain what he did, and how they reflect that, at the time of the alleged transgressions, he was not aware of breaking the rules and never acted in a negligent way.
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> 2 [The applicant] spoke a lot about the tough circumstances he faced in Nigeria, the level of complexity found with regard to compliance, some personally threatening situations he had faced as well as his initial reluctance to go there. He convincingly argued that it was hard to find a CFO and explain the difficulties left behind when the previous CFO left under a cloud. As [applicant] said himself the previous CFO left the company a “disaster’’.
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> 3 The [respondent] did not see the above is any justification for [applicant’s] actions except also to agree that Nigeria presents a challenge in respect of employees and processes. … that [applicant] should have been even more diligent.

[4] Page 125 Respondent’s bundle of documents.
[5] Pages 128 – 146 of the respondents bundle of documents.

4 [The applicant] lastly raised the issue of inconsistency in his evidence. This is very relevant as consistency is a core principle in labour relations. He raised the two types of inconsistency that the courts have distinguished. Historical inconsistency goes to whether an employer has imposed a similar sanction for the same contravention over time. [The applicant] identified that the account should be discovered by the two previous CFOs in Nigeria. … Next [the applicant] raised contemporaneous inconsistency which occurs when two or more employees engaged in the same or similar conduct at roughly the same time, but only one, or some of them are disciplined or receive different penalties. Unfortunately, this is hard to judge at this stage as there are on-going investigations. The principle of consistency with any other people also charged in matters related to this one will have to be borne in mind by the company.'[6]

The chairperson of the enquiry found:

> 'Before continuing I would also like to comment on my impression of [the applicant] comes across as a loyal employee who clearly has a long history with the company. He appears to have done a lot of good, and is a hard worker. He is clearly in many ways an asset to the company and has approached his work with dedication and passion. He did not go out of his way to harm the company or wilfully placed in jeopardy. That is why his conduct in regard to the charges brought against him is hard to understand. His approach (understandably) has been to minimize a contravention's and the risk to an impact on the company. In addition, he is not demonstrated any remorse. The entire party (understandably) has taken the opposite position in this argued that no "slippage", so to speak, can be condoned in respect to the duties responsibilities of a CFO all acting CFO.'
>
> and
>
> '[the applicant] guilty on a balance of probabilities … of the offences as charged … I would not describe what happened as "gross dishonesty" but rather "dereliction of duties as an acting CFO. If the company believed that

[6] Pages 143,144 and 155 of the respondents bundle of documents

there been gross dishonesty, I'm assuming they would have suspended Mr. Franke and charged him with contravening the code of ethics.'

[17] The chairperson concluded with a recommendation that the applicant be dismissed with notice. Surprisingly, although the chairperson of the disciplinary enquiry having apparently considered what issues are clearly important to an appropriate sanction, simply without any further explanation recommends dismissal.

[18] The applicant was notified of his dismissal on 16 September 2014 and invited to appeal against the decision. The applicant submitted written submissions in respect of his appeal.[7] The appeal was submitted to the Chief Executive Officer on 30 September 2013 for review and on 1 October 2013 the respondent's head of Human Resources advised the applicant that his appeal had been dismissed.[8]

[19] With regard to the issue in dispute and what the Court was required to decide, it is pertinent to note that prior to the matter commencing, I issued a directive that the parties were to file a consolidated pre-trial minute in compliance with the rules of this Court. What followed was that the applicant's filed a 63-page document purporting to be a consolidated pre-trial minute. This document not only in no way resembled a proper pre-trial minute it certainly did not amount to a pre-trial minute. It was clear that the parties had made no effort whatsoever to comply with the directive.

[20] At the commencement of the hearing, parties were instructed to comply with the directive before the matter commenced. The resulting seven-page document was filed and sets out the charges, the applicant's version and the respondent's version regarding the charges.[9] Although this pre-trial minute does not record "the issues that the court is required to decide"[10] it was clear from both parties opening statements what the issues were.

[7] Pages 150 – 155 of the respondents bundle of documents.
[8] Pages 156 of the respondents bundle of documents.
[9] Pre-trial minute 13 February 17.
[10] Rule 4 (b)(iv).

[21] As far as the issue the Court was required to decide is concerned, Mr Ngcukaitobi who appeared for the respondent conceded that the dispute was limited to the question of whether the applicant's conduct amounted to dishonest conduct or grossly negligent conduct and that the basic facts seem to be undisputed.[11] Ms Frank who appeared for the applicant likewise confirmed that it was common cause that the applicant was found guilty of the actions set out in the charge sheet and that the issue to be decided was whether the applicant's conduct amounted to dishonest conduct, specifically whether it amounted to "gross dishonesty, or alternatively grossly negligent conduct".

[22] Arising from the above, the issue to be decided was whether the sanction of dismissal was fair in particular, whether the applicant's misconduct justified his dismissal and if not what was an appropriate sanction. As the dismissal of the applicant was admitted the respondent bore the *onus* of proving that the dismissal was substantively fair.

<u>Evidence</u>

[23] As the facts concerning the applicant's conduct are largely common cause, the evidence is briefly summarised hereunder.

<u>Respondent's version</u>

[24] The respondent called Ms Dall'Omo as its only witness. Ms Dall'Omo testified that she was currently the CEO of Siemens, Southern and Eastern Africa, and that she had been working for Siemens for about 30 years. She gave a historical background about the company and how, in 2006, a compliance investigation was conducted as the company had been utilising unauthorised bank accounts. What was discovered in that period was that the six countries which had been affected by that investigation included Nigeria. The issues related to bank accounts, cash payments and unauthorised transactions. In response thereto a decision was taken to centralise bank accounts in 2007 and introduce the Finavigate system.

[11] Record volume 1 pages 12 – 15.

[25] Shortly after the applicant had been appointed as acting CFO, he had together with all the other signatories to the respondent's Nigerian bank accounts signed a new mandate card in respect of the bank accounts requiring more than one signatory. The six designated signatories included all the respondent's Senior Managers in Nigeria including the Accountant Mr Orija.

[26] Finavigate is an accounting system that Siemens adopted in order to mitigate risk, particularly concerning the registration of bank accounts as well as the payments flowing from those bank accounts, dating all the way from 2006 when Siemens globally became the subject of an investigation by authorities in the US and in Europe and subsequently was fined substantial amounts of millions of US dollars. Flowing from those fines, Siemens adopted Finavigate as one of the strategies to mitigate risk. The primary function of a CFO in relation to Finavigate was to ensure that all bank accounts that are in a particular country are registered on the system. It is an electronic system.

[27] One of the findings that had been made in the 2006 investigation was that there were payments made, either in the form of bribes or from secret accounts that the global office had no knowledge of or had no access to. So, Finavigate then became the system that the company adopted in order to mitigate its risks. The CFO was responsible to ensure that all bank accounts in a particular office are registered.

[28] The charge although framed in three parts related to the fact that in 2007 when the Zenith Bank account had been deregistered from Finavigate it had not been closed. This situation had prevailed through the reports and certifications of the successive CFO's until the appointment of the applicant in 2011 and the discovery of the account in 2012. The three parts to the charge involved:

28.1 As the CFO in Nigeria, the applicant failed to ensure that bank account held with Zenith Bank was registered on the Finavigate system.

28.2 The second aspect of Finavigate related to payments. Payments could not be made from bank accounts which were not uploaded or registered on the Finavigate system. With regards to part 1.2, there are two payments that were made in August 2012 and in September 2012 authorised by the applicant in his capacity as the CFO. Those payments were made from the same bank account that he failed to ensure that it was registered on the Finavigate system.

28.3 Thirdly, part 1.3 concerned the requirement that the CFO as part of his responsibilities, had to complete a so-called attestation every quarter. The CFO was required to confirm that, *inter alia*, the financial records of the company are in order. Specifically, one aspect of the attestation concerns whether all the bank accounts were accurately recorded and registered on Finavigate

[29] On three occasions, for the quarter ending December 2011, for the quarter ending March 2012 and for the quarter ending in June 2012, the applicant's attestations were incorrect. The applicant had confirmed that everything was in order in relation to the registration of these bank accounts. It transpired, after an investigation that a certain account, the Zenith Bank account, had not been registered. It is important to note that this account had been recorded in Finavigate as having been closed in 2007 although it had not. The attestations submitted after 2007 had all failed to record the Zenith Bank account.

These were the issues that led to the applicant being charged with misconduct.

[30] Ms Dall'Omo further testified that not all of the bank accounts listed on the resolution that the six Senior Managers had signed were registered under the Finavigate system as they should have been. Ms Dall'Omo concluded that of all the signatories and the CFO ought to have been aware that the Zenith Bank account had been removed from the register in 2007 but had not been closed and that therein lay his misconduct. Although it was the duty of Mr Orija to report to the CFO and provide him with the information, the reconciliation thereof was the duty of the CFO, and that the respondent relied on the CFO to ensure proper oversight. When the non-registration of the Zenith Bank account was discovered, the respondent conducted a forensic

investigation into the circumstances surrounding the existence of the Zenith Bank account. The report (referred to above) is included in the bundle of documents.[12]

[31] Ms Dall'Omo testified that the investigation report was a binding document and that the respondent was bound by its recommendations and the sanctions outlined therein. Therefor there was a need to ensure as management that the recommendations were executed. Despite this, in her evidence in chief when asked about the appropriateness of the sanction of dismissal, Dall'Omo said:

> 'Well, if he would have admitted at a certain stage that he did something wrong, we definitely would have looked at it in a different way. But after the compliance investigation it was clear that Mr Franke was of the opinion that he did the things right. And that would have been to us in the company a major breakdown in the trust relationship.'[13]

[32] During cross-examination by the applicant's counsel, Ms. Frank, Ms Dall'Omo insisted that regardless of the evidence and the contents of the report she regarded the applicant's misconduct as constituting dishonesty and therefore that dismissal was the appropriate sanction.

> 'Ms Frank: So, is this report; there is nowhere that says there is any dishonesty. So, how did you, Ms Dall'Omo, come to the conclusion that there is dishonesty?
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> Dall'Omo --- If you refer to the bank account attestation which has been performed in the months of... for the period ending end of December 2011, March 2012 and June 2012. I did not know at this point in time when this investigation came along that Mr Franke had knowledge of the account and that Mr Franke was a signatory to that account. Only subsequent to that I became aware of it. And hence as he knew about it and he did not answer the question 'I do not confirm'; this I regard as dishonesty.'

[12] Page 167 of the respondent's bundle of documents
[13] Record pages 85 -86.

Ms Dall'Omo conceded that the forensic report and the disciplinary enquiry specifically found that the applicant was **not** guilty of dishonesty and that the report recommended in respect of the applicant that the respondent takes "appropriate disciplinary actions **and/or** individual training".[14] She also confirmed that she had not given evidence at the disciplinary enquiry and that the forensic report although it pre-dated the enquiry, was not placed before the disciplinary enquiry.

<u>Applicant's evidence</u>

[33] Mr Franke, the applicant was the only witness. He described in his evidence, in some detail the difficulties, he had encountered whilst working in Nigeria. Included in the applicant's documents where a litany of reports, concerns and requests for assistance. He testified that as the Acting CFO he had encountered lots of violations of the respondent's processes and procedures incurred for a variety of reasons eg "cash on hand"; non-approved accounts, and manual payments. He had to deal with all these issues in addition to his responsibilities as Sector Country Controller, energy. He performed the tasks of Sector Country Controller, and Project Management, on top of the responsibility as acting CFO. He had frequently reported on the difficulties he was experiencing and had requested help on numerous occasions but no assistance was granted. It was clear from his evidence that the situation in the respondent's Nigerian office was chaotic.

[34] He testified that according to the records, during the years 2007, 2008, 2009, 2010, 2011 and 2012 (six years), nobody in the entire Siemens South Africa and Siemens Nigeria picked up the non-compliance regarding the Zenith Bank account.

[35] The applicant further testified that even though the account was not recorded in Finavigate, it was still and had always been reflected in the books and records of the respondent, and accordingly that there was never any risk of loss to the respondent. Mr Orija, the Nigerian office's Accountant, who reported to the applicant in the Nigerian office, was responsible to ensure that

[14] Forensic report page 185 of the respondent's bundle

the Zenith Bank account was and had been registered in Finavigate. Mr Orija had since 2007 omitted to update the system appropriately, even though he knew and had known at all times that the account was active. The respondent did not aver that the applicant himself should have physically uploaded the system, it was conceded that this was Mr Orija's responsibility. The responsibility of the CFO was to ensure that the report that the accounts were registered on the Finavigate system was correct as required by the rule. As a consequence, Mr Orija was served with a written warning and taken for training as opposed to the applicant who was dismissed.

[36] The applicant explained that as the acting CFO, he had relied on Mr Orija as the Accountant. Accordingly, when he noted the discrepancy he had asked Mr Orija about it and he was told that the account was an interim account. The Forensic investigation report found:

> 'Mr Tunde Orija, Head of Accounting and Controlling for Siemens Nigeria was responsible for ensuring that the bank accounts were appropriately registered in Finavigate. And he omitted to update the system appropriately, even when he knew that the account was active.'

[37] The applicant testified that he relied on the documentation that Mr Orija gave him; and that he performed the attestation function to the best of his ability. And insofar as there was an oversight of this account, it was an error of omission; that it was not done dishonestly.

<u>Evaluation</u>

[38] What is clear from the outcome of the disciplinary enquiry is that the chairperson of the disciplinary enquiry made it clear that the applicant was not guilty of dishonesty. The charge as listed in the charge sheet accused the applicant of "breach of CF Circular number 12 12 /2008, alternatively gross dishonesty, alternatively dereliction of duties as acting CFO." The chairperson's conclusion was that:

> '… relating to the overarching charge regarding the breach of the Circular 12/2008. I would not describe what happened as "gross dishonesty" but rather "dereliction of duties as an acting CFO. If the company believed there

> had been gross dishonesty I am assuming they would have suspended Mr. Franke and charged him with contravening the code of ethics'.[15]

[39] The forensic report commissioned by the respondent, which had been completed by the time the disciplinary enquiry took place, likewise confirms that the applicant was not guilty of dishonesty. The forensic report sets out in some detail the circumstances surrounding the matter of the Zenith Bank account and includes a recommendation regarding "disciplinary actions". The report does not recommend dismissal.

[40] The respondent's witness gave evidence that this report was binding on the respondent.

[41] It is probable that this was the reason the report was not placed before the disciplinary enquiry.

[42] The recommendation in respect of the applicant was that the respondent considers "appropriate disciplinary actions **and/or** individual training". (my emphasis) This recommendation is in keeping with the conclusion that there was no dishonesty. The recommendation clearly contemplates some form of disciplinary action short of dismissal and training. Had the report considered the applicant's conduct to be serious enough to warrant dismissal it would have said so.

[43] In the enquiry, the applicant raised the issue of consistency in regard to the sanctions imposed on the other perpetrators. The chairperson indicated that it was hard to judge this **as the investigation had not been completed**. This was despite the fact that not only had the investigation been completed but that the report too had been completed. In fact, the report reveals that it was only the applicant who was dismissed by the respondent.

[44] In her evidence, Ms Dall'Omo, ignoring the contents of the report and the evidence, suggested that the dismissal of the applicant by the respondent was the appropriate sanction for two reasons.

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[15] respondents bundle page 146.

a. Firstly, she suggested that despite the conclusion of the disciplinary enquiry and the forensic report, she regarded the applicant's conduct as being dishonest. This view is in direct contrast with the facts and what could be regarded as the respondent's official view as set out in the report, namely that his conduct was not dishonest.

b. The second ground upon which Ms Dall'Omo suggests that dismissal was the appropriate sanction is what she regarded to be the applicant's lack of remorse. Her view was that had the applicant admitted the misconduct and tendered an apology, it would have changed the view of the independent chairperson. If he would have admitted that he had done something wrong, she would "definitely have looked at it in a different way".

[45] Ms Dall'Omo's evidence or opinion regarding the applicant's honesty or lack thereof is irreconcilable with all the evidence, the report and the finding of the disciplinary enquiry that the applicant was not dishonest.

[46] As far as the suggestion that the applicant showed no remorse, it is important to take into account that at no stage during the forensic investigation, the disciplinary enquiry or during the hearing of this matter did the applicant deny that he was the person responsible for failing to deal with the unregistered Zenith Bank account. He admitted that:

a. he had failed to ensure that bank account […] (Zenith USD account) was registered on Finavigate;

b. authorised the two payments from the Zenith USD account in circumstances where this account was not registered with Finavigate; and

c. attested on the three separate occasions, namely the 1st ,2nd and 3rd quarter of 2012 that all bank accounts are accurately and completely registered in Finavigate despite the fact that the Zenith USD account was not recorded in Finavigate.

[47] It is not surprising that the applicant pleaded not guilty to the charges of misconduct bearing in mind that he was accused of dishonesty. It is difficult to justify Ms Dall'Omo's proposition that the absence, in the particular circumstances of this matter, of remorse justifies dismissal.

[48] The applicant's evidence both before the Court and the disciplinary enquiry made it clear that the applicant was under extreme hardship in Nigeria. He had, at short notice, been appointed acting CFO in addition to the responsibilities he was obliged to discharge as Sector Controller and Project Supervisor. It was not disputed that the situation in Nigeria was desperate. The litany of the difficulties and the requests for assistance the applicant had addressed to the respondent more than adequately demonstrates this.

[49] Taking into account that the respondent had decided, despite the forensic report, to accuse the applicant of gross dishonesty, it is unsurprising that the applicant did not admit to having been dishonest. Properly construed the applicant's plea of not guilty at the disciplinary enquiry and his explanation to all intents and purposes an attempt essentially in mitigation to explain how the circumstances he found himself in led to the misconduct. It was clear from the applicant's evidence particularly in this hearing that he once again sought to explain the circumstances that led to the failure to deal properly with the Zenith Bank account.

[50] I am of the view that Ms Dall'Omo's evidence that the applicant's absence of remorse justifies dismissal is ill-founded.

[51] What is clear is that the applicant was guilty of misconduct. The extent of his misconduct was that he was negligent in dealing with the Zenith Bank account in performing his duties as acting CFO. The issue to be decided is whether that negligence justified the sanction of dismissal.

[52] I am satisfied that the sanction of dismissal was inappropriate, too harsh a sanction taking into account the background circumstances. Accordingly, I am satisfied that the applicant's dismissal was unfair. This is particularly so taking into account the following mitigating aspects of this matter:

a. the applicant's length of service;

b. the circumstances surrounding his appointment as acting CFO in the Nigerian office of the respondent and the actions of the respondent's employees both before and during his appointment;

c. the parlous conditions in the Nigerian office;

d. the forensic Investigation Report and its binding recommendations;

e. the disciplinary chairperson's report and the evidence led in court.

[53] The fact remains however that the applicant was guilty of misconduct. It is therefore necessary and appropriate to determine an appropriate sanction. I am of the view that the applicant should be given a final written warning regarding his misconduct.

[54] At the commencement of this matter, the respondent made an open offer of settlement equivalent to 12 months' remuneration. The applicant rejected the offer and persisted with his claim for reinstatement.

[55] No evidence was led to suggest that reinstatement was not reasonably practicable and therefore having found that the dismissal was unfair the remedy to which the applicant is entitled to is reinstatement.

[56] As far as costs are concerned, the parties were equally responsible for the matter being unnecessarily referred to this Court. Whilst it is so that the applicant applied for the matter to be so referred the respondent filed a notice with the director recording that it had no objection to the application. Therefore, this Court must approach the question of costs in accordance with the provisions of the LRA. I can find no reason in law or in fairness why costs should not follow the result.

[57] In the interlocutory matter involving the redacted report, costs were reserved. As it turned out the respondent's attempt to suppress the full contents of the report was ill-advised and misguided. It became clear during the evidence that

the full report was relevant to a proper consideration of the matter. This justifies an order that the costs of that application be paid by the respondent.

[58] In the circumstances, I make the following order:

Order

1. The dismissal of the applicant by the respondent was substantively unfair.

2. The respondent is ordered to retrospectively reinstate the applicant from the date of his dismissal; taking into account the months' notice the applicant was given.

3. The applicant is to be issued with a final written warning relevant to the misconduct of which he was found guilty.

4. The applicant is to report for duty within 14 days of the date of this order.

5. The respondent is ordered to pay the applicant's costs including the reserved costs of the interlocutory application.

D. Gush

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate. L Frank

Instructed by: Robin Wheatley Attorneys

For the Respondent: Advocate. T Ngcukaitobi

Instructed by: Werksmans Attorneys