THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 22/23

In the matter between:

PASCHAL OBINNA ANYADIEGWU **Applicant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER SHUMANI SYDNEY TSHAKAFA **Second Respondent**

NEDBANK GROUP LIMITED **Third Respondent**

Heard: **27 May 2025**

Delivered: **18 August 2025**

Summary: CCMA arbitration proceedings – review of proceedings – review test considered – The Applicant's case falls short of the stringent threshold required for this Court to interfere with the Award. Review application dismissed.

JUDGMENT

CITHI, AJ

Introduction

[1] This is an application, in terms of section 145 of the Labour Relations Act[1] (LRA), brought by Paschal Obinna Anyadiegwu ("Applicant") to review and set aside an arbitration award issued by the Second Respondent ("Commissioner") dated 23 November 2022 under case number GAJB7208-22 ("Award"), acting under the auspices of the First Respondent ("CCMA"). The Third Respondent ("the Bank") opposes the application. In terms of the Award, the Commissioner found that the Applicant's dismissal was procedurally and substantively fair.

[2] Prior to setting out the factual background concerning the Applicant's dismissal, it is necessary to first deal with a preliminary point raised by the Bank that the review application is deemed to have been withdrawn in terms of clause 11.2.3 of the now-repealed Practice Manual of the Labour Court of South Africa[2] ("Practice Manual").

Point *in Limine*

[3] The relevant chronology to the Bank's jurisdictional point is briefly as follows: the Applicant served and filed his review application on 9 January 2023. On 31 January 2023, the Registrar delivered the first notice in terms of Rule 7A (5) of the then Labour Court Rules[3] notifying the parties that the Record of the arbitration proceedings was ready for collection. On 7 February 2023, the Registrar delivered a second notice in terms of Rule 7A (5) of the Labour Court Rules notifying the parties that the Record of the arbitration proceedings was ready for collection.

[1] Act 66 of 1995, as amended.
[2] Practice Manual of the Labour Court has been repealed by GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court ("new Rules") promulgated on 17 July 2024.
[3] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024). In terms of the new Rules, Rule 7A(5) is now Rule 37(9); Rule 7A(6) is now Rule 37(13) and 14 and Rule 7A(8) is now Rule 37(20) (a) or (b), effective from 17 July 2024.

[4] Clause 11.2.2 of the repealed Practice Manual required the Applicant to deliver the Record of the arbitration proceedings in terms of Rule 7A (6) of the previous Labour Court Rules within 60 days of the date on which the Applicant is notified by the Registrar that the Record has been received. Accordingly, the Record in this matter was due on or before 10 May 2023. The Applicant delivered the Record on 10 May 2023. The Record delivered excluded the Bank's bundle of documents used during the arbitration proceedings. On 22 May 2023, a day before the Bank's answering affidavit was due in terms of Rule 7A (8) of the Labour Court Rules, the Bank's attorneys directed correspondence to the Applicant's attorney, bringing to their attention that the Record filed was missing the Bank's bundle of documents. The Applicant's attorneys were requested to file the Bank's bundle of documents used during the arbitration proceedings. In that letter, the Bank's attorneys further contend that their client's affidavit will only be due once the full Record is delivered.

[5] On 23 May 2023, the Applicant's attorneys delivered the bundle of documents as requested by the Bank's attorneys. On 13 June 2023, the Bank's attorneys served and filed the Bank's answering affidavit. In the answering affidavit, the Bank contends that the complete Record was filed outside the 60-day time period stipulated in the Practice Manual and, therefore, the review application is deemed to have been withdrawn in terms of clause 11.2.3 of the Practice Manual.

[6] The Bank's point *in limine* is, in my view, devoid of merit. In terms of the provisions of clause 11.2.6 of the Practice Manual, read in conjunction with Rule 7A (6) of the Labour Court Rules, an Applicant is required to deliver portions of the Record necessary for the adjudication of the review application. On 10 May 2023, the Applicant delivered a Record that he asserts is relevant to the adjudication of the review application. Having perused the Record, I am satisfied that the review application is capable of adjudication on the Record delivered by the Applicant on 10 May 2023. Further in this regard, most of the documentation requested was extensively led into evidence during the arbitration proceedings.

[7] In my view, the contention advanced by the Bank – that the filing of the requested documentation outside of the 60-day period bears the consequence that

the review application is deemed to be withdrawn in terms of clause 11.2.3 of the Practice Manual, notwithstanding the fact that the Applicant delivered portions of the Record relevant for the adjudication of the review application within the stipulated timeframe – is legally unsound. Indeed, no authority was advanced for this extraordinary proposition. Dr JJ van der Walt, who appeared on behalf of the Bank, to his credit, left that question in the hands of the Court. Nonetheless, I am of the view that the Record delivered on 10 May 2023 complied with the provisions of clause 11.2.2 of the Practice Manual read together with Rule 7A (6) of the Labour Court Rules. Accordingly, I am satisfied that the review application is capable of being adjudicated on the Record filed by the Applicant on 10 May 2023. I now proceed to deal with the merits of the review application.

Relevant chronology that led to the Applicant's dismissal

[8] The Applicant was employed by the Bank as a Financial Planner effective from 1 July 2007. The Applicant was a representative of an authorised Financial Services Provider (Bank) in terms of section 13 of the Financial Advisory and Intermediary Services Act[4] (FAIS Act) and was responsible for giving financial advice on behalf of the Bank. The fees generated from rendering financial advice are split between the Financial Planner and the Bank in accordance with an agreed fee structure. Section 3 of the General Code of Conduct for authorised Financial Service Providers and Representatives[5] ("Code") states that the Financial Service Provider and/or representatives must at all times render financial services honestly, fairly, with due skill, care, and diligence, and in the interests of clients and the integrity of the financial services industry.

[9] Section 9 of the Code required the Financial Service Provider to, *inter alia*, maintain a record of the advice (ROA) furnished to a client which must reflect the basis on which the advice was given, and in particular, a brief summary of the information and material on which the advice was based; the financial products which were considered; the financial product/s recommended with an explanation of

[4] Act 37 of 2002.
[5] BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives as amended.

why it was selected; whether the product/s is or are likely to satisfy the client's identified need and objectives; and, where the financial product/s recommended is a replacement product, the comparison of, *inter alia*, fees must be stated and the reasons why the replacement product was considered more suitable for the client's needs than retaining or modifying the terminated contract, must be provided.

[10] Section 8 of the Determination of Fit and Proper Requirements[6] states that a representative of the Financial Services Provider must be a person who is honest and has integrity and is of good character[7]. Section 14 of the FAIS Act provides that an authorised FSB (the Bank) must debar an FSP (Financial Planner) from rendering financial services if the jurisdictional facts for debarment have been established.

[11] In July 2022, the Bank received a complaint from Ms Thelma Padiri (Padiri), a client within its wealth department. Padiri was a client in the Applicant's portfolio. This complaint detailed two primary concerns: an allegation of the Applicant's unprofessional and discourteous conduct, and a claim of withdrawals that were made on her investments at the instance and/or advice of the Applicant and reinvestment as '*new funds*' in another fund. The Bank appointed Mr Ernest Herbst (Herbst) from the Group Financial Crime, Forensic and Security Division to investigate the complaint.

[12] The investigation conducted revealed that on 20 November 2017, Padiri made an initial investment of R936,000.00 into the Nedgroup Investments Opportunity Fund B2. The Applicant, having acted as the responsible financial planner concerning this investment, levied an upfront commission fee of 3.42% which was the applicable rate at the time in terms of the Bank's Financial Planning Business Handbook ("NFP Business Handbook"). A formal ROA detailing the basis of the advice, the upfront fee rate applicable and the specific investment choice was duly signed by the Applicant and Padiri on 20 November 2017. The payment of R936,000.00 was processed on 23 November 2017.

[6] BN 194 of 15 December 2017: Determination of Fit and Proper Requirements (Government Gazette No: 41321) as amended.
[7] Section 14 of the FAIS Act set out the procedure that the Financial Service Provider must follow to debar a representative that has ceased to possess the character and honesty and integrity.

[13] On 4 December 2017, Padiri invested another amount of R520,000. 00 in the Nedgroup Investments Opportunity Fund B2. A ROA relating to this investment was not part of the bundle of documents used during the arbitration proceedings. However, in my view, nothing turns on this having regard to the gravamen of the complaint against the Applicant. On 6 September 2018, Padiri invested an amount of R700,000.00 into the Nedbank Investments XS Select Guarded FOF. A formal ROA was signed on 6 September, setting out the details as envisaged in terms of Section 9 of the Code. The Applicant levied the commission upfront fee of 3.45% for this investment.

[14] Padiri opened another investment on 16 March 2020, wherein an amount of R946,000.00 was invested into the Nedgroup Investments Stable Fund. The Applicant levied the commission upfront fee payment of 3.45% in respect of that investment as well.

[15] The NFP Business Handbook states that no more than a 3.45% upfront fee may be charged on the same funds within a 5-year period. Accordingly, the Applicant was not permitted to charge another upfront fee on the above investments within 5 years, as doing so would contravene the NFP Business Handbook.

[16] On 7 September 2018, an amount of R720,000.00 was withdrawn from Padiri's Opportunity Fund B2, which was the initial investment dated 20 November 2017. On 11 September 2018, Padiri opened a Nedgroup Investment XS Selected Guarded Fund C for an amount of R700,000.00. The payment was processed on 19 September 2018. The Applicant levied an upfront commission fee of 3.45% for this investment.

[17] The amount invested in the Nedgroup Investment XS Selected Guarded Fund C was withdrawn from the Opportunity Fund B2 investment opened on 20 November 2017. The Bank's contention is that the R700,000.00 amount was not '*new money*' but rather funds that were withdrawn from the Opportunity Fund B2 investment activated on 20 November 2017. That being the case, the Applicant ought not to have charged the upfront fee commission of R3.45%. The Bank further contends that the Applicant ought to have advised Padiri to do a switch rather than opening the

Nedgroup Investment XS Guarded Fund C investment account. A switch in the circumstances would not have resulted in Padiri being levied with the upfront commission of 3.45%, as her investment (invested on 20 November 2017) was within the 5-year period.

[18] On 16 March 2018, two withdrawals were executed from the investment accounts held by Padiri. A withdrawal of R510,000.00 was made from the Opportunity fund B2, and a separate withdrawal of R520,000.00 was made from the Nedgroup Investment XS Selected Guarded Fund of Funds C. The total amount withdrawn from the two accounts was R1 030 000.00. On the same day, an ROA for this investment was signed, which reflects that Padiri invested an amount of R946,000.00 into the Nedgroup Investment Stable Fund A2. The invested amount was deposited into the Nedgroup Investments Stable Fund A2 on 19 March 2018. Again, the Applicant levied an upfront commission fee of 3.45% for this investment.

[19] On 23 March 2018, Padiri signed up for another Nedbank Investment Stable Fund 2 for an amount of R622,000.00. In the ROA, it is stated that Padiri was called for a review – she then expressed an interest in opening a new investment portfolio alongside the previous portfolios reviewed and would invest an additional lump sum that she had. It is common cause that this investment never materialised for reasons that will be discussed below. It is noteworthy that on the same day, an amount of R622,000.00 was withdrawn from the Nedbank Investment Stable Fund A2, which was opened on 16 March, transferred to Padiri's transactional account, and later transferred back to the Nedbank Investment Stable Fund A2.

[20] Between September 2018 and March 2020, Padiri was charged an additional amount of R56,797.00 in upfront fees/commission as a result of the withdrawals and reinvestments before the 5-year period as detailed above. The Bank had to reimburse Padiri this amount. In general, the Applicant's explanation is that he was not aware that the funds used emanated from the withdrawals as detailed above. It is common cause that on the days the withdrawals were made, the Applicant was conspicuously either on leave or not available. In explaining the two withdrawals of 16 March, the Applicant stated that Padiri requested the funds for her son-in-law,

who was involved in the import and export business. Padiri denied the Applicant's version during the investigation.

[21] Arising out of the above, the Applicant was issued with a notice of suspension with full pay on 14 January 2022, pending the finalisation of an internal investigation that had ensued. On 14 March 2022, the Applicant was issued with a notification to attend a disciplinary hearing scheduled for 31 March 2022. In terms of that notification, the Applicant was required to answer to the following allegations:

> 'Misconduct in that:
>
> 1. Dishonesty, in that, during the period 7 September 2018 and 19 March 2019,
>
> - You charged the full upfront commission (3.45% incl VAT) for re-investing funds of client Ms Thelma, which you reasonably ought to have known was not new funds, but disinvestments from other funds you yourself assisted with.
> - Records of Advice dated 6 September 2018 and 16 March 2020 on page 5 refer to "you will invest additional lump sum you have in your savings account". This statement is false as the client did not have any additional funds for investment except for the funds which were withdrawn from her NGI account on 07 September 2021 and 19 March 2020 and thereafter reinvested into different funds.
> - You attributed the withdrawals to the client having requested the money to fund her son in-law's import business, however, this is false as Ms Padiri does not have a son in-law.
> - You did this knowing and understanding the contents of the Nedbank Financial Planning Business Handbook, which states that "No more than 3.45% upfront advice fee may be charged on the same funds within a 5 – year period".
>
> By your actions you did not act in the best interests of the client by charging her an additional amount of R56 787.00 (in total) in upfront fees/commission you were not entitled to.
>
> Charge 2 – Breach of the NFP Business Handbook,

In that paragraph '3.5 Other Limits' prohibits that "No more than 3.45% upfront advice fee may be charged on the same funds within a 5 – year period". You breached this rule when charging Ms Padiri a maximum upfront advice fee on two further occasions:

- On 11 September 2018 you invested R700 000 of Ms Padiri's funds into the Nedgroup Investments XS Select Guarded Fund of Funds C (8591990) and charged 3.45% upfront advice fee which funds had already been charged the maximum upfront advice fee on 23 November 2017 when these were initially invested in the Nedgroup Investments Opportunity Fund (8570707).
- On 19 March 2020 you invested R946 000 into the Nedgroup Investments Stable Fund A2 (8635171) and charged 3.45% upfront advice fee which funds had already been charged the maximum upfront advice fee previously on 23 November 2017 and 04 December 2017 when these were initially invested in the Nedgroup Investments Opportunity Fund (8570707),

You were not permitted to charge any upfront advice fee on these further occasions as you had already charged the client this maximum amount on the same funds previously.'

[22] At the conclusion of a disciplinary hearing that then ensued on 31 March 2022, the Applicant was found guilty of the above charges and dismissed. The Applicant's dismissal was effective from 14 April 2022. The letter of dismissal notified the Applicant that his name would be listed on the Register of Employee Dishonesty System ("REDS"). Aggrieved by the decision to dismiss him, the Applicant referred an alleged unfair dismissal dispute to the CCMA for conciliation in terms of section 191 of the LRA, failing that, arbitration. After conciliation attempts were unsuccessful, the matter was set down for arbitration before the Commissioner on 12 October 2022. On or about 23 November 2022, the Commissioner delivered the arbitration award, which is the subject of these review proceedings.

<u>Arbitration Award</u>

[23] During the arbitration proceedings, the Applicant was represented by Ms Michell Lage, an attorney from CGG Inc. The Bank was represented by Mr Ntebo Letshela, who is employed by the Bank in a position of Industrial Relations. The Bank called Herbst and Zanele Jafta ('Jafta'), who worked at the Digit Advice Desk. The Applicant testified on his behalf and did not call any witnesses in support of his case. The relevant Bank statements, withdrawal forms, the NFB Handbook and ROAs relating to the investments were adduced into evidence.

[24] The Applicant assailed both the procedural and substantive fairness of his dismissal. In respect of the procedural fairness challenge, the Applicant contends that his dismissal was pre-emptive. The basis of this contention was that he was removed from the payroll before his disciplinary hearing was finalised, which resulted in him not receiving his remuneration. On substantive fairness, the Applicant avers that he was not aware that the funds used for the investments were from the withdrawals made from Ms Padiri's existing investments. The Applicant confirmed that he reviewed Padiri's investment accounts. The Applicant further stated that he thought the funds were from the client's current account, which he had no access to.

[25] Had he known that the funds were from the existing investments, he would have advised the client to do a switch rather than opening a new investment. In a nutshell, the Applicant's explanation ranged from not being aware that the funds were from the disinvestments to the Bank, having had no NFP Business Handbook prior to September 2020, and the ROAs were approved by his Line Manager.

[26] The main thrust of the Commissioner's reasoning in finding that the Applicant's dismissal was procedurally and substantively fair is contained at paragraphs 62, 68 and 69 of the Award. At paragraph 62, the Commissioner addressed the Applicant's procedural challenge:

> '62 The applicant further submitted that his dismissal was pre-empted. He challenged the fairness of the procedure in that it was a formality because he was already removed from the payroll. He did not receive his salary in March while he was still going to attend a disciplinary hearing. He was not given a reason as to why he was not paid. Only after he complained he was told that there was an error, and the Finance Department made a mistake with a

formula for calculating the salary. I there find that the dismissal was procedurally fair. There is no evidence that his dismissal was procedurally unfair. The applicant's claim that his dismissal was pre-empted is without merit.'

[27] In respect of the Applicant's substantive fairness challenge, the Commissioner opined:

'68 It was not disputed that a 5 – year rule does exist. The financial planner may not use an old investment to open a new investment account, unless 5 years have elapsed as per Nedbank Financial Planning Business Handbook rules.

69 The applicant confirms that he did review the client's portfolio but denies that there are withdrawals. The withdrawals were shown to be reflecting on the same document the applicant relies on. It is a common cause that the applicant is aware of the withdrawals. It signifies that there is a fiduciary duty on the financial planner to identify the source of the funds to be invested. The applicant failed his fiduciary duty to do so. The statements the applicant made copies of clearly show that the client withdrew funds from the existing investment to open a new investment. It is probable that the applicant was aware of the investments and the source of the funds to be invested, but failed to advise the client to switch than withdraw and reinvest because he wanted to get a commission. This practice is detrimental and costly to the clients. The applicant failed to act with honesty and integrity. Furthermore, the applicant failed to adhere to a 5 – year rule, he should have considered an investment from November 2017 and September 2018 to be new investments.'

[28] Ultimately, the Commissioner concluded that the Applicant's dismissal was substantively and procedurally fair. It is this conclusion that is the subject of these review proceedings.

<u>Grounds of review</u>

[29] The Applicant submits that the Award is reviewable for a variety of reasons, which include, *inter alia*, that:

29.1 the Commissioner failed to attach necessary weight to the fact that the Financial Planners relied on information provided by the client during the meeting. The Applicant contends that he was not informed that Padiri had made the withdrawals from her investment accounts;

29.2 the Commissioner failed to draw a reasonable inference from the fact that the client was not called to testify to dispute the contents of the signed ROAs. Accordingly, so argued the Applicant, the ROAs should have been accepted as valid and binding;

29.3 the Commissioner failed to attach due weight to the fact that the ROAs were approved by the Line Manager and the approval thereof, according to the Applicant, confirms the contents therein and that the Applicant's advice was in line with the Bank's policies;

29.4 the Commissioner concluded, without evidence, that it would have been impossible for the Bank to operate without the NFP Business Handbook prior to September 2020; and

29.5 In respect of the Commissioner's findings on procedure, the Applicant contends that the Award does not address his procedural challenge, despite raising the issue at the onset of the arbitration proceedings. Further in this regard, the Applicant takes issue with the Commissioner's mischaracterisation of the relief he sought during the arbitration proceedings. In the Award, the Commissioner recorded that the Applicant sought reinstatement, while during the arbitration proceedings, it was indicated that the Applicant sought compensation and removal of his name from REDS.

<u>The review test</u>

[30] The applicable test on review in applications such as this one is now trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[8], the Constitutional Court held that *'the reasonableness standard should now suffuse s 145 of the LRA',* and that the threshold test for the reasonableness of an award was:

[8] (2007) 28 ILJ 2405 (CC).

'… Is the decision reached by the commissioner one that a reasonable decision maker could not reach? …"[9]

[31] In *Glencore Operations South Africa (Pty) Ltd v Taala and Others*[10], the Labour Appeal Court (LAC) per Van Niekerk JA restated the threshold for interference with a commissioner's arbitration award:

> 'The hurdles that the appellant was required to overcome on review were to establish some misdirection on the part of the arbitrator in his assessment of the evidence and, secondly, that the factual conclusions that he drew were untenable, rendering the award one to which no reasonable decision-maker could come. Implied in the Labour Court's finding is that the arbitrator had regard to relevant evidence, did not take irrelevant evidence into account, and arrived at a conclusion that fell within the bounds of reasonableness.'[11]

[32] In *Makuleni v Standard Bank of SA (Pty) Ltd & others*[12], the LAC per Sunderland JA indeed reminded this Court of the crucial distinction between a review and an appeal. The case highlighted instances where the Labour Court was '*misled into treating the case for a review as if it were an appeal'*. The learned Judge observed:

> 'The court 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.'[13]

[33] In sum, this Court's review powers are limited to scrutinising the rationality and reasonableness of the decision-making process and outcome. They do not extend to it re-adjudicating the merits of the case that was before a commissioner as

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[9] Ibid at paras 106 and 110.
[10] [2025] 6 BLLR 559 (LAC).
[11] Ibid at para 25.
[12] (2023) 44 ILJ 1005 (LAC).
[13] Ibid at para 4.

if it were an appeal. Lastly, it is unhelpful to enumerate a catalogue of alleged errors without substantively demonstrating how such errors materially impacted the ultimate outcome.[14]

[34] Thus, errors which do not materially impact the substantive rationality of the outcome are to be regarded as superfluous observations and do not, in themselves, constitute a basis for judicial intervention. The true inquiry remains whether, despite any identified errors, the Award falls within the band of decisions that a reasonable decision-maker could reach.

[35] Below, I proceed to assess the Commissioner's Award to determine whether it falls within the band of decisions that a reasonable decision-maker could have reached, in light of the evidence presented and the review test enunciated above.

<u>Analysis</u>

[36] It is undisputed that a series of withdrawals and reinvestments were effectuated in Padiri's investment accounts during 7 September 2018 and 19 March 2022. The first withdrawal on 7 September 2018 was an amount of R720,000.00 on the Opportunity fund B2 opened on 20 November 2017 for the initial investment of R936,000.00. The withdrawal form, bearing Padiri's signature dated 7 September 2018, contains handwritten notations stating that '*Pascal on leave'*. On the form, it is recorded that *'withdrawals are payable within two business days of processing your instruction (one business day for Nedgroup Investments Money Market Fund)*'. The nominated account for payment of this withdrawal is Padiri's current account. The withdrawal was executed a day after an amount of R700,000.00 was invested into Nedgroup XS Selected Guarded FOF on 6 September 2021.

[37] An amount of R700,000.00 withdrawn from the Opportunity Fund B2 on 7 September 2018 was reinvested into the Nedgroup XS Selected Guarded Fund of Funds C on 11 September 2018. The ROA for this investment was signed on 6 September 2018. It is recorded in the ROA that Padiri was called for a review of her

[14] See: *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paras 30 – 33.

investment portfolio, and during the review, Padiri requested a 3-year horizon wherein she will invest an '*additional lump sum'* from her savings account. The Applicant charged the full upfront commission fee for this investment. Padiri had already paid the full upfront commission fee a year before, on 20 November 2017, when she signed for the Opportunity fund B2 investment for an amount of R936,000.00.

[38] On 16 March 2020, two separate withdrawals were made from the Opportunity Fund B2 and the Nedgroup XS Guarded Fund C, respectively. In the Opportunity Fund B2, an amount of R510,000.00 was withdrawn, whilst an amount of R52,000.00 was withdrawn from the Nedgroup XS Guarded Fund C. The total amount withdrawn from the two investment funds was R1 030 000.00. Again, the withdrawal form contains handwritten notations stating that '*Pascal on leave'*. On 19 March 2020, an amount of R946,000.00 was reinvested into the Nedgroup Stable Fund 2. Crucially, the ROA for this investment was signed on 16 March, which coincides with the day the Applicant met Padiri and the withdrawals of R510,000.00 and R520,000.00 from the Opportunity Fund B2 and Nedgroup XS Guarded Fund C.

[39] The ROA signed on 16 March is almost a cut-and-paste of the ROA dated 6 September 2018. The ROA states that Padiri was called for a review of her investment portfolio - she requested a 3-year horizon during the review of her portfolio, wherein she will invest an '*additional lump sum'*. The Applicant charged a full upfront commission fee for this investment despite charging the full upfront commission fee on 20 November 2017 (Opportunity Fund B2) and 11 September 2018 (XS Selected Guarded Fund C).

[40] The Applicant's main defence was that he was not aware that the reinvested funds (11 September 2018 and 19 March 2020) were withdrawals made on 7 September 2018 and 16 March 2020, and therefore not '*new funds'* justifying opening new investment accounts. His version, as I understand it, is that if he were aware that these were not '*new funds'*, he would have advised Padiri to do a switch rather than a new investment. It being common cause that a switch would not have resulted in the Applicant levying an upfront commission fee for the disinvestment

funds, as he had already charged upfront commission fees in November 2017 and September 2018.

[41] In my view, the Applicant's defence is demonstrably inconsistent with the objective evidence. In his evidence-in-chief, the Applicant stated that a review of the investment as recorded in the ROA entails reviewing previous investments, a balance on the investments and market performance. That being the case, the bank statements reflecting the withdrawals were part of the documents the Applicant reviewed on 6 September 2018 and 16 March 2020. The bank statements appearing on pages 272 – 280 showed all the withdrawals in Padiri's investment accounts. Thus, the reinvested funds are traceable to the withdrawals made on 7 September 2018 and 16 March 2020. In addition, the Applicant is required to ascertain the source of the funds before opening a new investment account.

[42] In the ROA, the Applicant recorded that the funds were from Padiri's '*additional lump sum*'. This, in my view, was a clear prevarication. The Applicant had known Padiri for more than 6 years and had been her Financial Planner since 2017. The Applicant was aware that Padiri was a 66-year-old pensioner in 2018, and her only source of income was the monthly income from her pension. Accordingly, the Applicant knew that Padiri would not receive any '*additional lump sum*'. However, even if she did, the Applicant was still obliged to investigate the source of the '*additional lump sum'*. This investigation, if undertaken, would have revealed information that is already known to the Applicant.

[43] The inference is inescapable that the Applicant's conduct was premeditated. The Applicant called Padiri for a '*review*' of her investments. Objectively, this '*review*' was a sham. In this *'review'* meeting, Padiri was made to sign documents that she did not properly understand. Padiri's reliance on the Applicant's expertise and integrity was justifiable. The signed documents meant that Padiri withdrew funds from her existing investments and reinvested the same funds in newly opened investment funds either on the same day (16 March 2020) or within a few days (11 September 2018) of the withdrawals. This enabled the Applicant to charge an additional upfront commission fee because the source of the funds was recorded as

'*additional lump sum*' from a savings account and therefore constitutes '*new funds'*, which entitled the Applicant to charge the upfront commission fee.

[44] The Applicant devised this grand plan to circumvent the provisions of the Bank's NFP Business Handbook, which states that *'no more than 3.45% upfront advice fee may be charged on the same funds within a 5-year period'*. The Applicant benefited from the plan to the detriment of Padiri, the Bank and integrity of the financial services industry. The Bank had to reimburse Padiri for the additional upfront commission fee charged.

[45] The evidence demonstrates that the Applicant put in place a stratagem to bypass the provisions of the Bank's NFP Business Handbook for personal enrichment. It is trite that Financial Planners are expected to render financial services with honesty and integrity. The Bank's expectation that Financial Planners should not act dishonestly by breaching rules put in place to safeguard the interests of its clients is undoubtedly reasonable and consistent with its obligation to only retain representatives that are honest and have integrity. The Rule, which prohibits charging a client more than 3.45% within 5 years of the investment, was implemented to prevent the very misconduct the Applicant committed. In my view, the withdrawal made on 23 March 2020, which is not covered by the charge sheet, lays bare the Applicant's strategy and completely undermines his version that he did not know that the funds were disinvestments.

[46] On 23 March 2020, an amount of R622,000.00 was withdrawn from Padiri's Stable Fund A2 account, paid into her current account, but later transferred back into her Nedgroup investment Stable Fund A2 investment account on the same day. The Applicant's explanation for this is not entirely convincing. In an email dated 9 December 2021, sent to Herbst, the Applicant alleges that this investment failed because there were no funds in Padiri's account. This is factually incorrect as self-evident from what I stated above.

[47] In the ROA for this investment, signed on 23 March 2020, the Applicant states that Padiri was called for a '*review*' and she requested a 3-year investment horizon to invest an '*additional lump sum'* she had. The purported review meeting on 23 March

2020 took place a few days after the withdrawals and reinvestment, on 16 March 2020. Accordingly, the financial statements the Applicant *'reviewed'* on 23 March 2020 reflect withdrawals of 11 September 2018 and 16 March 2020, respectively.

[48] In my view, the Applicant's purported leave of absence on the days of the withdrawals was a calculated subterfuge, intended to obscure his involvement and prevent the tracing of the aforementioned withdrawals and subsequent reinvestment transactions back to him. The Applicant's explanation that Padiri withdrew the funds on 16 March 2020 to lend it to her son-in-law, who was in the import and export business, was correctly rejected by the Commissioner. On the objective facts, the withdrawn funds are traceable to the reinvestment of R946,000.00 to the Stable Fund 2 on 16 March 2020.

[49] The Applicant contends that the Commissioner failed to appreciate that the Bank had no NFP Business Handbook prior to September 2020. The suggestion is that the incident happened prior to the implementation of the current version of the NFP Business Handbook, which prohibits Financial Planners from charging more than 3.45% additional upfront commission fees within 5 years of the investment. In my view, the Applicant's argument cannot be reconciled with his version that he would have advised Padiri to do a switch rather than opening a new investment if he knew that the funds were disinvestments from existing investments. In any event, Jafta gave evidence showing that the rule prohibiting the Financial Planners from charging clients more than 3.45% within 5 years of the investment had been part of the different versions of the NFP Business Handbook.

[50] The Applicant further contends that the Commissioner failed to appreciate that Padiri was not called to dispute the contents of the ROAs that were signed. This argument, in my view, completely misses the point. The validity of the ROAs was never placed in dispute. During the investigation, Padiri readily accepted that she was aware of the withdrawals and reinvestments. Padiri stated that the withdrawals and reinvestments were on the advice given by the Applicant. It was the frequency of the withdrawals and the numerous documentation that she had to sign within a short period of time, which raised concerns and culminated in the hotline complaint in July 2022.

[51] Lastly, the Applicant contends that the Commissioner committed a reviewable irregularity in failing to attach weight to the fact that his manager approved the ROAs, which, according to him, indicates that the ROA complied with the Bank's policies. This contention is patently without merit. Section 9 of the Code placed an obligation on the Applicant to render financial services honestly and fairly. On the objective facts, there was no evidence that the Manager was involved in rendering financial services to Padiri. Further in this regard, the Applicant's manager would not have known that the funds used were disinvestments from the existing investments. The Applicant was deceitful in his description of the source of funds in the ROAs. In *South African Society of Bank Officials – The Finance Union and Another v Standard Bank Ltd and Others*[15] (*SASBO*), the LAC described dishonesty in the following terms:

> 'Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception. This Court in *Nedcor Bank Ltd v Frank & Others* defined dishonesty as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulent. Deceitfulness can manifest itself in various forms, which includes providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal…' (footnote omitted)

[52] I am of the view that the Applicant's conduct was unethical, deceitful and constituted a material breach of Section 3 of the Code, which obliged him to render financial services honestly, fairly, with due skill, care, and diligence, and in the interests of clients and the integrity of the financial services industry. Self-evidently, the Applicant elevated his personal interests above the interests of the client and the integrity of the financial services industry. On the objective facts, the Applicant demonstrated a willingness to use deceptive and unethical methods to bypass the provisions of the Bank's NFP Business Handbook designed to protect the public for

[15] [2022] 10 BLLR 934 (LAC) at para 17.

his personal enrichment. This conduct, in my view, constitutes an egregious form of dishonesty.

[53] It is my finding that the Commissioner's conclusion – that the Applicant was aware that the funds reinvested on 11 September 2018 and 16 March 2020 were from the withdrawals made on 7 September 2018 and 16 March 2020 from the disinvestments – is supported by objective evidence and falls within the bands of reasonable decisions available to a reasonable decision-maker faced with the same facts. Accordingly, the Commissioner's conclusion that the Applicant was guilty of dishonesty cannot be faulted. In *SASBO,* the LAC stated:

> '…The need for employees to act with honesty and fidelity is so fundamental in the financial services industry, more so, where the employees deal with large sums of money. A breach of trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it. It can hardly be argued that the dismissal was not justified.'[16] (footnote omitted)

[54] It is undisputed that the Applicant held a position of trust which required him to give financial services honestly, fairly and in the interests of the clients and the integrity of the financial services industry. As demonstrated above, the Applicant engaged in conduct that was dishonest and constitutes a breach of his statutory obligations to advance his personal interests. I am of the view that when a Financial Planner provides financial services in a dishonest manner – actions calculated for personal enrichment rather than the best interests of their clients or the industry – it immediately renders the employment relationship untenable. Such conduct, in my view, is inherently destructive of the employment relationship, as it fundamentally shatters the essential trust, integrity, and ethical foundation critical for such a role within the financial sector.

[16] Ibid para 30.

[55] In *Mlombo v Standard Bank Financial Consultancy and Another*[17], the Financial Service Tribunal, dealing with a debarment of a Representative for dishonesty-related conduct, made the following observations:

> 'Barring is not akin to a sentence. As long ago as 1778, Lord Mansfield stated in Ex parte Brounsall Cowp 829 that debarment (in that case of a solicitor) is not a punishment and that the question is rather whether the person concerned in the light of the conduct would be free from suspicion. In other words, debarring is for protecting the public and is not punitive.' (footnote omitted)

[56] The Bank was, therefore, entitled to fairly terminate the Applicant's contract of employment to protect the public. Thus, the Commissioner's conclusion that a sanction of dismissal was warranted is a decision that falls within the band of reasonable decisions.

[57] This brings me to the Applicant's challenge on the procedural fairness of his dismissal. In my view, the Applicant's contention that the Commissioner failed to address his procedural fairness challenge is patently without merit. At paragraph 62 of the Award, the Commissioner addressed the Applicant's contention that his dismissal was pre-empted. The Commissioner accepted the Bank's explanation that an error occurred, which resulted in the Applicant not receiving his salary in March.

[58] This error was, however, rectified. Accordingly, the Commissioner concluded that the Applicant's dismissal was procedurally fair. Lastly, the Applicant further contends that the Commissioner miscategorised the relief he sought. In paragraph 7 of the Award, the Commissioner stated that the Applicant sought reinstatement as a relief and removal of his name from REDS. During the arbitration proceedings, the Applicant indicated that he sought compensation and removal from REDS. The question of relief is, in my view, a moot point. Given the Commissioner's finding that the dismissal was substantively fair, the Applicant is not entitled to any relief. That being the case, the question did not arise for determination. The Commissioner's miscategorised of the Applicant's relief is, therefore, inconsequential.

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[17] (FSP30/2019 [2019] ZAFST 4 (23 December 2019) at para 52.

Costs

[59] In accordance with the requirements of law and fairness, as set out in section 162 of the LRA, I am of the view that an order of costs should not be made in this matter. The requirements of the law and fairness are best served by each party bearing its own costs.

Conclusion

[60] For all the reasons set out above, I am of the view that the Applicant has failed to disclose grounds of review to justify this Court's interference with the Commissioner's findings on guilt and procedure. The arguments advanced by the Applicant in support of this application do not, in my assessment, demonstrate any irregularity, irrationality, unreasonableness, or fundamental misconception in the Commissioner's findings that the Applicant's dismissal was procedurally and substantively fair. The Applicant's case, thus, falls short of the stringent threshold required for this Court to interfere with the Award.

[61] Accordingly, I make the following order.

Order

1. The Third Respondent's point *in limine* is dismissed.
2. The Applicant's review application is dismissed.
3. There is no order as to costs.

D Cithi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr G Grove of CGG Inc Attorneys

For the Third Respondent: Dr JJ van Walt of Cliffe Dekker Hofmeyer Inc