



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR165/2023

In the matter between:

SASBO OBO NATASHA NEVILLE

Applicant

and

STANDARD BANK SOUTH AFRICA LTD

First Respondent

COMMISSIONER VAN STADEN NO

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 20 November 2024

Delivered: 29 January 2025

Summary: Application to review and set aside the arbitration award of the second respondent. Failure to prove that the arbitration award is one that a reasonable decisionmaker could arrive at. Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] The applicant is the South African Society of Banking Officials (hereafter “SASBO”) who brings this application on behalf of its member. SASBO seeks to review and set aside the arbitration award issued by the Second Respondent (hereafter the “commissioner”). The commissioner found that the dismissal of the applicant’s member was substantively fair. Procedural fairness of her dismissal was not in dispute.

Material facts

[2] The member, Ms Natasha Carla Neville (hereafter, for convenience, referred to as “the applicant”) was dismissed by the first respondent (hereafter “the Bank”) for misconduct. The following factual matrix is relevant:

2.1 Prior to 2020, during the course of a restructuring exercise, the Bank developed the position of Universal Banker (hereafter “the banker” or “the UB”), which amalgamated several roles into one including that of clerk, sales consultant, and service consultant.

2.2 The applicant was engaged by the Bank, at its Helderberg branch (Western Cape) as a UB from approximately April 2020 until June 2021, when she was promoted to team leader. For at least part of this period, the applicant was on maternity leave.

2.3 Every UB was required to meet a sales target. In particular, they were required to solicit customers and have them agree to open a “MyMo account” (hereafter simply referred to as “the account”). The account had low bank charges and was designed for customers with limited financial resources. The accounts were designed by the Bank to rebuild its lost market share in the low-income sector. The purpose was to generate

income for the Bank, through new customers and the regular use of such accounts.¹ However, even if an account was dormant, the Bank still levied monthly fees of R4.95 (for as long as the account remained open).

2.4 Each UB was expected to open ten new MyMo accounts every week. However, each new account would only be taken into consideration, for the purposes of the target, when the account had been activated through a “*customer-initiated credit transaction*”. For the Bank, this meant that the customer must make a single deposit into the account.

2.5 The Bank relied on several source documents to prove the rule:

2.5.1 On 20 February 2020, an email was circulated to all bankers by the Provincial Head of Retail and Business Banking, Mr Eben Kloppers. Kloppers informed the bankers that, in respect of the MyMo accounts, the activation rule was that there must be a single “*customer-initiated credit transaction posted into the account.*” Furthermore, Kloppers informed bankers that, if they had any doubts about the activation rules, they should contact their manager or the Retail & Business Banking Head.

2.5.2 On the intranet, a handbook (titled the “Customer High Net Worth Product Handbook”) appears which informed staff how to open different accounts. In respect of the MyMo account, the handbook states: “*Only customer-initiated transactions are considered for activation, non-customer-initiated transactions such as fees reversals will not receive a sales credit.*”

2.6 The Bank was informed, by a whistleblower, that the bankers were using their own personal funds to activate the MyMo accounts (the “practice”) in order to meet their sales targets. The Bank engaged Ms

¹ Record Part A: Transcript p12 at line 10

Wilmarie Visagie (hereafter “Ms. Visagie”) of its Group Investigations Department to investigate of the allegations. The investigation entailed an audit of the new accounts and interviews of the bankers. The investigation revealed that a large number of bankers had engaged in the practice across the country.

2.7 The Bank instituted disciplinary action against the bankers engaged in the practice and informed the regulatory authorities such as the Financial Services Conduct Authority and the Prudential Authority. As a result, the Bank was labelled “high risk” by the regulatory authorities.

2.8 Information about the investigation, and the disciplinary action, leaked to the media and reports were published *inter alia* in News24. The Bank was unhappy with this publicity among other things because the practice suggested low compliance by staff with ethical standards.

2.9 During her engagement as UB, and prior to her promotion to team leader, the applicant had activated ninety-nine accounts using her own personal funds – when the rules of the Bank dictated that the accounts must be activated through a “customer-initiated credit transaction”. Of these, thirteen accounts had been opened by other bankers but activated by the applicant using her own funds. The Bank believed that the bankers involved were activating accounts for each other, in order to conceal the practice.

2.10 Prior to her disciplinary hearing, the applicant was interviewed by Ms. Visagie, in the presence of at least one other individual. She was given an opportunity to make a statement, which she did (hereafter referred to as “the statement”). In her statement, the applicant stated as follows:

“Customer will make deposit at the arm or transfer via EFT. In the instance where a customer is unable to get to an ATM to make a deposit, I would drive them or make the deposit for them. If I use my own money,

it's a donation that I give the customer as they are still looking for a job and do not want the account to close or it's a SASSA customer they are waiting for the money to be paid in. I only do this with the customer knowledge and if it's a family friend." (own emphasis)

A little later, in the same statement, the applicant stated:

"I understand that what I have done was wrong but we as UB have been place under a lot of pressure by the company first with the UB journey with an option of opt in or out. Then being on the journey and have been given big target ... If you do not perform you go on informal performance management, then formal performance management and at the end also not knowing if you have job again. I love my job because it gives me the opportunity to provide for my family even with all the stress, the lying awake at night and the worry where will you get the sales tomorrow." (own emphasis)

2.11 Thereafter, the applicant was suspended, and charged with two offences:

- *Dishonesty in that between September 2020 and June 2021 you utilized your own personal funds in order to activate several newly opened MyMo accounts that were opened under your name, therefore misrepresenting the bank's sales records.*
- *Dishonesty in that between November 2020 and April 2021 you utilized your own personal funds in order to activate several newly opened MyMo accounts that were opened under the names of your colleagues, therefore misrepresenting the bank's sales records.*

2.12 Prior to her disciplinary hearing, the applicant made a further statement. In this document titled a "declaration" (hereafter "the declaration") the applicant stated:

"I know this was incorrect but I was under a lot of pressure at work to have activated NTB. I did not want to go onto performance management

as I was on UB journey and still needed to receive an appointment letter. It does not stipulate on our advertisement that the accounts need to be activated but we were still pushed for activated accounts. I do not use this as an excuse to validate my actions but unfortunately I cracked under the pressure. I have stopped with these irregularities and only promote doing the right things to other staff at Helderberg as I know it was not worthwhile to do the incorrect things. If I could go back I would not do this. I can only admit to my faults and do apologise for my mistakes. I will not do this again. All I can do is ask for a second chance. (own emphasis)

2.13 Following a disciplinary hearing, the applicant was dismissed on 12 April 2022. Believing her dismissal to be substantively unfair, the applicant referred a dispute to the CCMA for conciliation and arbitration. The arbitrator found that the dismissal was substantively fair.

Arbitration proceedings

[3] The Bank called three witnesses; Ms Visagie, Ms Shimone Pretorius, and Mr Alan Dunbar.

3.1 Ms. Visagie testified that she investigated and held an interview with the applicant - which led to the statement (referred to in para 2.10 above). The applicant was not coerced into making the statement and voluntarily admitted her conduct was wrong. She testified that the rule that the customer must activate the account makes sense given the purpose of the account,² namely that the customer would continue to use the account thereby generating income for the Bank.³ Ms Visagie further testified that the applicant had behaved improperly by placing her own personal interests above that of the Bank. Finally, she testified that external chairpersons had been appointed to conduct the disciplinary hearings and they arrived at their own independent decisions based on

² Record Part A: Transcript p43 lines 5 – 8

³ Record Part A: Transcript p12 lines 9 – 11

the circumstances of each case (including factors such as length of service, remorse and number of transgressions). Ms Visagie testified that the Bank could not dictate the sanction to the external chairpersons, because a collective agreement prevented it from doing so.

3.2 Ms Pretorius, the chief compliance officer, testified about the harm caused by the misconduct; negative media publicity, resulting reputational damage, and the regulatory authorities' ruling that the Bank was "high risk".

3.3 Mr Dunbar, the regional coverage head (or regional manager) for the Western Cape, testified about the process to open and activate the accounts, which did not permit bankers to use their own funds. He testified that the activation of the accounts using methods not sanctioned by the Bank was dishonest. He testified about the ethics training conducted with bankers annually, which had been attended by the applicant each year. He testified that he was unaware of the practice, by some bankers, of using their own funds to activate accounts. He testified that the applicant's sales performance was a factor used in deciding to promote her to team leader. He also testified that even if the Bank did not suffer direct financial harm there were other costs such as the associated cost of dormant accounts, opportunity costs,⁴ and reputational costs.

3.4 The applicant testified that the Bank acted inconsistently by dismissing her whereas four other bankers, who engaged in the similar conduct, received only a final written warning. This was explored in cross examination of the witnesses for the Bank.

Legal principles

General principles: Reviews

⁴ Record Part A: Transcript p12

[4] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court fashioned the appropriate review test⁵ in relation to CCMA arbitration awards in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* The test has come to be known as the “Sidumo test” or the “reasonableness test.”

[5] Subsequently, the Constitutional Court⁶ further clarified:

“[76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

“Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.” (Own emphasis)

[6] It is clear therefore that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

⁵ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

⁶ See *CUSA v Tao Ying Metal Industries and Others*⁶ (“Tao Ying”) (2008) 29 ILJ 2461 (CC)

[7] Our courts have emphasized, and maintained, the narrow scope of reviews. Thus, an award would only be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The appeal court has held that:⁷

‘... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’ (Own emphasis)

[8] In addition, our courts emphasize that reasonableness embraces a wide range of outcomes, many of which may be reasonable.⁸ The outcome should therefore not be evaluated on a piecemeal basis, but on the totality of the evidence. In *Head of the Department of Education v Mofokeng and others*⁹ the appeal court held that where an arbitrator fails to apply his or her mind to the material issues, this usually indicates that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[9] It is trite that the grounds of review must be pertinently set out in the applicant’s founding and supplementary affidavits.¹⁰ These grounds may not be extended in the replying affidavit or in heads of argument.

⁷ See *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) at para [18]

⁸ *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

⁹ [2015] 1 BLLR 50 (LAC)

¹⁰ *Communication Workers Union and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 at paras [35] and [39]

[10] In brief, in its founding papers, the applicant alleges that:

10.1 The commissioner misconceived the nature of the enquiry by failing to appreciate the charges, for which she was dismissed, related to dishonesty. The commissioner's finding that the applicant was dishonest was unreasonable, because it was based on a misunderstanding that the applicant made a statement in which she admitted dishonesty.

10.2 The commissioner failed to appreciate that the Bank was required to prove that the applicant intended to be dishonest. His finding that the applicant was dishonest was unreasonable because he failed to take into consideration that the applicant had *"acted openly by depositing the moneys in the presence of the customers with her name reflecting as depositor."*

10.3 The commissioner's finding that there was no inconsistent application of discipline was unreasonable because it failed to take into consideration the Bank's disciplinary code and procedure which permits an (external) chairperson of a disciplinary hearing to consult with Human Resources or Industrial Relations before making an appropriate decision on sanction.

[11] In her supplementary founding affidavit, the applicant raises the following:

11.1 The commissioner failed to consider that the applicant did not commit any misconduct after being promoted,

11.2 The commissioner did not consider that there are varying degrees of dishonesty,

11.3 The commissioner did not assess her state of mind, her intention, her willingness to deceive her employer, whether her conduct was an honest mistake, and that the applicant was remorseful.

11.4 The commissioner descended into the arena, took over leading evidence, and created an inference of bias.

Analysis of the grounds of review

[12] The applicant alleges that commissioner acted unreasonably because he approached the matter on the basis that dishonesty always attracts a sanction of dismissal whereas there are varying degrees of dishonesty. Furthermore, says the applicant, dishonesty does not, always, attract the sanction of dismissal.

12.1 I readily accept that offences involving dishonesty do not necessarily incur the supreme penalty of dismissal, because the facts of every case must be assessed and mitigating features taken into account.¹¹ When assessing whether the imposition of the sanction of dismissal was fair the commissioner must consider the totality of circumstances including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, and the basis of the employee's challenge to the dismissal.¹² In addition, the commissioner must consider 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.

12.2 In this matter, the commissioner appears to have misunderstood the statement made by Van Niekerk J (as he was then) in *Cecil Nurse (Pty) Ltd v Busakwe NO and others* where the learned judge stated that: *“the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, such as long service and a clean record, against the sanction of dismissal in cases of dishonesty.”* The learned

¹¹ *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) at para [44]

¹² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [78]

judge was merely pointing out that dishonesty is an extremely serious form of misconduct given that the trust relationship lies at the very heart of the employment relationship. The test in relation to sanction remains that set out in *Sidumo*.¹³

12.3 Importantly, reviews are not about assessing the reasoning of the commissioner so much as assessing the reasonableness of the outcome.¹⁴

12.4 Furthermore, the distinction between appeals and reviews should not be blurred. It was held in *Makuleni v Standard Bank of SA (Pty) Ltd & others*¹⁵ that the court which is asked to review a decision of commissioner “*must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.*” In addition, in that judgment, Sutherland JA points out that to meet the review standard an award must so egregious that no reasonable person could reach it.

[13] The applicant alleges that the commissioner’s finding that the sanction of dismissal was unreasonable because he failed to consider that the applicant was remorseful, and she committed no misconduct after being promoted. Unfortunately, as I explain below, I cannot accept these submissions.

13.1 The applicant testified that, upon promotion, she was no longer required to do sales and open up accounts.¹⁶ In the circumstances, the

¹³ Ibid.

¹⁴ *Khambule v National Union of Mineworkers and others* (2019) 40 ILJ 2505 (LAC) at para [11]

¹⁵ (2023) 44 ILJ 1005 (LAC)

¹⁶ Record Part A: Transcript p83 lines 1 - 4

fact that the applicant did not use her own funds to activate accounts after her promotion is not a mitigating factor at all.

13.2 The applicant, in her statement, and her declaration, accepted without any qualification that her conduct was wrong and in breach of company rules and policies. However, at arbitration, she attempted to justify her conduct on the basis that the rule was unclear to her without offering any explanation as to how she understood the term “*customer-initiated credit transaction*”. In addition, the applicant testified that her conduct was honest, ethical, and in the bank’s interests. Her evidence at arbitration simply cannot coexist with her earlier acknowledgment that her conduct was wrong, and she would not repeat such conduct. The applicant testified that her earlier acknowledgments of wrongdoing was simply her attempting to record what she became aware during her interview with investigators - that she had breached the rules and policies. However, neither the statement nor the declaration state that, at the time of the misconduct, she was unaware of the rules relating to the opening of accounts. At arbitration, she attempted to evade questions relating to the rules and policies. After extensive questioning, she finally agreed that the Bank had never told her that she could use her own personal funds to activate accounts.

13.3 In the circumstances, there has been no genuine acknowledgement of wrong doing by the applicant. The point is well illustrated in *De Beers Consolidated Mines Ltd v CCMA & others*¹⁷ where Conradie JA had the following to say:

“[25] This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has

¹⁷ (2000) 21 ILJ 1051 (LAC)

broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great." (own emphasis)

[14] This brings us to the issue of intention, as an element of dishonesty. Our courts have described dishonesty a generic term embracing all forms of conduct involving deception.¹⁸ It is conduct emanating from lack of integrity; which includes willingness to steal, cheat, lie or act fraudulently. Furthermore, deceitfulness "*can manifest itself in various forms, which include providing false information, non-disclosure of information, pilfering, theft and fraud*". Dishonesty plainly requires the intention to deceive.

[15] The applicant alleges that the commissioner failed to assess her intention. I disagree. The commissioner, having found that the statement and the declaration was an admission of dishonesty, was not required to further assess her intention. In any event, I believe that the commissioner's finding, that the statement was indeed an admission of dishonesty, was reasonable, as I will discuss later.

[16] On all the evidence properly before the commissioner, the inference¹⁹ that the applicant intended to deceive her employer was reasonable, consistent with the proven facts, and the most plausible inference, as discussed below:

¹⁸ *Nedcor Bank Ltd v Frank and Others* (DA4/01) [2002] ZALAC 11 (8 May 2002) at para [18]

¹⁹ The court in *SA Post Office v De Lacy & another* 2009 (5) SA 255 (SCA) at para 35 summarised the position as follows:

'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities.'

16.1 The respondent's witnesses testified that, in their view, the applicant had conducted herself with intention to deceive the Bank.²⁰ The applicant, who denied acting dishonestly, testified that everything was transparent because the customer knew the account would be activated with her own funds. Importantly, the applicant did not explain why she did not take steps to disclose this information to the Bank.

16.2 The applicant conceded that she had failed to record, on the history notes (applicable to each transaction when activating the account) that she had made the deposit on behalf of the customer.²¹ The applicant could not explain why she did not do so. This would have been the easiest way to disclose her conduct to the Bank.

16.3 The applicant alleges that the Bank should have known that she was activating accounts using her own funds because this was apparent from her sales data and extracts. However, the data and extracts produced at arbitration do not reflect the name of the applicant as the person making the deposit. While it is correct that the account number is the same for all ninety-nine accounts activated by the applicant the Bank should not have to monitor or investigate the conduct of its bankers to confirm that they are complying with the rules. If the rule is known to the bankers, as it clearly was, then any bankers who remain unclear about the rule should have sought guidance. The Bank had even encouraged such queries. The irregular practice by the bankers was not transparent to the Bank, and the applicant took no steps to disclose it to the Bank.

16.4 The applicant conceded, under cross-examination, that she activated the accounts and not the customer.²² If the applicant ever understood her conduct as being compliant with the rules, one would have expected her to explain that.

²⁰ Record Part A: Transcript pp 5 and 91,

²¹ Record Part A: Transcript p68 lines 10 – 12

²² Record Part A: Transcript p68 lines 13 – 15

16.5 At arbitration, the applicant did not vigorously dispute the existence of the rule, knowledge of the rule, or breach of the rule. Nor did she attempt to explain why she had not disclosed to the Bank that the rule was being breached. Instead, her evidence vacillated between arguing that the rule became clear later, and arguing that she was placed under pressure (and therefore compelled to breach the rule).

16.6 The applicant conceded, under cross examination, that the Bank had never informed the bankers that they could use their own funds to activate accounts. She did not seize the opportunity (at arbitration) to explain her belief, initially, that the practice was permissible.

16.7 The applicant could not explain how she understood the rule - that accounts must be activated through a "customer activated credit transaction". In my view, the rule speaks for itself and required no clarification from the Bank, particularly given the purpose of the account. The Bank required customers to activate the new account, by way of a credit transaction, because it wanted an assurance that the accounts would be remain active. Active accounts attract greater revenue for the Bank. Instead, here, of the ninety-nine accounts activated by the applicant, approximately 79% of them became dormant after activation.

16.8 Importantly, when the applicant was asked by her own representative, during examination in chief²³ and in reply,²⁴ why she had used her own funds she did not reply that she had done so because the practice was not prohibited and such practice was, instead, permissible. Instead, the applicant testified that she used her own funds because she was under pressure. Her statement, and her declaration, explain the pressure. The applicant wanted to achieve her sales target, and avoid being placed under performance management. She also wanted to secure a letter of appointment as a Universal Banker.

²³ Record Part A: Transcript p26 lines 5 - 12

²⁴ Record Part A: Transcript p85 lines 20 – 23

16.9 The applicant maintained that she made donations to cash strapped customers out of the goodness of her heart. However, this cannot be reconciled with the fact that the donations were made solely for the activation of the account. The applicant denied that she had any interest in the activation of the account, while simultaneously maintaining she only engaged in the practice because she was under pressure. This kind of logical fallacy was characteristic of her evidence.

[17] The applicant alleges that the commissioner acted unreasonably by misunderstanding that the statement was not an admission of dishonesty. I disagree. The applicant did not, in her statement, or her declaration, or her testimony, ever profess to have misunderstood the rule against bankers activating accounts. On this basis alone, it must be accepted that the applicant acted deliberately, with the intention to deceive. Furthermore, the applicant's explanation, consistent at all times, was that her conduct was motivated by her desperation to meet her target and avoid performance management. This was a strong indication that the applicant intended to deceive the Bank, and misrepresent sales.

[18] The applicant contends that the commissioner failed to take into consideration that the disciplinary code permits an external chairperson to consult with the company before deciding on a sanction. This proposition can easily be dispensed with – it was not put to the respondent's witnesses under cross-examination. In any event, this does not detract from the Bank's argument that the external chairperson was empowered to finally determine the sanction. The Bank contended that a collective agreement existed which permitted the external chairperson to have the final say in determining the sanction of individuals found guilty of misconduct.

[19] The applicant contends that the commissioner failed to consider the evidence that the Bank had inconsistently applied discipline because four comparators were not dismissed for similar misconduct. On the other hand, the

Bank contended that the comparators²⁵ identified by the applicant were materially distinguishable. I agree. First, in respect of the comparators, the others derived no benefit from their breach of the activation rules, unlike the applicant who was promoted to team leader. Second, none of the other bankers confessed that they acted in breach of the rule because they were under pressure to avoid performance management. Third, the circumstances of the comparators were different taking into consideration the facts of each matter. Finally, the sheer volume of irregular activations by the comparators were vastly different to that of the applicant. There can be no inconsistency when there are material distinguishing factors between the applicant and her comparators.²⁶ In

²⁵ The four comparators are:

- (1) Ms Natasha Kennedy was charged with dishonesty for irregularly activating 3 accounts using her own funds. Unlike the applicant, Ms Kennedy always maintained that she had done no wrong and breached no rule. Ms Kennedy herself informed Bank management of the three accounts that she had activated. Ms Kennedy was found not guilty of dishonesty but guilty only of breaching the activation rules.
- (2) Ms Busisiwe Ndyawe was charged with using her own funds to irregularly activate a single account belonging to her nephew. Ms Ndyawe was not charged with dishonesty.
- (3) Ms Zahlia Dicken was also charged with irregularly activating a single account. Ms Dicken was not charged with dishonesty.
- (4) Mr Gladwin Meintjies was charged with using his own personal funds to activate four accounts. These accounts were for family members, some of whom he regularly paid.

²⁶ In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* (2010) 31 ILJ 452 (LC) at para [10] Van Niekerk J (as he then was explained:

"The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator... The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. ... Similarity of circumstance is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors." (own emphasis)

any event, our courts have held that the inconsistency principle cannot assist an employee to profit from an employer's manifestly wrong decision.²⁷

[20] The conduct by the applicant showed a pattern of misconduct. Most importantly, the comparators were not found guilty of acting dishonestly.

[21] The commissioner descended into the arena, took over leading evidence, and created an inference of bias. While this allegation is made on the papers, it was not pursued during argument. In any event, the references to the record do not demonstrate that the applicant was disadvantaged by any questions posed by the commissioner. Section 138(1) of the Labour Relations Act No. 66 of 1995 grants to the commissioner a fair degree of latitude to conduct the proceedings in a fair and expeditious manner. The arbitral process cannot be equated to proceedings before a court of law, with the same trappings and formalities. There is no indication from the record that the commissioner behaved improperly and advantaged the first respondent. It is telling that at no stage of the proceedings did the applicant or her representative complain to the commissioner that he had conducted himself improperly or unfairly.

Costs

[22] Neither party vigorously pursued costs. In any event, costs do not follow the result in labour matters. The requirements of law and fairness do not compel me to make an order against the applicant.

Conclusion

[23] In the circumstances, for the reasons set out above, I make the following order:

23.1 The application is dismissed,

²⁷ See *SACCAWU & others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC)

23.2 There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv M Engelbrecht SC

Adv F Venter

Instructed by BJ Erasmus Pieterse Attorneys

For the First Respondent:

Adv A Myburgh SC

Instructed by Mervyn Taback Inc