



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2036/17

In the matter between:

DEPT OF EDUCATION: MPUMALANGA

PROVINCE

First Applicant

MEC EDUCATION: MPUMALANGA

PROVINCE

Second Applicant

HEAD DEPT OF EDUCATION:

MPUMALANGA PROVINCE

Third Applicant

and

MATHALA N.O

First Respondent

GPSSBC

Second Respondent

XABA, SJ AND ANOTHER

Third Respondent

Heard: 5 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and to the Court's library. The date and time for hand-down is deemed to be 09h45 on 21 April 2020.

(by email)

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award dated 28 July 2017 and issued by the first respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator found that the third and further respondents, Xaba and Sihlangu, (referred to jointly as 'the employees'), had been unfairly dismissed by the first applicant. He ordered the employees' reinstatement with retrospective effect.
- [2] The employees were dismissed in August 2009, almost eleven years prior to the date of the present hearing. That delay is partially explained by the fact that the dispute was the subject of an arbitration award issued in August 2011. That award was successfully reviewed in August 2014, when the matter was remitted for rehearing before a different arbitrator. The award under review in the present proceedings is that issued after the rehearing.
- [3] The employees were employed as clerks in the first respondent's HR division. Sihlangu was employed as a principal personnel officer, and in this capacity was Xaba's supervisor. Xaba was employed as a senior administration officer. Xaba's functions included the making of adjustments to salaries, paying allowances and bonuses and the like on the Persal system; Sihlangu was required to approve the

adjustments initiated by Xaba. (In Persal parlance, Xaba was a user or implementer, and Sihlangu a reviser.)

- [4] The present application has its roots in charges brought against the employees in August 2008, relating to transactions effected on the Persal system during June 2008. Specifically, Xaba was charged with committing an act of dishonesty by implementing transactions that resulted in an undue payment in favour of an educator who had completed an advanced certificate in education, a Ms. AS Mahlangu. Sihlangu faced a similar charge on account of her having approved the transactions. Specifically, the charge that formed the subject of the arbitration hearing was the following:

...you are guilty of misconduct in terms of Annexure A of the PSBC Resolution 1 of 2003 in that you committed an act of dishonesty by using Persal ID 90297 on the 27th June 2008, paying a qualification of Advanced Certificate twice to AS Mahlangu with Persal number 81947356 amounting to R11 791.75; first on 23 June 2008, R27 209.57 and secondly on 27 June 2008, R11 791.75.

- [5] In the proceedings under review, the employees did not place procedural fairness in dispute. They also did not dispute that an undue payment had been made to Mahlangu. Their primary defence to the charge was that they had made a mistake, and that there was no dishonest intent on their part. The employees also challenged the consistency with which the rule had been applied by the first respondent. Finally, the employees submitted that dismissal was too harsh a penalty, since their conduct amounted to no more than making an error. The first respondent alleged that the employees' conduct was deliberate and dishonest, and that dismissal was an appropriate penalty.

- [6] The evidence is summarised by the arbitrator, and it is not necessary for present purposes to repeat all that was said. Given that the thrust of the review is an attack on the arbitrator's assessment of the evidence, the following precis is sufficient for present purposes. The first witness to testify was Mr. Elleck Nxumalo, a trainer in the Persal system. Persal is the system used in government to maintain personnel records and make payment of salaries and

other emoluments to state employees. His testimony broadly concerned the Persal system, and two 'rules' that were conveyed during training. The first is to preserve the confidentiality of passwords; the second is that nothing can be implemented on the Persal system without a source document. By this he meant a document that formed the basis of the transaction, e.g. a death certificate or a degree certificate, or some other document which had consequences for the employee's status or remuneration. The source document is furnished to the implementer in a file sent from the registry, and acts the trigger for the transaction and its justification. The implementer captures the information on the system, using the source document. The source document is then given to the supervisor, who checks and approves the transaction. No transaction can be initiated or approved without a source document. The personal file sent from the registry is endorsed with the Persal number of the employee concerned; that number is used when the Persal system is accessed and the relevant transaction processed. Nxumalo had no direct knowledge of the transaction in question. Under cross-examination, Nxumalo was pressed on the possibility of mistakes being made and persons, for example, being paid when they were not entitled to be paid. His response was to deny any knowledge of that possibility. As I have indicated, Nxumalo had no knowledge of the events that formed the subject of the dispute; his knowledge was limited to that which was taught during training on the Persal system. The important points to emerge from his testimony are that each user of the Persal system has a unique user number which may not be shared, that no transaction may be effected without a source document, and that all Persal users are trained on the system.

- [7] The second witness, Swanepoel, testified that he had trained the employees on the operation of the Persal system. They were duly qualified to perform their functions as implementer and approver respectively. He also testified that each operator had a unique user number. Xaba, as the initiator, was required to act only in receipt of a source document; in this instance, the proof of qualification. The document, dated 19 May 2008 recorded that Ms. AS Mahlangu had obtained the advanced certificate and that the diploma/degree would be issued at a

graduation to be held on 4 September 2008. Xaba was required to determine whether the receipt of the qualification entitled Mahlangu to a once-off cash bonus or a notch increment, the date when the qualification was obtained. Mahlangu had a unique Persal number, which served to identify her and distinguish her from other employees who might have the same initials and surname. The Persal record reflected that the effective date of the transaction was 1 January 2004, rather than 19 May 2008, and that the entry had been made by Xaba at 15:55:37 on 23 June 2008. A payment of R26 209.50 was effected on the basis of the effective date of the qualification (20040101). In other words, there was no source document in the file sent from the registry that authorised Xaba to make the entry that he did on the Persal system, nor was there any basis for Sihlangu to verify the source document and approve the transaction. Swanepoel denied that the transaction could have been mistakenly made – a document was necessary to activate an effective date. The Persal record further reflected that Sihlangu verified the qualification and approved the transaction at 15:56 on 23 June 2008. Swanepoel testified that approval could not possibly take place within 30 seconds. Swanepoel was also referred to the Persal record reflecting that on 27 June 2008, Xaba logged into the system and effected a transaction first by deleting the date '20040101' and entering a date 'EFF.DATE 20080119'. Again, this was done without any source document. Swanepoel testified that Xaba removed the salary arrears and made an entry that would result in Persal paying AS Mahlangu a notch payment. On this account, a second payment of R11 791.75 was effected. The records put to Swanepoel further reflected that in June 2008, Mahlangu was paid a cash bonus for the qualification she obtained, backdated to January 2004 and that on 27 June 2008, she received a salary notch.

- [8] During the course of Swanepoel's evidence, the arbitrator specifically put the following to him:

ARBITRATOR: In summarizing your evidence, there are two ways that they could not have made a mistake – the source document and the Persal number?

SWANEPOEL: And the Persal number, yes.

ARBITRATOR: Which is a unique number?

MR SWANEPOEL: That is right.

ARBITRATOR: Having those two, there is no way one can make a mistake?

MR SWANEPOEL: Yeah.

ARBITRATOR: Because you do not rely on the other thing. You double check, having the source document. This is a qualification of Mr Mahlangu, because you may have three Mr Mahlangu in the department. You must therefore verify with the Persal number if it belongs with these Mr Mahlangu.

MR SWANEPOEL: Yes.

ARBITRATOR: That is how I have heard you thus far.

MR SWANEPOEL: Yeah.

- [9] In cross-examination, Swanepoel conceded that employees entering transactions on the Persal system could make mistakes, but denied that it was possible that a mistake could have been made in the present instance. He gave a number of reasons - first, because the recipient AS Mahlangu was identified by a unique Persal number and secondly, because there was no source document on file reflecting an effective date of 2004. He also stated that the difference between the correct date (2008-05-19) and the date inserted was not indicative of an error. Had it been an error, he would have expected the day, month or year to have been inverted or incorrectly entered, not the entire date. Further, the fact that the implementer (Xaba) and supervisor (Sihlangu) had made the same mistake on a date. Swanepoel did not dispute that information could be captured erroneously, and that an employee could be erroneously paid, but not on the scale and in the circumstances that presented in the case. It was put to Swanepoel that the payments of R26 209.50 made on 23 June 2008 and R11 791.75 made on 27 June 2008 were made in respect of two different persons, both named AS Mahlangu. In re-examination, Swanepoel testified that it was not possible for two persons named AS Mahlangu to share the same Persal number.

The record reflected that the two payments that were the subject of the charge against the employees were paid to a single person with a unique Persal number. Swanepoel confirmed that it was not possible to approve a transaction in under a minute, as the record in respect of the first payment reflected and further, that the second transaction of R11 791.75 was made with effect from 1 January 2004, a date that preceded the qualification obtained by some four years.

- [10] The third witness for the applicant was Mr Calvin Mhlabane, the deputy director of human resources. He testified that a process had been initiated to recover the amounts paid to Mahlangu, and that the relationship of trust between the department and the employees had broken down.
- [11] After the applicant closed its case, the employees sought to introduce two documents, referred to in the record as annexures C and D. Their admissibility was disputed, but only Annexure D was referred to when the employees testified. The annexure is an academic record issued by the University of Pretoria in respect of an Anna Sally Mahlangu, recording that she completed a distance education ACE in education management on 19 May 2008 and that the certificate was awarded on 4 September 2008.
- [12] Xaba did not dispute that he had implemented the transactions on 23 and 27 June 2008, or that there was no source document for 23 June 2008 that made any reference to the date of 1 January 2004. He conceded that as per annexure D, the effective date on which any increase to Mahlangu's remuneration could be made consequent on her obtaining the certificate was 19 May 2008. He also did not dispute that to effect a transaction on the Persal system he had to manually enter the effective date, reference and type of payment, and that he needed to check the allowance code. Xaba disputed that he had made any payments or that it was his function to make any payments – the authority to pay was that of his supervisor, and his supervisor (Sihlangu) made payments. In other words, as he stated in cross-examination, his duties were confined to the capturing and updating of records on the Persal system. He described the process designed to

effect payments on the Persal system. For example, a student submits a certificate on completion of a course, which is passed to the registry. When a personal file could not be located, a dummy file was created. Xaba stated that his entry of the date 2008-01-09 was a typing error; the date of completion of the qualification was 2008-05-19. The payment made on 27 June 2008 was for an adjustment of salary; a notch increase. In regard to the implementation effected on 23 June 2008, Xaba stated that the amount was paid in respect of a different AS Mahlangu, in response to a query by that person. The registry inserted the Persal number on the file.

- [13] Sihlangu testified that her duties extended to approving work done by others. She did not dispute approving the payments in question. Specifically, she stated:

What I am saying is that; if the money was not supposed to go to Mahlangu, it was a mistake. It did not happen intentionally.

Sihlangu conceded that 'according to the documents', the payment of R26 209.50 was not due to Mahlangu. When asked by her representative why she had nonetheless approved the payment, Sihlangu stated that she could not recall, and blamed her workload. Mahlangu also made reference to other employees in the department who had not been dismissed despite their having mistakenly approved payments. After objection by the applicant's representative, the matter was left for argument. When Sihlangu was pressed during cross-examination on the time that it took for her to approve the transaction after Xaba had implemented it, she replied that she did not know 'how it came about on the system that the compute allocate time the way it is allocated'.

The arbitration award

- [14] The arbitrator made reference to *Nedcor Bank Ltd v Frank & others* (2002) 23 ILJ 1243 (LAC) and the court's reference there to the elements of dishonesty. as entailing 'a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat lie or act fraudulently.' The arbitrator concluded that none of the applicant's witnesses had acted in this manner. No evidence had been presented

connecting the employees to the money paid to Mahlangu, in the form of either a 'benefit or kickback' to them. The assertion by Mhalabane that the employees had intended to siphon money from the state was unsubstantiated.

- [15] In so far as the employees defence that they had made a mistake was concerned, both Nxumalo and Swanepoel had conceded that mistakes had happened in the past, committed by Persal users. This inclined the arbitrator to the view that the employees' conduct had amounted to an error rather than dishonest behavior. In so far as Swanepoel had testified that the time within which the transaction was effected by Xaba and approved by Sihlangu (some 30 seconds), the arbitrator did not regard this as evidence of dishonest conduct, at least not in the absence of other corroborating evidence.
- [16] The arbitrator further found that the applicant had acted inconsistently in taking action against employees who had committed errors. The arbitrator's reasoning can be found in the following paragraph:

[38] Undisputed evidence from the Applicants was that this mistake was committed by other officials in the past but no action was taken against him. Sihlangu version was that it happened in the where head office unduly paid her thrice her salary; money which was since recovered but no action was taken against the perpetrator. This was further confirmed by both Nxumalo and Fannie albeit not mentioning names, as in the case of Sihlangu. Evidence from Ronnie was that mistakes such as those were punishable criminally and otherwise. What I find problematic with his version was that he failed ultimately to state or omitted to state who of the officials were arrested or disciplined, in particular with both Fannie and Nxumalo, whom their testimony proceeded his, mentioned that officials committed to such offences. On his version being led by the representative, Ronnie missed the opportunity to set the record straight on this issue, leaving the Respondent to be found to have acted inconsistently in applying this rule (sic).

Grounds for review

- [17] In broad terms, the applicants submit first, that the arbitrator misconceived the nature of the enquiry, failed to make a credibility finding in the face of a material dispute of fact, and misdirected himself in relation to the central dispute. Secondly, the applicants submit that the arbitrator ignored relevant evidence, and made reference to irrelevant considerations. In the supplementary affidavit, the applicants amplified these grounds by reference to the record. The applicant submits that all of these misdirections had the consequence of an outcome that falls outside of the bands of reasonableness.

Legal principles

- [18] In review applications brought under s 145 of the LRA, the prevailing authorities support a two-stage enquiry. It is not sufficient for an applicant to establish that the commissioner or arbitrator committed a material error or irregularity in relation to the evidence that served before him or her; it must also be established that notwithstanding the conduct complained of, the result or outcome of the proceedings falls outside of a band of decisions to which a reasonable decision-maker could come on the basis of the evidence. In *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) at 1084, the Supreme Court of Appeal made the point in the following way:

[25] In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome and reasonable.

This test was elaborated upon by Murphy AJA in *Head of the Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), where the court emphasised that errors or irregularities in relation to facts or issues may or may not produce an unreasonable outcome; what matters is the materiality of the error or irregularity and its relation to the result. The court said the following:

Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.

- [19] Put another way, if the arbitrator ignores material facts, the award will be reviewable if the distorting effect of this misdirection renders the outcome or result of the proceedings unreasonable.

Analysis

- [20] I deal first with the arbitrator's finding of inconsistency. As I understand it, the arbitrator accepted evidence from Xaba and Sihlangu that other employees had 'made mistakes' implementing transactions on the Persal system, and that no action had been taken against them. What was put to Nxumalo in cross-examination was that the employees capturing data had made mistakes; Sihlangu receiving her salary three times over was cited as a specific example. Nxumalo's response was to say that anyone can make a mistake, but if an implementer made a mistake, it was for the reviser to disapprove the transaction, and for the mistake to be corrected. Swanepoel similarly conceded that employees could make mistakes. But that concession was qualified by Swanepoel's view that in the present instance, the discrepancy between a

legitimate entry to reflect Mahlangu's qualification and any increase in remuneration that may flow from it, and what was manually entered by Xaba and approved by Sihlangu, was just too great to ascribe to a mistake. It was never put to him in cross-examination that particular employees had in the past made mistakes and escaped disciplinary action. In Mhlabane's cross-examination, nothing was put to him regarding any inconsistent conduct on the part of the applicant. Indeed, it was the last witness, Sihlangu, who belatedly attempted to make out a case of inconsistency

- [21] The arbitrator's finding that the applicant had acted inconsistently in applying a rule of conduct (in her mind, a rule against committing mistakes) by failing to discipline other employees who committed mistakes is not supported by the evidence, for at least two reasons. First, it was common cause that the Xaba had made an error in implementing the two transactions that were the subject of the charge, and that Sihlangu had similarly made an error in approving the transactions. That was not in dispute, nor was the fact that neither employee was disciplined for making a mistake. The issue before the arbitrator was whether the employees had acted with dishonest intent. Whether other employees were disciplined (or not) for committing *bona fide* errors was therefore irrelevant to the enquiry before the arbitrator. In any event, neither employee made out a proper case for inconsistency. The propositions put in cross-examination lacked any specificity as to the instances of inconsistent conduct relied on, as did the evidence-in-chief given by the employees. It was not for the applicant's witnesses to 'mention names' or 'set the record straight' as the arbitrator implies in paragraph 38 of the award – any case for inconsistency had to be made by the employees. In other words, it was not for Nxumalo or Swanepoel to refute a case of inconsistency that was never put. In coming to the conclusion he did in paragraph 38 of the award, the arbitrator misconceived the nature of the enquiry and failed to have regard to the evidence before him. That part of the award thus stands to be reviewed and set aside.

- [22] Paragraphs 39 to 41 of the award concern the appropriateness of dismissal as a sanction. In particular, the arbitrator finds that the relationship of trust and confidence had not been compromised, that the employees had long service and clean disciplinary records, and that the monies that they had been accused of appropriating had been recovered. Again, given the arbitrator's prior finding that the employees had not committed the misconduct of which they were accused (i.e. that they had made mistakes and had not acted dishonestly), none of this is relevant. There was no alternative charge of acting negligently, or 'making a mistake' - the employer's only charge was one of dishonest conduct. All of the considerations in these paragraphs address the appropriateness of dismissal as a sanction for proven misconduct, as opposed to some lesser penalty. To consider the factors relevant to a fair sanction after a finding that the employees were not guilty of the misconduct that they were alleged to have committed is irrational, and manifests a failure to appreciate the nature of the enquiry. For this reason, that part of the award stands to be reviewed and set aside.
- [23] That leaves the arbitrator's finding that the applicant had failed to prove, on a balance of probabilities, that the employees had committed 'an act of dishonesty' by respectively implementing and approving the payments to Mahlangu. It will be recalled from the discussion on the content of the award that the arbitrator's logic was, in effect, that neither Swanepoel nor Nxumalo had said that the employees acted dishonestly, that they were personally not aware of any dishonesty, and that the applicant's witnesses had conceded that mistakes could be made when implementing and approving transactions on the Persal system. It should be recalled that Nxumalo's evidence was limited to the processes involved in effecting transactions on the Persal system; he specifically disavowed any knowledge of the transactions in issue. What the arbitrator does is to ignore Swanepoel's evidence, virtually in its entirety. While it is correct that Swanepoel conceded that implementers and approvers could make mistakes, he specifically stated that in his view, the transactions that were the subject of the arbitration proceedings could not have been mistakes. He gave four reasons. First, there were no source documents that served as a basis of the initiation of the

transactions. Secondly, the nature of the entries made did not indicate a mistake – mistakes usually occurred when implementers entered either the wrong day, month or year. It was also ‘very rare’ that the implementer and approver both make the same mistake in relation to a date or other information. In the present case, the day, month and date entered (20040101) bore no relation to any qualification obtained by Mahlangu, and yet was approved by both employees. Thirdly, in the ordinary course, the approval of a transaction would take at least five minutes – the approver would have to be given the file, scrutinise the source documents and the transaction, and approve them. In his view, this would take at least five minutes. Finally, the Persal numbers on the documents shown to him established that all of the transactions benefitted the same AS Mahlangu, whose Persal number was unique. The second payment could therefore not have been made to a ‘different’ AS Mahlangu. None of this evidence was seriously challenged in cross-examination. Yet the arbitrator simply fails to deal with this evidence, nor does he furnish any cogent reason for rejecting it. Indeed, in paragraph 36 of the award, the arbitrator appears to accept the version proffered by Nxumalo and Swanepoel that it would be impossible to approve a transaction within 30 seconds of its implementation, but dismisses this undisputed fact on the basis that *‘this argument also did not assist in establishing dishonesty unless corroborated...’*. First, the evidence adduced was as to a fact (i.e. that it was impossible properly to scrutinise a transaction, verify the underlying documents and approve it, all within a period of 30 seconds), and not an ‘argument’. Secondly, the employees did not dispute this evidence, and neither had an explanation for it, but for Sihlangu who appeared vaguely to have suggested that the computer time recording was incorrect.

- [24] In short: the arbitrator came to a conclusion without properly considering and weighing the evidence before him. The evidence by Xaba and Sihlangu was accepted uncritically, in circumstances where serious questions had been raised about whether on the facts, there could have been a *bona fide* mistake made by either of them. The failure properly to assess the evidence regarding the events

of 23 and 27 June 2008 and to determine the probabilities on that basis is a reviewable irregularity.

- [25] That finding notwithstanding, the second stage of the review enquiry obliges the court to determine whether the result or outcome of the proceedings under review is reasonable, despite the irregularities committed by the arbitrator. In other words, this court must broadly evaluate the evidence and consider whether the arbitrator's misdirections notwithstanding, the result is capable of justification for other reasons.
- [26] Dishonest intent is a matter to be determined by the evidence. In *Nedcor Bank Ltd v Frank & others* (2002) 23 ILJ 1243 (LAC), the court referred to the elements of dishonesty as entailing 'a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently.' While this judgment is relied on by the arbitrator to find, it would seem, that there was no evidence of any dishonest intent on the part of either of the employees, it should be recalled that the facts of that case concerned conduct by the employees of a bank and an ATM situated at an airport. The ATM had run out of cash over a particularly busy weekend, and could not be loaded until the Monday. The employee concerned and his supervisor decided not to leave the ATM in a condition that would alert the airport management to the fact that the machine had run out of cash, and to disengage the machine in such a way that it failed to operate, but did not indicate that it had run of cash. The purpose of this act was to protect the bank from the wrath of the airport's management. The employee was dismissed for dishonesty, in that he had allowed his supervisor to disengage the card reader. The employee was reinstated after an arbitrator hearing, a decision that was upheld by this court and the LAC. The LAC stated that to sustain the fairness of the dismissal, some intention beyond an act that is merely reckless, disobedient or foolish was required. The court found that the explanation proffered by the employee (i.e. that he wished to protect his employer from the wrath of the airport's management) was entirely plausible, and

that on the evidence, no other reason (let alone one related to dishonesty) suggested itself.

- [27] In the present instance, the employees admit that two payments in favour of AS Mahlangu were made on 23 and 27 June 2008 in the amounts of R26 209.50 and R11 791.75 respectively. They also admit that they were respectively the implementer and approver of the transaction. The defences that the employees raised, in Xaba's case that there was a source document and that the payments had been made in respect of two individuals with the same surname and initials, and in Sihlangu's case that she had been overworked, simply hold no water. In Xaba's case, the source document on which he sought to rely makes no reference to an effective date of 1 January 2004. Further, it was not disputed that the implementer receives a file from the registry with a unique Persal number – even if two employees share a common name, the transaction is effected on the basis of the Persal number. Xaba's assertion that the source document in respect of the second transaction was 'on the system' is similarly obviously contrived. This defence was never put to any of the applicant's witnesses, and fails to account for why and how a 'query for underpayment' came to be on the system and how Xaba came to deal with it. Sihlangu was intend to act as a check and balance in the system – her failure to perform her functions and in particular, the approval of the transactions effected by Xaba, without scrutiny, points to collaboration. In short - the evidence ineluctably points to an intent of the part of both employees to act, in the words of *Nedcor Bank Ltd*, 'without integrity or straightforwardness', i.e. dishonestly. Given the serious nature of the misconduct, the penalty of dismissal is appropriate. In summary, there are no other reasons, having regard to the record, to justify the arbitrator's conclusion.

Substitution

- [28] The arbitrator's award thus stands to be reviewed and set aside. The court has a discretion to remit the matter for rehearing, or to substitute the award for a decision to which a reasonable decision-maker could have come. As I have indicated, this matter has its roots in events that took place almost 12 years ago.

The dispute has previously been the subject of a review and rehearing. Any further delay is in the interests of neither party, and would undermine the statutory purpose of expeditious dispute resolution. In any event, the record is complete and the court is in as good a position as the bargaining council to make a determination. For these reasons, I intend to order that the arbitrator's award be substituted with an order to the effect that the employees' dismissal is substantively and procedurally fair.

Application to strike out

- [29] Finally, there is the matter of the application to strike out. In response to the notice of motion and founding affidavit, the employees filed a supplementary affidavit. They did so prematurely, since the record and the applicant's Rule 7A (8) notice had not been filed. The applicant elected not to take issue with this state of affairs, 'from a practical perspective'. After the Rule 7A (8) notice and supplementary affidavit had been filed, the employees then filed a second answering affidavit, expanding on the content of the first. The applicants then objected on the basis that there is no provision in the Rules for the filing of a further affidavit. There is no merit in the application to strike out, firstly because the applicant has clearly acquiesced in the premature filing of the first answering affidavit, and having done so, can hardly deny the employees the opportunity to respond to the matters that were raised in the supplementary affidavit. Secondly, and as I pointed out during the hearing, the value and usefulness of answering and replying affidavits in review proceedings are minimal. Given the test applicable in review applications, what is relevant are the grounds for review and the record of the proceedings under review, all of which are contained in the founding papers. From that point on, a deponent's subjective views and opinions on the reasonableness of the outcome of the proceedings are rarely, if ever, of any assistance to the court given that there are no factual disputes to resolve in these circumstances, and that it is the primary function of the court to determine any relationship of reasonableness between the record on the one hand, and the outcome or result on the other.

Costs

[30] In relation to costs, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The court ordinarily does not make costs orders in circumstances where employees act in good faith to protect their interests, and where their opposition to any proceedings is not frivolous or vexatious. There is no reason in the present instance to depart from that convention.

I make the following order:

1. The arbitration award issued by the first respondent on 28 July 2017 under case number GPBC 1640/2009 is reviewed and set aside.
2. The award is substituted by the following:

‘The applicants’ dismissal was substantively and procedurally fair, and the referral is dismissed.’
3. There is no order as to costs.

André van Niekerk
Judge

APPEARANCES

For the applicants: Adv. F Venter, instructed by Adendorff Theron Inc.

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