THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1628/22

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA	**Applicant**
and	
TUMISHO MOTSWEGE	**First Respondent**
COMMISSIONER SHUMANI SIDNEY TSHAKAFA ***N.O.***	**Second Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **4 July 2024**

Delivered: **14 February 2025**

JUDGMENT

MALULEKE, AJ

Introduction

[1] This is an application to review an arbitration award under case no: GAJ5126-22 in which the arbitrator found that the First Respondent, Tumisho Motswege, was substantively unfairly dismissed by the Applicant.

[2] The arbitrator's award further ordered that the Applicant reinstate the First Respondent with retrospective effect from 1 August 2022 and directed the Applicant to compensate the First Respondent with an amount of R125 373.92 by no later than 31 July 2022.

[3] The Applicant requires this Honourable Court to review and set aside the arbitration award issued by the arbitrator on 18 July 2022, substituting the arbitration award with an order that the dismissal of the First Respondent was substantively fair, alternatively remitting the matter to the CCMA to be arbitrated afresh by a commissioner other than the arbitrator.

Background facts

[4] The First Respondent was employed by the Applicant as a Prestige Banker earning a gross monthly salary to an amount of R26 718.02, she had been in the employ of the Applicant since 1 September 2015. The First Respondent's job description was for, *inter alia*, the opening of new accounts, transferring, amending and closing accounts in accordance with the Applicant's laid down procedures. Further to the above, the First Respondent was required to gather and complete accurate dates for the opening of loan accounts and granting of facilities, to adhere to all internal risk-related policies and guidelines, obtain necessary customer documentation as required by the Bank's Know Your Customer policies and regulations; upload documentation on Bank's system known as ECM and request customers to submit original documentation; validate the client's regulatory status; refer matters outside scoring criteria with the appropriate information to credit evaluation and to apply a wide range of business knowledge to make decisions that are in the best interest of the Bank and the client.

[5] In its founding affidavit, the Applicant submits that under its Disciplinary Code, dismissal is warranted if an employee fails to follow laid down procedures which results in a financial loss. The Disciplinary Code further states that dismissal is also warranted if an employee engages in any other act or behaviour which is considered so serious that it destroys the Bank's ability to trust the employee or makes the employment relationship intolerable for the Bank.

[6] The Applicant's submissions are that, while the First Respondent was on duty attending to calls in the Bank's Customer Care Service Centre, a caller who identified himself as Victor called and the First Respondent answered the call. The caller purported to be Mr. Ntsikelelo Biyata, a client of the Bank who had a credit card account with the Bank and he informed the First Respondent that he was looking for a banker known as Timothy and because Timothy was engaged in another telephone call at the time, the First Respondent offered to assist, Victor informed the First Respondent that he wanted to open a transactional account with the Bank. In doing so, the First Respondent was required to follow two security steps. Firstly, the First Respondent was required to follow the XDS process which is utilised to authenticate customers. Secondly, the First Respondent was required to follow the verification process which relates to the verification of the customer's details using the Department of Home Affairs portal which also includes confirmation of employment.

[7] The First Respondent followed the first step but failed to follow the second step, being the verification process that relates to the customer's details using the Department of Home Affairs portal which includes confirmation of employment. After following the first XDS step, the First Respondent simply opened Biyata's profile and proceeded to open the transactional account for Victor of a R200 000.00 personal loan and overdraft facilities of R48 200.00. Mr Biyata then disputed ever opening a transactional account of the aforesaid amounts.

[8] The Applicant then investigated the matter and the investigation revealed that Mr Biyata was a victim of impersonification and as a result, the Applicant suffered a

loss of R266 000.00 which was made up of the R200 000.00 personal loan, R48 200.00 overdraft facility, and interest and services fees. It is the Applicant's submission that the loss is squarely attributable to the First Respondent's failure to conduct the verification process that relates to the Department of Home Affairs portal which included the confirmation of employment.

[9] In her submissions, the First Respondent denies that the verification process which relates to the verification of the customer's details using the Department of Home Affairs portal is a prerequisite especially when dealing with existing clients. In essence, according to her, such process is not required when you are dealing with existing clients of the bank.

The award

[10] The arbitrator concluded that the First Respondent's dismissal was substantively unfair. The core of his reasoning was the following:

> '40. I am satisfied that the Respondent has proved that the Applicant had failed to uphold the process laid down by the Respondent in terms of its procedure and as a result the Respondent suffers loss in the sum of R266 000.00. The Applicant failed to give satisfactory explanation as to why she did not follow the process.
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> 41. The Applicant testified that there were other employees who committed some or similar offence, but they were not dismissed, instead they were issued with Final Written Warning. The Respondent had to satisfy me as to why it could not be expected to deviate from the dismissal sanction, since the policy provides for Final Written Warning and dismissal. The Respondent did not give satisfactory explanation as to why the other two employees were issued with Final Written Warning and not dismissal. There is no satisfactory explanation why I should consider the sanction to be appropriate for this particular Applicant.
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> 44. I am persuaded that the Respondent managed to discharge the onus of showing that the Applicant committed the gross misconduct she was charged and dismissed for. However, in terms of inconsistent application of

the rule and sanction imposed, I am not convinced that the Respondent has discharged it onus. The Respondent did not give satisfactory explanation for differentiation.

45. The Applicant has asked for reinstatement with retrospective effect. After taking into account the entire evidence of the Respondent's witnesses and that of the Applicant, I am persuaded that the Applicant's dismissal was substantively unfair. The Applicant made a case that the Respondent dismissed her unfairly because there were other employees who committed same or similar offence as hers but were given Final Written Warning. One of those employees caused the Respondent substantial loss emanating from the breach of the Respondent's rules.

46. On its own evidence the Respondent testified that the quantum was not material. The bone of contention was whether the Applicant failed to follow the processes laid in terms of its procedure. I found the argument to be without merit that Innocentia Khalembashe was found guilty of breaching the rules of the Respondent. She was issued with a Final Written Warning. The Respondent suffers a financial loss in the sum of R500 000.00 but certain amount was recovered. Mr. Serobatse Tlhokelwa was found guilty of breaching the Respondent's rules and causing a loss to the Respondent. He was also issued with a Final Written Warning.

47. The Applicant has no previous misconducts. She had a clean disciplinary record. If these factors were taken into account, the Respondent would still issue the Applicant with Final Written Warning as prescribed in terms of the Disciplinary Code.

49. The Respondent did not submit reason as to why it should have deviated from the disciplinary policy and not to impose a sanction short of dismissal such as Final Written Warning as it did to other two employees who were found guilty of same offence of breaching the rules of the Respondent, as the Applicant.'

Review test, legal principles and evaluation

[11] Section 145(1) of the Labour Relations Act[1] (LRA) reads as follows:
'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award...'

[12] Section 145(2)(a) and (b) of the LRA further provides the following:

'(2) A defect referred to in subsection (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) Exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.'

[13] The *Sidumo* test remains the landmark judgment in review applications, therefore this Honourable Court is obliged to consider reasonableness test as postulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2]. The question is therefore whether the decision arrived at by a commissioner is one that a reasonable decision-maker could reach, having regard to the material properly before them.[3]

[14] The Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4] held that irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. 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

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[1] Act 66 of 1995, as amended.
[2] [2007] ZACC 22; 2007 12 BLLR 1097 (CC).
[3] Ibid at para 268.
[4] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para 33.

the inquiry, 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 hypothesis* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.

[15] Item 3(6) of the Code of Good Practice: Dismissal[5] (Code) outlines that the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past and consistently as between two or more employees who participate in the misconduct under consideration.

[16] The legal principles applicable to consistency in the exercise of discipline are set out in item 7 (b)(iii) of the Code "*establishes as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'"*[6]. This is often referred to as the parity principle, a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency i.e. 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.[7] A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element.

[17] 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.[8]

[5] Schedule 8 of the LRA.
[6] *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* [2009] ZALC 68; (2010) 31 ILJ 452 (LC) at para 10.
[7] See: Van Niekerk, N Smit, BPS Van Eck et al "Law@Work", LexisNexis South Africa, 6th ed.
[8] See: *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545 H-I; *NUM v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 20.

[18] Furthermore, the Labour Appeal Court has held that employees cannot profit from an employer's manifestly wrong decision in the name of inconsistency.

[19] In *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd*[9], the Labour Appeal Court summed up the principle of parity as follows:

> 'The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. … [A] wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.'

[20] In *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*[10], the Labour Appeal Court held that the parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence.

[21] For purposes of the subject matter, it is essential to note that in today's world impersonification occurs from time to time and therefore it has become a norm of the day. It is therefore of crucial importance that in order to safeguard the resources of banking institutions in particular more and/or extensive verification processes as outlined by the rules of that institution must be fully complied with to the latter.

[22] Furthermore, in *casu*, the First Respondent admitted to having failed to comply with the rules as outlined by the Applicant stating that she was not required

[9] [1999] ZALAC 17; (1999) 20 ILJ 2302 (LAC) at para 29.
[10] [2000] 8 BLLR 869 (LAC) at para 19.

to since this was an existing client of the bank and/or the Applicant. The First Respondent's version in this regard lacks credibility and must be rejected outright. The basis for this assessment is that verification processes remain the cornerstone of the security system of banking institutions and therefore, employees must ensure that at all material times, such processes are complied with to the latter, which the First Respondent failed to do in this instance.

[23] The arbitrator's ruling in *casu* is purely based on the principle of parity and/or inconsistent application of discipline. The principle however cannot be the only factor to determine whether the dismissal is fair or unfair, therefore each matter will still be determined based on its own merits.

[24] Section 145 of the LRA requires that the outcome of arbitration proceedings, as represented by the commissioner's decision, must fall within a band of reasonableness but this does not preclude this Honourable Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings that result is nonetheless capable of justification.

[25] With this background, I turn now to consider the Applicant's challenge to the award as it relates to the transcribed record of the arbitration proceedings.

[26] The exchange between the First Respondent's Attorney, Mr Chauke and the Applicant's witness, Ms Wilson demonstrates that the circumstances and the charges which were faced by the First Respondent and Khalembashe were quite distinct, although in both instances there was a financial loss, in Khalembashe's case, some funds from the R500 000.00 loss were recovered.

[27] It is evident from the record of the CCMA proceedings that the arbitrator's finding that the Khalembashe matter and that of the First Respondent are similar is not supported by the testimony adduced during the CCMA arbitration proceedings.

[28] Furthermore, it is evident from the record of the CCMA arbitration proceedings that the First Respondent has failed to take any responsibility relating to the loss suffered by the Applicant except to state that she was not required to conduct any verification process which is related to the verification of the customer's details using the Department of Home Affairs portal which, in the view of this Honourable Court, if she did conduct such verification this would have reduced the risk of the Applicant's exposure to the loss suffered.

[29] In view of the abovementioned, it is clear that the arbitrator failed to take note of the First Respondent's lack of remorse during the arbitration proceedings which is, in my view, a contributory factor that ought to have been taken into consideration.

[30] The Code makes reference to dismissal and it is very clear on the guidelines for an appropriate sanction. In terms of the Code, it is not appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

[31] In deciding on a balanced sanction and/or ruling, consideration must be given to the circumstances of the offence, the circumstances of the employee as well as the interest of the employer and the other employees, the message sent to other employees regarding misconduct of that nature and more importantly, a lack of acknowledgement of wrongdoing and/or remorse on the part of the employee.

[32] In light of the above, it is clear that the First Respondent has, throughout the arbitration proceedings, denied any responsibility over the loss suffered by the Applicant and therefore effectively no remorse was shown by the First Respondent whatsoever.

[33] It is of crucial importance to note that this Honourable Court finds that the principle of parity, as raised by the First Respondent, to be baseless in that no similarities were identified in the matter of Khalembashe and that of the First Respondent.

[34] The Applicant therefore cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency even in instances where no similarities have been identified likewise in the subject matter.

[35] With this background, it is the decision of this Honourable Court that the arbitrator has failed to objectively consider all the relevant factors and this necessitates the review and setting aside of the award.

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

Order

1. The arbitration award granted by the Second Respondent on 18 June 2022 under case no: GAJB5126-22 is reviewed and set aside;
2. The Second Respondent's award is substituted with an order that the dismissal of the First Respondent is substantively fair;
3. There is no order as to costs.

S Maluleke
Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	Mr Doctor Cithi
Instructed by:	Mervyn Taback Inc
For the Respondent:	Mr. Cliven Chauke
Instructed by:	Shinyori Chauke Inc